COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LINDA SHAUB, Complainant	:	
v.	:	PHRC Case No. 200302130
PLUNKETT'S PLACE, Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant, Linda Shaub, (hereinafter "Shaub") is a female over the age of fifty. (N.T. Vol. 3. p.65, 130; R.E. 8)

2. The Respondent, Plunkett's Place, is a local tavern located at 4254 Richmond Street Philadelphia, Pa. (N.T. Vol. 1. p 290; R.E. 8)

3. Plunkett's Place was owned by Christopher Plunkett, (hereinafter "Plunkett"). (N.T. Vol. 3, p.17)

4. In 1999, Plunkett purchased the building at 4254 Richmond Street and began renovations until in February 2001, Plunkett's Place opened. (N.T. Vol. 3, p.17)

5. Prior to opening Plunkett's Place Plunkett met Shaub. (N.T. Vol. 1; p. 49; Vol. 3, p. 17)

6. Plunkett had known Shaub's husband for 15 years. (N.T. Vol. 3, p.18)

7. At the time, Shaub had between 15 to 20 years experience working in bars. (N.T. Vol. 1, p.52)

8. Shaub expressed an interest in helping Plunkett get his bar open. (N.T. Vol. 3, p 18-19)

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

N.T. Vol. 1	Notes of Testimony, October 24, 2006
N.T. Vol. 2	Notes of Testimony, October 25, 2006
N.T. Vol. 3	Notes of Testimony, October 26, 2006
C.E.	Complainant's Exhibit
R.E.	Respondent's Exhibit

9. At the time, Plunkett was in his mid-twenties and had never owned a bar before. (N.T. Vol. 3, p.18)

10. When Plunkett's Place opened, Shaub left another job and came to work as a bartender/manager at Plunkett's Place. (N.T. Vol. 1, p.49-50, 54, 72, 106 and Vol. 3, p. 22)

11. Between the opening in February 2001 and the summer, Plunkett hired other employees who often did not show up for work or left because they made little money. (N.T. Vol. 3, p.23)

12. Plunkett's Place generally ran three shifts per day with one employee per shift: 7am – 10am; 10am – 6pm, and 6pm – 2am or closing. (N.T. Vol. 1, p.53, 106)

13. Because employees either did not show up or quit, Shaub was left to run Plunkett's Place alone a lot of times. (N.T. Vol. 3, p.23)

14. Before the summer of 2001, the bar was not making money and Shaub quit recommending that Plunkett get his Mother to fill in. (N.T Vol. 3, p.24-25)

15. Approximately a week before she quit, Shaub lent Plunkett money to keep the bar operating. (N.T. Vol. 3, p.24)

16. By summer's end of 2002, Plunkett's Place was doing better. (N.T. Vol 3, p.30)

17. At about that time, Shaub was in Plunkett's Place as a patron and spoke with Plunkett telling him if a shift opened, she was available but she was not looking to be a manger again. (N.T. Vol. 3, p.31)

18. Subsequently, Plunkett called Shaub asking her to cover a Monday night shift for the year's first Monday night professional football game. (N.T. Vol. 3, p. 33)

19. Shaub indicated she would think about it. (N.T. Vol. 3, p.33)

20. Later, Shaub called Plunkett and told him she would not mind coming back but she did not want to work "crappy" shifts. (N.T. Vol. 3, p.35)

21. Recalling Shaub working long shifts for so little money in the first months after Plunkett's Place opened, and despite the fact that other bartenders were angered, Plunkett assigned Shaub to the Friday night shift and also scheduled Shaub for Holidays. (N.T. vol. 3, p.40, 53-54)

22. During Shaub's second period of employment she generally worked 8-9 hours a day, three shifts per week. (N.T. Vol. 1, p.63-64)

23. In February 2003, Shaub began to require kidney dialysis three times a week. (N.T. Vol. 1, p.87, 207, 228)

24. Plunkett worked closely with Shaub to accommodate her dialysis schedule. (N.T. Vol. 2, p.188)

25. Plunkett attempted to find Shaub an office job but Shaub noted that she just wanted to continue bartending. (N.T. Vol. 2, p.338-339)

