COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND TALTOAN, Complainant

v.

HERSHEY CHOCOLATE COMPANY, A DIVISION OF HERSHEY FOOD CORPORATION, Respondent

Docket No. E-32826-D

STIPULATIONS OF FACT

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OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

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v.

HERSHEY CHOCOLATE COMPANY, A DIVISION OF HERSHEY FOOD CORPORATION, Respondent

Docket No. E-32826-D

STIPULATIONS OF FACT

The following facts are admitted by all parties to the proceedings and no further proof thereof shall be required:

1. Complainant herein is Raymond A. Taltoan, III, an adult black male, who resides at 2029 Chestnut Street, Harrisburg, PA 17104.
2. Respondent herein is Hershey Chocolate Company, a division of Hershey Foods Corporation, located at 19 East Chocolate Avenue, Hershey, PA 17033-0819.
3. On or about December 20, 1985, PHRC notified Respondent that probable cause exists to credit the allegations of the complaint.
4. On January 10, 1986 a conciliation conference was held wherein PHRC endeavored to resolve the complaint. PHRC was unsuccessful in this effort.
5. Complainant was employed by Respondent from December 15, 1980 to March 15, 1985 when he was discharged by Respondent.
6. Complainant was notified of his termination by letter dated March 15, 1985.

J. Thomas Menaker
Attorney for Respondent

Ellen K. Barry
Assistant Chief Counsel, PHRC

Emily J. Leader
Attorney-at-Law

Dec 7, 1987
dated.

FINDINGS OF FACT

The facts contained in the "Stipulations of Fact" are hereby incorporated herein as if fully set forth. 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 throughout:

S.F. Stipulations of Fact
N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

1. Raymond A. Taltoan, III, ("Complainant"), began his employment with Hershey Chocolate Company, a division of Hershey Foods Corp., ("Respondent"), on December 15, 1980. (N.T. 55; S.F. 5)
2. In 1980, Respondent employees were subject to an initial four-month probation period. (N.T. 593)
3. In 1981, during his probationary period, the Complainant was assigned to the Respondent's moulding room where he worked for Leonard Kowker. (N.T. 592)
4. On the Complainant's first day under Kowker's supervision, the Complainant took two hours for lunch although he was permitted 25 minutes only. (N.T. 594)
5. Kowker's intention was to fire the Complainant but upon a personal request for leniency, Kowker took no adverse action against the Complainant. (N.T. 594-596)
6. Other Respondent employees had been terminated during their probationary period for similar infractions. (N.T. 597)
7. The Respondent maintained a progressive discipline policy and all disciplinary action taken against an employee was recorded on documents called Personnel Action Memos ("PAM"). (N.T. 247, 266)
8. Although the Respondent had a progressive discipline policy, there were some infractions which could result in automatic discharge, i.e., theft, falsification of documents, product contamination, insubordination (depending on the severity), and some physical altercations. (N.T. 267, 268)
9. During the period of the Complainant's employment, Michael Bailey, ("Bailey"), was the Respondent's manager of Labor Relations, (N.T. 248). It was part of Bailey's job to review all PAM's and insure consistency in discipline. (N.T. 247)
10. A provision in the appendix of the collective bargaining agreement between the Respondent and the employees' union established an absenteeism control policy. (C.E. 11)
11. The Respondent's absenteeism policy was a no fault policy with all absences accountable to an employee with limited exceptions. (N.T. 532; C.E. 11)
12. If an employee violated the Respondent's absenteeism policy, the employee received a written warning as the first step in the Respondent's progressive discipline policy. If upon review of an employee's absenteeism record, an employee continued to violate the absenteeism policy the employee is given a 2 day disciplinary layoff. A third offense results in a two-week disciplinary layoff, and a fourth offense is grounds for termination. (C.E. 11)
13. The Respondent employs approximately 2,700 hourly employees. (N.T. 249)