26. Sexually explicit banter was common at Plunkett's Place. (N.T. Vol. 1, p. 65, 67, 102, 141, 263, 109, 122-123, 132, 170, 339; Vol. 2, p. 351,352, 357, 19, 130, 132; Vol. 3, p.139,185)

27. Plunkett had a suspicion that led him to conclude that bartenders must be serving more than they were ringing up. (N.T. Vol. 2, 187, 285)

28. In approximately July/August 2003, Plunkett hired John Hudchick as manager. (N.T. Vol. 1, 138; Vol. 2, p. 210)

29. Plunkett asked Hudchick to attempt to ascertain whether any employee was stealing from Plunkett's Place. (N.T. Vol2, p.286, N.T. Vol. 3, p.56)

30. Hudchick reported to Plunkett that Shaub was stealing. (N.T. Vol. 2; p.285, 287)

31. Upon Plunkett's receipt of this information, Plunkett became fearful about confronting Shaub. (N.t. Vol 2, p. 287; N.T. Vol. 3, p.61)

32. Shaub was known to be disrespectful to Plunkett and had also been known to tell Plunkett off in a nasty manner. (N.T. Vol. 2, p.17-18, 20,183)

33. Plunkett called Shaub into the office to confront her with his belief that she had been stealing. (N.T. Vol. 3, 62)

34. Plunkett's intention behind calling Shaub in was not to fire her but to simply talk with her. (N.T. Vol. 3, p.61)

35. When Plunkett told Shaub he believed she was stealing, Shaub began to scream and both Plunkett and Shaub ended up cursing at each other. (N.T. Vol. 12, p.73; N.T. vol. 3, p.62)

36. Ultimately, Schaub stormed out screaming an expletive at Plunkett. (N.T. Vol. 3, p.63)

37. Subsequently, Shaub called to see if Plunkett had scheduled her to work. (N.T. Vol. 3, p.63)

38. Plunkett told Shaub they needed to talk but Shaub just used an expletive and asked if she was on the schedule. (N.T. Vol. 3, p.64)

39. Later, when Shaub came in to get her check, Plunkett asked to speak with her. (N.T. Vol. 1, p.41; N.T. Vo.l 3, p.64)

40. Shaub responded with expletives and that if she was not on the schedule she does not work there anymore. (N.T. Vol. 3, p.64)

41. In effect, Shaub informed Plunkett that she was going to get him for the way he talks to the young female bartenders and the way he acts. (N.T. Vol. 3, p.65)

42. Shaub also told Plunkett that he could not fire her because she is a female over fifty years old. (N.T. Vol. 3, p.65)

43. Plunkett tried to tell Shaub she had not been fired. (N.T. Vol. 3, p.65)

44. Shaub told Richard Taylor, a patron of Plunkett's Place, that Plunkett had accused her of stealing and that was why she was fired. (N.T. Vol. 1, p.380)

45. Shaub testified that Plunkett neither spoke to Shaub about money missing nor accused her of stealing. (N.T. Vol. 2, p140, 256-257)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to a Public Hearing.
3. Shaub is an individual within the meaning of the PHRA.
4. Plunkett's Place is an employer with the meaning of the PHRA.
5. Neither Shaub nor Plunkett were wholly credible.
6. To establish a *prima facie* case of a hostile environment claim a Complainant must show:
   (a) that she suffered intentional discrimination because of her sex;
   (b) that discrimination was pervasive and regular;
   (c) that discrimination detrimentally affected her;
   (d) that a reasonable person of the same sex would have been detrimentally affected; and
   (e) respondeat superior.
7. When an employee's own vulgar, profane, and sexually explicit conduct contributes to the hostility of a workplace, that employee's claim may fail.
8. Shaub failed to establish that Plunkett's conduct detrimentally affected her.
9. To establish a *prima facie* claim for retaliation a Complainant must show:
   (a) that she engaged in protected activity;
   (b) that the Respondent was aware of the protected activity;
   (c) that subsequent to the protected activity the Complainant was subjected to an adverse employment action; and

(d) that there is a casual connection between the protected activity and the adverse employment action.

10. Plunkett's Place offered legitimate non-discriminatory circumstances surrounding Shaub's leaving the employ of Plunkett's Place.

11. Shaub failed to prove that Plunkett's Place's reasons were a pretext for unlawful discrimination.

OPINION

The case arises on a complaint filed by Linda Shaub (hereinafter "Shaub") against Plunkett's Place on or about September 30, 2003, at PHRC Case No. 200302130. In her two count complaint, Shaub generally alleged that Christopher Plunkett (hereinafter "Plunkett"), the owner of Plunkett's Place subjected her to sexual harassment during her employment at Plunkett's Place. Additionally, Shaub alleged that when she "objected to the obscene and sexually explicitly language used by" Plunkett, she was retaliatory terminated. Shaub's claims allege that Plunkett's Place violated Sections 5(a) and (d) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et. seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit Shaub's allegations of discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. However, those efforts were unsuccessful, and this case was approved for Public Hearing. The Public Hearing was held on October 24, 25, and 26, 2007, in Philadelphia, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. Post-Hearing briefs were submitted by the parties in mid-January 2007.

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

> It shall be an unlawful discriminatory to practice...for any employer because of the...sex...of any individual...discriminate against such individual...with respect to...terms, conditions or privileges of employment...(43 P.S. 955(a)).

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

> It shall be an unlawful discriminatory practice...[f]or any...employer...to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act...(43 P.S. 955(d)).

Regarding Shaub's independently cognizable sexual harassment claim, it is readily apparent that the only thing that is crystal clear in this case is that Plunkett's Place was replete with sexual banter, innuendo and general vulgarity. Nearly all who testified agreed that sexually explicity and graphically crude language permeated the overall atmosphere at Plunkett's place. However, this is where agreement ceased. In this case, there are diametrically opposed versions of who said or did what to whom. Shaub and several of her witnesses generally submit that Plunkett engaged in offensive sexually explicitly conversations nearly all the time either with or about most all of the female bartenders at Plunkett's Place. Shaub also offered testimony that Plunkett offensively touched not only her but other female bartenders as well. Plunkett and his witnesses countered suggesting that Plunkett had not sexually harassed Shaub. On the contrary, Plunkett submits that Shaub herself was a frequent and willing participant in the sexual innuendo, vulgar storytelling, and general crude atmosphere prevailing at Plunkett's Place.

Obviously, credibility determinations will be extremely important given the drastically conflicting versions of events at Plunkett's Place. On this point, neither Shaub not Plunkett were entirely credible. For instance, Plunkett's testimony on cross examination can best be described as evasive. During his direct testimony, Plunkett purported to recall exact details of events and conversations, however, when questioned on cross, Plunkett became forgetful, smug and argumentative. Plunkett did not even acknowledge that he had been under oath during a prior deposition or

concede when the deposition had occurred despite his deposition seemingly having been taken only 13 days before his testimony at the Public Hearing. In this instance, Plunkett's display of animosity toward the opposing attorney and his obvious selective memory substantially weakens his credibility.

Shaub' credibility was also found lacking in several respects. Indeed, with regard to her retaliation claim and the circumstances of her leaving the employ of Plunkett's Place in September 2003, Shaub's credibility was especially dealt a major blow. Shaub testified that Plunkett never spoke to her about stealing. (N.T. Vol. 1. p.140). Shaub also submitted that Plunkett never accused her of stealing. (N.T. Vol. 1 p.256-257). However, Richard Taylor, one of Shaub's own witnesses, testified that Shaub told him that Plunkett had accused Shaub of stealing and that was why she had been terminated. (N.T. Vol. 1, p. 380). On this critical point, clearly, Shaub was significantly discredited.

Another major theme that substantially weakens Shaub's version of the alleged incidents of sexual harassment she purportedly suffered at the hands of Plunkett involved Shaub's initial complaint to the PHRC. It is disturbingly significant that Shaub's formal PHRC complaint makes absolutely no mention of any incident of inappropriate touching. Shaub's PHRC complaint vaguely describes the alleged sexual harassment as repeated "obscene and sexually explicitly language" directed to Shaub and other female employees. Beyond the fact that not a single purported utterance was described with particularity, Shaub's complaint never mentions any alleged inappropriate touching.