14. The Respondent's absenteeism policy resulted in a considerable number of PAM's for excessive absenteeism, i.e., 70 PAM's were issued for excessive absenteeism between September 4, 1984 and March 21, 1985. (S.F. in N.T. 265)
15. The Complainant's disciplinary record included:

    a. A December 1, 1981 PAM for excessive absenteeism: Penalty-written warning. (C.E. 1H)
    b. July 1, 1982 PAM for insubordination: Penalty-loss of pay for balance of shift plus 8 hrs. off, and warning of possible discharge for future incidents. (C.E. 1G)
    c. September 16, 1983 PAM for disrespect for co-workers' use of vulgar and obscene language: Penalty-two day suspension and discharge warning. (C.E. IE)
    d. November 18, 1982 PAM for unexcused absences: Penalty-written warning.
    e. January 22, 1985 PAM for excessive absenteeism: Penalty-written warning. (C.E. 1D)
    f. March 14, 1985 PAM for willful product contamination: Penalty-discharge effective March 15, 1985. (C.E. 1B)

16. The Respondent notified the Complainant that the decision to terminate him was necessary because on March 12, 1985, he willfully contaminated the Respondent's product. The Respondent's notice also noted that the Complainant's overall work record had been considered. (C.E. 1C)
17. During the Complainant's employment with the Respondent, the Complainant worked in many of the departments which make up the whole of the Respondent's large organization. (C.E. 1A)
18. On February 25, 1985, the Respondent transferred the Complainant to the second shift in its plow room. (N.T. 352; C.E. 1A)
19. The Respondent's plow room averaged 13 employees per shift. (N.T. 282) Of the 13 employees, 6 were plow operators. (N.T. 282) The plow room contained 38 plows. (N.T. 283) A plow is a large heated mixing bowl apparatus which processes condensed milk into a chocolate powder. (N.T. 283) There are a total of 4 mixing blades on a plow: are-agitator re-mixer; a splitter; a pressure blade; and la cutter blade. (N.T. 284-285) The re-agitator and splitter blades are near the center of the bowl and are non-adjustable blades. The pressure and cutter blades circulate around the inside of the bowl on opposite ends of a large cross arm close to the bowl's perimeter. (N.T. 284-285)
20. During the mixing process within a plow, the pressure and cutter blades must be periodically adjusted as the consistency of the product charges. (N.T. 284)
21. The pressure blade adjustment is located outside of the plow. (N.T. 286)
22. Cutter blade adjustments are made by reaching over the rim of the bowl approximately 1 to 2 feet and turning an adjustment wheel to obtain the desired adjustment. (N.T. 286, 637-639, 656)
23. For operator safety, inexperienced plow operators stop the plow to facilitate cutter blade adjustments. (N.T. 649)
24. Plow operators stand on a step stool while adjusting the cutter blade. (N.T. 289)
25. The Complainant is approximately 6' 5" in height and the rim of the plow would come approximately to the Complainant's waist while standing on the stool next to a plow. (R.E. 3; N.T. 187)

26. The Complainant testified on direct examination that on March 12, 1985, he got up and felt a bug coming on so he took some medication and felt better. The Complainant's testimony declares he came to work feeling good. (N.T. 68)
27. The Complainant's reporting time on March 12, 1985 was 3:00 p.m. (N.T. 138)
28. On cross examination, the Complainant stated that when he got up in the morning of March 12, 1985, he was not sick and took no medicine until later in the afternoon. (N.T. 137, 138)
29. The Complainant's testimony regarding what occurred upon his arrival at work is in conflict with both the Complainant's supervisors, ("Slade"), testimony, and other testimony regarding the timing of the events of the afternoon of March 12, 1985. The Complainant indicated he reported to his job assignment and was doing his regular duties and began to get sick later during his shift after he had done a run on his assigned plows. (N.T. 68, 138, 139, 140, 372) Slade testified that upon the Complainant's arrival at 3:00 p.m., the Complainant came to Slade and stated he was ill and requested to be allowed to go home. (N.T. 309, 312)
30. In effect, the Complainant testified he did not go directly to Slade upon his arrival at 3:00 p.m. but after a time on the job he became ill and vomited. (N.T. 68, 140) The Complainant further indicated that he vomited into an animal feed barrel located near his area of responsibility and advised Slade that this had occurred. Animal feed is primarily contaminated product. (N.T. 215)
31. Slade testified that at approximately 3:15 p.m., a replacement became available and the Complainant was sent to the Respondent's medical department. (N.T. 311)
32. At approximately 3:15 p.m., the Complainant went directly to the medical department. The Complainant testified that he was gone from the plow room between 45 minutes and 1 hour. (N.T. 142)
33. Possibly more than any other Respondent employee, the Complainant frequently went to the medical department seeking permission to go home. (N.T. 367, 386, 388, 415, 549, 550, 551)
34. The Complainant's testimony indicates that when he arrived at the medical department, he was seen right away first by a nurse on duty and then by a physician's assistant, ("Cary"), and that he was at the medical department for at least one-half hour. (N.T. 69, 144, 155).
35. Both Cary and nurse Lutz agreed that the Complainant was examined by Cary, and that the Complainant refused medication, however, the Complainant denied being offered medication or even being examined. (N.T. 70, 153, 214, 374-377, 381, 419-421)
36. The result of the Complainant's visit to the medical department was that Cary returned the Complainant to work. (N.T. 70, 388)
37. When the Complainant left the medical department, he did not return directly to the plow room, instead, he first went to Bailey's office. (N.T. 71, 159)
38. The Complainant went to Bailey's office to ask Bailey to overrule the medical department's decision to return him to work. (N.T. 71)
39. The Complainant testified that while waiting to see Bailey, he became ill and vomited in a large ashtray. (N.T. 71, 162)
40. The receptionist in Bailey's office, Shirley Brennan, testified that while waiting for Bailey, the Complainant told her he was going to be sick and walked over towards the ashtray. (N.T.438, 440) The Complainant denied threatening to throw up in the waiting