Only days after leaving Plunkett's Place, Shaub completed an IN-5 Form Discharge Questionnaire. In that questionnaire, question number 1 asked Shaub to "explain what happened to you...," Shaub responded "touch" and "say gross (sic) things to us".

When an individual has been rubbed up against, smacked on the buttocks, humped, and an attempt has been made to unsnap their bra, as alleged in Shaub's testimony, (N.T. Vol. 1 p.69), surely it is reasonable to expect that person would articulate significantly more details than simply saying "touch" when asked what happened. Shaub's testimony suggests that Plunkett visited such patently offensive, physical acts on Shaub a couple times a week. (N.T. Vol. 1, p.69). When Shaub signed her PHRC complaint, it should have been glaringly obvious that there was no mention of any inappropriate touching. Again, Shaub's credibility is shaken to its very foundation.

What appears to be the case is that offensive physical touching may well have occurred at Plunkett's Place, only such instances likely happened to some of the younger female bartenders but not to Shaub. Indeed, both Shaub's IN-5 Form. Discharge Questionnaire and her formal complaint reference others as recipients of Plunkett's purported cretinous vulgar sexually explicit comments. Until she testified at the Public Hearing, Shaub consistently failed to offer anything more than a vague general declaration that Plunkett used obscene and sexually explicit language. Such a failure tends to further undermine Shaub's credibility.

The post-hearing brief on behalf of the complaint observes that the present matter involves a hostile environment sexual harassment claim. In Hoy v. Angeline, 691 A.2d 476, 480 (Pa. Super. 1997), aff'd 720 A 2d 745 (Pa. 1998), the Pa. Superior Court started that such a claim occurs when unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment, citing Chamberlin v. 101 Realty,

Inc., 915 F.2d 777,782 (1st Cir. 1990). The Hoy case also set forth elements a Complainant must prove to establish a hostile environment claim. The elements are:

1. The Complainant suffered intentional discrimination because of her sex;
2. The discrimination was pervasive and regular;
3. The discrimination detrimentally affected the Complainant;
4. The discrimination would detrimentally affect a reasonable person of the same sex in that position; and
5. The existence of respondeat superior liability;

at 480 citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3rd Cir. 1990).

Of these five elements, Shaub's claim fails because she cannot establish the third requisite element. To establish this element, Shaub must prove that subjectively, she was detrimentally affected by Plunkett's actions. Although Shaub testified that she found some of Plunkett's sexually explicit comments disgusting, (N.T. Vol. 1, p.102) and she was offended (N.T. Vol. 1, p.293), when the "totality of the circumstances" are considered, See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69; Hall v. Gus Constr. Co., 842 F. 2d 1010, 1013 (8th Cir. 1998); Snell v. Suffolk County, 782 F 2d 1094, 1103 (2nd cir. 1986): and Hicks v. Gates Rubber Co, 833 F 2d 1406, 1413, 45 FEP Cases 608 (10th Cir. 1990), Shaub's own actions are shown to have actively contributed to a distasteful working environment. Further, when Shaub's actions are evaluated, Shaub is unable to prove that her working conditions were personally intolerable.

When an employee is found to have contributed to the distastefulness of a work environment by their own profane and sexually explicit conduct, their claim of a hostile work environment has failed. See Gam v. Kepro Circuit Systems, 28 FEP Cases 639 (E.D. Mo. 1982); Weinsheiner v. Rockwell Intl. Corp., 54 FEP Cases 828 (M.D. Fla. 1990), (a Complainant's willing and frequent involvement in the sexual innuendo

prevalent in her work area indicate that she did not find the majority of such conduct truly "unwelcome" or "hostile"); Perkins v. General Motors Corp., 709 F. Supp. 1487, 51 FEP Cases 1684 (W.D. Mo. 1989), (a Complainant was an active, encouraging participant in sexually explicitly conversations and actions); Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 41 FEP Cases 532 (S.D. Miss. 1986), (a Complainant participated in frequent discussions and bantering about sex). An employee's participation or encouragement of such behavior might sometimes preclude a finding that the conduct was unwelcome. The Zorwayyed v. Laven Co., 735 F Supp. 1497, 1504, 52 FEP Cases 1350 (D. Kan 1990).