area near Bailey's office. (N.T. 160) However, he did testify that he did vomit into an ashtray. (N.T. 71)

41. The Complainant did speak with Bailey, and Bailey refused to overrule the medical department's decision. (N.T. 71, 169-170, 496)
42. Bailey testified that when he refused to overrule the medical department the Complainant stated, “I guess you want me then to throw up in the plow to demonstrate that I am too sick to work.” (N.T. 496, 501) The Complainant denied telling this to Bailey. (N.T. 180-181)
43. After the Complainant left Bailey's area, Brennan called plant sanitation and Sidney Dickinson (Dickinson), the plant sanitation supervisor, inspected the ashtray in the waiting room. No evidence of vomit was found. (N.T. 577-578)
44. After leaving Bailey, the Complainant returned to the plow room and asked to speak with Slade with union representative Jay Sheaffer present. (N.T. 71)
45. Slade met with the Complainant and union representative Sheaffer and reaffirmed that only the medical department could authorize Complainant to go home. (N.T. 72)
46. Slade testified that during this meeting the Complainant said, "If I get ill, I will throw up in a plow."
47. The Complainant denied making such a statement. (N.T. 180) Union representative Sheaffer indicated he did not hear the Complainant threaten to throw up in the plow, (N.T. 43), but also stated that he could not recall everything said, just the highpoints. (N.T. 38)
48. Union representative Sheaffer also testified that after the Complainant left Slade's office, Slade called Sheaffer back in and told him he was short of help and that the Complainant had done the same thing the previous week. (N.T. 36)
49. The Complainant testified that a while later, (approximately 1-1½ hours later), after a new batch of the product had been dumped into plow #17 while stretched to the middle of the plow to adjust the blades, without warning, he began to vomit. (N.T. 73, 182, 187, 189) The Complainant states that he put a hand to his mouth; however, it went out of control and some vomit got into plow #17: (N.T. 73, 189) The Complainant further testified that he was standing on the stool next to plow #17 and while turning away he was still vomiting. (N.T. 73) Further, the Complainant testified that he ran to the animal feed barrel where he continued to be sick. (N.T. 73, 190) At one point, the Complainant indicated he threw up on the floor between plow #17 and the animal feed barrel on the side of the plow, and on his clothing. (N.T. 190, 211)
50. Slade testified that the Complainant came to him saying he threw up in plow #17. (N.T. 321, 501) The Complainant indicated he asked a co-worker to go get Slade as he was at the animal feed barrel being sick. (N.T. 73)
51. After the incident, the plant supervisor, Roy Shaeffer, Bailey, Slade, union representative Sheaffer, and the Complainant met in Slade's office. (N.T. 74, 503, 601)
52. While in Slade's very small office, neither Slade, nor Bailey nor Roy Shaeffer either saw or smelled evidence of vomit on the Complainant. (N.T. 322, 510, 601)
53. During this meeting, the Complainant maintained he had vomited into plow #17. (N.T. 75, 323, 505)
54. The result of the meeting was the Complainant’s suspension pending a review of what disciplinary action was appropriate. (N.T. 511)