In the present case, Shaub freely admits that she has a "foul-mouth." (N.T. Vol 1, p 179; N.T. Vol. 3, p.185). Shaub further admits she called Plunkett various crude and vulgar names such as "dick wood ears," (N.T. Vol. 1 p.124), and "dick head," (NT Vol. 1, p.141, 264). Others confirmed that Shaub called Plunkett other offensive names like "A. hole," "little four-eyed prick," "little dick," little prick," and "Mother F...er", and teased him merciously. (N.T. Vol. 2, p.109, 124,183,293; Vol. 3, p.131, 132). Further undermining Shaub's claim is evidence that she exposed herself while bartending. (N.T. Vol. 1, p.132, 133, 179, 263; N.t. Vol. 2, p.340; N.t. Vol. 3, p.80, 140). Shaub admits that she would pull her pants down revealing her backside but suggest she did this to chase Plunkett away. (N.T. Vol. 1, p.263). Indeed, Shaub testified that she did not think there was anything wrong with doing this. (N.T. Vol. 1, p.133)

One of Shaub's witnesses testified that she recalled Shaub nastily telling Plunkett to f... off. (N.T. Vol. 2, p.17-20). Shaub admitted calling Plunkett's girlfriend a "happy meal," and repeating to customers that Plunkett "f...s his girlfriend in the a.." (N.T. Vol. 1, p.257, 258). Without contradiction, it was also said that Shaub told patrons of the bar about her sex life and tried to get involved in the sex-lives of others. "(N.T. Vol. 3,

p.130, 132). Further, when Plunkett and his girlfriend were upstairs, Shaub was reported to have announced to patrons that "they are up f...ing, f...ing up the a.." (N.T. Vol. 3, p.50) And when Plunkett and his girlfriend came downstairs, Shaub would say "we heard you" and patrons of the bar would laugh. (N.T. Vol. 3, p.50). On another occasion, an employee had a baby and Plunkett did something nice. The next day, Shaub is reported to have told everyone that Plunkett was f...ing the employee and the baby was his. (N.T. Vol. 3, p.46).

With regard to Shaub's interaction with customers, it seems Shaub was well known to be crass and vulgar and constantly used sexual terms. (N.T. Vol. 2, p.109). She is reported to have asked her customers, "what the f... do you want?" (N.T. Vol. 2, p.102), or "do you want a nipple or on your Mother's tit so you can suck it?" (N.T. Vol. 2, p.102, 103) as well as generally making fun of male customers. (N.T. Vol. 2, p. 293, 344). Plunkett's Mother testified without contradiction that Shaub would constantly talk with sexual overtones about sex with patrons and who was laying who. She would talk about what underwear she was or was not wearing. (N.T. Vol. 2, p.120). It was revealed that on one occasion, Shaub even came to work in a bikini. (N.T. Vol. 2, p.120). Although not allowed in Plunkett's Place, Shaub encouraged customers to get up on the bar and dance. (N.T. Vol. 2, p.103; N.T. Vol. 3, p.49). Plunkett's Mother testified that she had to convince one of Shaub's friends to keep her clothes on and that Shaub thought it was funny. (N.T. Vol. 2, p.104).

Of particular note is the testimony about Shaub's daughter, Danielle. (N.T. Vol. 2, p.296). Again, without contradiction, testimony was given that Shaub wanted Danielle to work at Plunkett's Place. (N.T. Vol. .2, 104, 133; N.T. Vol. 3, p. 135). It strains belief that Shaub would say on one hand that she was offended and on the other want her daughter to work there.

What emerges from a review of Shaub's behavior is that her free use of sexually offensive language, rude and crude behavior and overall unprofessional conduct totally undermines her claim that she found similar conduct offensive. Here, Shaub's own offensive behavior equaled if not exceeded the behavior she claims Plunkett displayed.