55. Bailey was only aware of one previous incident of product contamination. (N.T. 521) A few months prior to the March 12, 1985 incident, a white employee named Taraschi was terminated after it was learned he had put lifesavers into one of the Respondent's products. (N.T. 522)
56. Dickinson was called to the plow room and he checked all around plow #17, on the floor near the plow and between plow #17 and the animal feed barrel. Dickinson found no sign of vomit. (N.T. 579, 580, 584)
57. Slade also inspected plow #17 and the surrounding area. He too found nothing. (N.T. 322-324) However, Slade did note what he described as a small amount of moisture on the crumb powder in the animal feed barrel which Slade described as "spit". (N.T. 324-325)
58. As the product in plow #17 was destined for public consumption, Bailey and Roy Shaeffer had no choice but to take the Complainant at his word that he had vomited into plow #17. (N.T. 542, 611) Accordingly, approximately 2,500 pounds of product from plow #17 had to be scrapped at a cost in excess of $2,000. (N.T. 338, 355, 508, 509)
59. Although the Complainant maintained that the incident was not willful, (N.T. 75, 276, 537, 541), Bailey had cause to believe the Complainant's reported drastic actions were simply done to get to go home while avoiding disciplinary action for excessive absenteeism. (N.T. 276, 496-497, 501, 504, 543)
60. The Complainant knew that had he failed to come to work on March 12, 1985, he would have exceeded an allowed number of absences and would have been given a 2 day disciplinary suspension. (N.T. 70, 158, 488)
61. Product contamination is a dischargeable offense. (N.T. 45, 267, 521, 538)
62. The Respondent was justified in concluding that the Complainant deliberately vomited into plow #17.

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 in this case.
3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act (PHRA).
4. The Respondent is an employer within the meaning of the PHRA.
5. Direct evidence is not required to prove discrimination, circumstantial evidence alone may be sufficient.
6. Where a Respondent does everything that would be required of it if a Complainant had properly made out a prima facie case, whether a Complainant really did so is no longer relevant.
7. The Respondent offered legitimate non-discriminatory reasons for its termination of the Complainant.
8. Disciplinary record comparison evidence offered by the Complainant was not of comparably situated White employees.
9. The Respondent had previously discharged a comparably situated White employee.
10. The Complainant failed to establish by a preponderance of the evidence that the reasons for his termination articulated by the Respondent were pretextual.

11. Judgment of credibility is a responsibility entrusted to the trier of fact.
12. The testimony offered by the Complainant was not credible.
13. Witnesses for the Respondent offered credible testimony.

OPINION

This case arises on a complaint filed by Raymond A. Taltoan (hereinafter "Complainant") against Hershey Chocolate Company (hereinafter "Respondent") on or about April 4, 1985, at Docket Number E-32826-D. The Complainant alleged that the Respondent discriminated against him by dismissing him because of his race, Black, and because he had filed a prior PHRC complaint. The Complainant claimed that the Respondent's dismissal of him violated Sections 5(a) and (d) of the Pennsylvania Human Relations Act, Act of October 25, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter the "PHRA ").

PHRC staff conducted an investigation and found probable cause to credit the allegations of the discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation, and persuasion. The efforts were unsuccessful, and this case was approved for Public Hearing. Prior to the Public Hearing, the Complainant withdrew that portion of his complaint alleging retaliation. The Public Hearing on the remaining issue of an alleged race-based discharge was held on December 7 through 9, 1987 in Harrisburg, PA, before Carl H. Summerson, Hearing Examiner.

The case on behalf of the Complainant was presented by Emily J. Leader, Esquire. J. Thomas Menaker appeared on behalf of the Respondent, and the PHRC interest in this matter was overseen by Ellen K. Barry, Esquire, Assistant Chief Counsel, PHRC. Post-hearing briefs were simultaneously submitted by the parties in March 1988.

The Respondent's brief opens with an assertion that the record is devoid of direct evidence of racial discrimination. This is an accurate observation, however, in discrimination cases, it is rare for a Respondent to have made direct statements or to have performed patent acts of discrimination; and therefore, many cases are left with an evaluation of mere inferences and circumstantial evidence. Harmony Volunteer Fire Co. v. PHRC, 34 Pa. Superior Court 595, 459 A.2d 439 (1983); Harrisburg School District v. PHRC, 77 Pa. Commonwealth Court 594, 466 A.2d 760 (1983). Direct evidence of discrimination is not required. See International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 358 n. 44 (1977).

The Respondent's brief also focuses much attention on an argument that the complainant's evidence failed to establish a prima facie case. The Respondent points out that the record is also devoid of evidence concerning who replaced the Complainant following his discharge. Also, the Respondent argues, the Complainant failed to point to similarly situated employees not in the Complainant's protected classes who were treated more favorably. These matters customarily go to the fourth element of a prima facie showing.

Normally, in a disparate treatment case, the pattern of analysis follows a common avenue. First a Complainant makes a prima facie showing. Once established, a respondent is afforded an opportunity to articulate a legitimate, non-discriminatory reason for its action. If the Respondent meets this production burden, in order to prevail, a Complainant must demonstrate that the entire

body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Although the Respondent's arguments regarding whether the Complainant made out a prima facie case are well taken, we are not going to dwell on the prima facie requirement. Because this matter was fully tried on the merits, it is appropriate to move to the ultimate issue of whether the Complainant has met his ultimate burden of persuasion that his discharge was discriminatory within the meaning of the PHRA. See U.S. Postal Service Board of Governors v. Aikens, 31 FEP 609 (U.S. Supreme Court 1983) ("Aikens").

In this case, the Respondent responded to the Complainant's case by offering evidence of the reason for the Complainant's dismissal. Aikens indicates that once a Respondent does this, the McDonnell-Burdine presumption arising from a prima facie showing drops from the case, and the factual inquiry proceeds to a new level of specificity. Aikens further states that the prima facie case method established in McDonnell Douglas was never intended to be rigid, mechanized, or ritualistic. Rather it is merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. Aikens, citing Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

"Where the [Respondent] has done everything that would be required of [it] if the [Complainant] had properly made out a prima facie case, whether the [Complainant] really did so is no longer relevant. The [trier of fact] has before it all the evidence it needs to decide whether 'the [Respondent] intentionally discriminated against the [Complainant].'" Aikens at 611.

The Respondent's proffered reason for the Complainant's discharge was clearly stated in a March 15, 1985 letter to the Complainant. In summary, the Respondent contends it discharged the Complainant for willful contamination of the Respondent's product and his overall work record. To appreciate the legitimacy and extent of the Respondent's justification for terminating the Complainant, it is first necessary to examine and evaluate the credibility of the witnesses in this case.

Judgment of credibility is a responsibility entrusted to the trier of fact. Carr v. Com., State Board of Pharmacy, 49 Pa. Cmwlth. 330, 409 A.2d 941 (1980); Boughter v. Com., Dept. of Public Welfare, 55 Pa. Cmwlth. 521, 423 A.2d 806 (1980); PHRC v. Hempfield Township, 23 Pa. Cmwlth. 351, 352 A.2d 218 (1976). In this case, much of the testimony presented was conflicting. In assessing credibility, consideration was given to each witness' motive and state of mind, strength of memory and demeanor while on the witness stand. Consideration was also given to whether a witness' testimony was contradicted, and the bias, prejudice, and interest, if any, of each witness. Recognition was also given to the premise that where resolution of a matter rests with a weighing and balancing of conflicting evidence, absolute certainty is rarely achieved.

Testimony on behalf of the Complainant's case was presented by only two witnesses: the Complainant himself and union representative Jay Sheaffer. The Complainant's testimony can be described as clear, candid and positive at times yet elusive, evasive, and forgetful at other times.

Additionally, a variety of strong circumstances and tangible facts plainly discredit significant portions of the Complainant's testimony.

The most damaging physical evidence in stark conflict with the Complainant's testimony was the configuration and mechanization of plow 17. The Complainant would have us believe he was stretched at least 4 feet over the rim of plow 17 to make blade adjustments when suddenly he became nauseated and vomited without an opportunity to turn away fast enough to avoid vomit getting into the product in the plow.

The Complainant's only other witness agrees with Slade that there are no blade adjustments in the center of the plow. The only adjustment made by reaching over the rim of a plow is the cutter blade adjustment which can easily be reached without stretching completely over the plow.

Similarly, the Complainant attempted to persuade us that when he stood on a stool next to plow 17, the plow's rim came to his ribs. Respondent's exhibit 3 clearly portrays a man, whose testimony indicates was shorter than the Complainant, next to plow 17, and the rim of plow 17 is merely waist high. Additionally, the Complainant's testimony described the stool next to plow 17 as flimsy. The stool in Respondent's exhibit 3 looks in no way to be flimsy. The pictures painted by the Complainant of the plow operation were clearly distorted and not credible.