This conclusion is reinforced by observing Shaub on the witness stand. While testifying, Shaub quite freely and without apparent reservation or embarrassment repeated some very crude and loud remarks that had allegedly been made. This observation is not a criticism but merely another way to indicate how a reasonable person might conclude that Shaub was not personally offended at Plunkett's Place.

Under a subjective standard, it cannot be said that Shaub was detrimentally affected by Plunkett's alleged conduct in any way. Because Shaub's proof fails on this requisite element, consideration of other criteria is not necessary. Accordingly, Shaub's claim of a hostile work environment fails in light of the fact that she engaged in the very type of conduct about which she complains.

Although Shaub failed to prove by a preponderance of credible evidence that Plunkett's obnoxious, sexually explicit conduct was sufficiently severe to alter the conditions of her employment, there was considerable testimony offered by other female bartenders regarding Plunkett's exceptionally ugly and rude conduct that certainly could be conducive to meritorious sexual harassment claims had they been made. Certainly, we do not minimize the gravity of the scope of alleged incipient sexually charged conduct. There was considerable evidence presented about intensively offensive demeaning sexual inquiries and vulgarities. Plunkett was portrayed as asking about the sexual proclivities of young bartenders, and generally acting in a perverse manner. Unlike Shaub, some of the younger bartenders had never worked in a bar before and may not have actively contributed to Plunkett's sexually

suggestive vulgar, lewd lascivious behavior. While Shaub seems to have experienced the sexually explicit atmosphere with amazing resilience and relished reciprocating in kind, other younger bartenders simply tolerated Plunkett's obnoxious behavior because they needed the job. Clearly, had a bartender other than Shaub leveled a similar claim, the outcome may well have be very different.

Because of this, we strongly urge Plunkett to develop a meaningful and effective sexual harassment policy and to personally attend a training program that thoroughly informs him of all of his legal responsibilities with respect to providing a workplace free from sexual harassment. If such a policy is developed, we further suggest that it is extremely prudent that all employees of Plunkett's Place are trained regarding the components of such a policy and the rights and responsibilities of each individual employee.

Turning to Shaub's retaliation claim, to establish a *prima facie* case, Shaub must show:

(1) that she engaged in a protected activity;

(2) that the Respondent was aware of the protected activity;

(3) that subsequent to the protected activity Shaub was subjected to an adverse employment action; and

(4) that there is a casual connection between Shaub's protected activity and the adverse employment action.

Robert Wholey Co. v. PHRC, 606 A. 2d 982 (Pa. Commonwealth Ct. 1992); Brown Transport Corp. v. PHRC, 133 Pa. Commonwealth Ct. 545, 578 A. 2d. 555 (1990).

While there is considerable dispute regarding whether Shaub actually protested Plunkett's behavior, for the purpose of reaching the heart of this matter, we will assume arguendo that Shaub established the requisite *prima facie* showing. The resolution of

this case turns on whether Shaub can prove by a preponderance of evidence that the circumstance of Shaub leaving the employ of Plunkett's Place offered by the Respondent are pretextual.

As noted earlier, Shaub generally testified that she was never even accused of stealing. (N.T. Vol. p. 256-257). Clearly, she was. Indeed, Shaub told Richard Taylor that she had been fired after Plunkett accused her of stealing. (N.T. Vol. 1, p 380).

Plunkett's version of events leading up to Shaub leaving begins with his long time concern about a perceived theft problem. (N.T. Vol. 2 p. 187,211). Plunkett articulated that several months before Shaub left, he hired John Hudchick to manage Plunkett's Place and to find who was stealing. (N.T. Vol. 1, p. 138; N.T. Vol. 2, p. 286; N.T. Vol. 3, p. 56). Plunkett submits that subsequently, Hudchick came to him and informed him that Shaub was stealing. Plunkett offered that Hudchick showed him a video tape that showed Shaub stealing. (N.T. Vol. 2, p. 349; N.T. Vol. 3, p. 60). Plunkett further suggests that he was shocked and devastated to learn that Shaub had been stealing. (N.T. Vol. 2, 365; N.T. Vol. 3, p. 60).

Plunkett testified that he became upset and feared confronting Shaub because he felt she would flip out, and yell and scream at him. (N.T. Vol. 2, p. 287; N.T. Vol. 3, p. 37). Plunkett also submits that he neither wanted to nor intended to terminate Shaub. (N.T. Vol. 2, p. 288, 256; N.T. Vol. 3, p. 61). On the Monday after being informed Shaub was stealing, Plunkett did call Shaub in and as anticipated, when Plunkett confronted Shaub about stealing, voices were raised, (N.T. Vol. 2, p. 188). Indeed, Plunkett and Shaub loudly cursed at each other. (N.T. Vol. 3, p. 62). Rather than continue a heated discussion, Plunkett told Shaub to go home and they would talk later. (N.T. Vol. 3, p. 62). As Shaub stormed out, she leveled a series of expletives, first at Plunkett specifically, and then generally to patrons as she left. (N.T. Vol. 3, p. 63).

Subsequently, Shaub called to see if she was on the schedule, (N.T. Vol. 3, p. 63), and when Plunkett told her they needed to talk, Shaub in effect stated that if she was not on the schedule she was "f...ing fired, right!" (N.T. Vol. 3, p. 69). In response, Plunkett told Shaub that if she was gong to act like that, she would not be put on the schedule, and that she should come in to talk. (N.T. Vol. 3, p. 64). Shaub then uttered an expletive and hung up. (N.T. Vol. 3, p. 64).

After a few days, Shaub called to say she was coming in for her pay. When she arrived, Plunkett asked to speak with her. Shaub responded with an expletive saying that she was not on the schedule so she does not work there anymore. (N.T. Vol. 1, P. 73; N.T. Vol. 3, p. 64). In effect, Plunkett submits that Shaub was not terminated, she simply left. (N.T. Vol. 3, p. 65). Indeed, Shaub agrees she quit. (N.T. Vol. 1, p. 73).

The post-hearing brief on behalf of the complaint asserts that Shaub demonstrated that the allegation that Shaub was stealing was false. Fundamentally, the argument on this point fails to account for the single fact that the burden of proof is on Shaub to establish pretext. The burden on Plunkett's Place is simply to articulate a legitimate non-discriminatory reason for why Shaub left Plunkett's Place's employ. Clearly, Plunkett's Place has met its production burden.

Shaub argues that Plunkett's Place failed to either present John Hudchick as a witness, or introduce the purported video tape showing Shaub stealing, or produce business records to show Plunkett's Place was losing money. Frankly, once Plunkett's Place met it's production burden, it was Shaub's burden to show pretext. If she chose to do so, she could have presented John Hudchick in an attempt to show Plunkett's version was false. However, Hudchick was not called. Furthermore, if business records of Plunkett's Place could establish that Plunkett was exaggerating the extent of a purported loss, it was Shaub's burden to attempt to make this showing. She did not.

Considering the evidence as a whole, Shaub has failed to prove by a preponderance of evidence that Plunkett's Place version of events surrounding Shaub's leaving Plunkett's Place was pretextual. Accordingly, an order dismissing Shaub's claims follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN REALTIONS COMMISSION

LINDA SHAUB, **Complainant**	:	
v.	:	**PHRC Case No. 200302130**
PLUNKETT'S PLACE, **Respondent**	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned case, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Sections 5(a) and 5(d) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Facts, Conclusions of Law, and Opinion be approved and adopted. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

July 11, 2007
Date

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN REALTIONS COMMISSION

LINDA SHAUB, **Complainant**	:	
v.	:	**PHRC Case No. 200302130**
PLUNKETT'S PLACE, **Respondent**	:	

FINAL ORDER

AND NOW, this 23rd day of July, 2007, after a review of the entire record in this matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Facts, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the full Commission adopts said Findings of Facts, Conclusions of Law, and Opinion as its own finding in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby.

ORDERS

That the complaint in this case be, and the same hereby is, dismissed.

By: Stephen A. Glassman
Chairperson

Attest:

Dr. Daniel D. Yun,
Secretary