Another area where tangible evidence discredits portions of the Complainant's testimony deals with what the Complainant told us about physician assistant Cary. Throughout his testimony, the Complainant seemed to take great care indicating he mistakenly believed physician assistant Cary was a doctor. The Complainant went so far as to assert that Cary always told him, “I'm a doctor, I can take care of you...”

Added to Cary's flat denial to such statements, there is the physical evidence submitted as Respondent's exhibit 6 which is an identification badge always worn by Cary which clearly states Cary is a Physician Assistant. It would appear the Complainant was attempting to discredit Cary, as a considerably unfavorable portrait was painted of the Complainant by the entire medical staff including Cary.

Three witnesses from the Respondent's medical department agreed that the Complainant frequently visited the medical department. On his visits, his most frequent demand was to be sent home. When the Complainant came to the medical department he would pound on the counter for attention and would become verbally abusive to medical staff. Dr. Dunkle described the Complainant as uncooperative, abrasive and rude. The Complainant questioned the abilities and qualifications of those examining him and had on occasion been noted to feign vomiting. On one occasion, the Complainant was described as intentionally spitting up when he did not get his way. On other occasions, the Complainant just became angry and abusive.

Another incident which clearly displayed an angry and abusive side of the Complainant was an incident on September 16, 1982, between the Complainant and a co-worker, Natalie Ann (Resanovich) Coomer. On the day in question, the Complainant's job was pulling stock items for shipment. Coomer's job was to check the accuracy of the amounts pulled. An internal mix-up in paperwork resulted in inconsistent instruction on how many items were to be shipped as reflected

on the Complainant's and Coomer's checklists. When Coomer pointed out what she believed was an error by the Complainant, the Complainant in effect became abusive in language and action. The Complainant used an extremely vulgar and offensive phrase toward Coomer while at the same time making an obscene gesture.

A union representative, Marion Heist, and another worker, Ralph Kleinfelter, were in the shipping room at the time of this incident and confirmed the vulgarity of the Complainant's extreme reaction. As the testimony at the public hearing unfolded, it became abundantly clear that when anything was done to the Complainant which he did not like, his reaction could become abusively retaliatory to an extreme.

In addition to the factors listed above, parts of the Complainant's own testimony illustrate blatant inconsistency. For example, when describing the September 16, 1982, incident between Coomer and himself, the Complainant's testimony fluctuated regarding whether he used vulgar language. First he said he did, then he did not, then he did. (N.T. 59. 121, 122)

Regarding the circumstances surrounding the March 12, 1985, incident, once again, the Complainant's testimony vacillated in several areas. First, at one point, the Complainant tells us when he got up he felt a bug coming on so he took medication, felt better, and came to work feeling good. (N.T. 68) Later he tells us, he got up and was not sick and took no medicine. (N.T. 137) He became ill later and took medication later in the afternoon. (N.T. 138)

The Complainant further contradicted his own testimony regarding his stated first occasion to vomit into the animal feed barrel. Early in his testimony, he indicates that he vomited into the feed barrel and went to Slade to inform him as to what occurred. (N.T. 68, 139, 141) Later, the Complainant testified that he told Cary a co-worker saw the Complainant vomit and the Complainant had asked the co-worker to go get Slade. (N.T. 70)

On another matter, the Complainant first testified that at the medical department he did not request to be allowed to go home. (N.T. 146) However, only a short time later, the Complainant states that he asked Cary 3-4 times to go home. (N.T. 154) On yet another matter, the Complainant first testified that he wanted to be able to go home without incurring any disciplinary action. (N.T. 158) Later his testimony changed to a denial that he knew he would get discipline if he did not come to work on March 12, 1985. (N.T. 158)

Lastly, the Complainant had testified that he had thrown up so much that vomit was on his hands, his clothes, and his shoes. (N.T. 188, 190) When asked if he had gone into the bathroom between when he said he vomited and the meeting in Slade's office which followed, the Complainant stated he had not. (N.T. 219) When faced with the dilemma of how then did he clean himself, he changed his testimony to reflect that he did go to the bathroom to clean himself. (N.T. 220)

Combined with these specific instances of inconsistent testimony of the Complainant, we find several distinct areas where the Complainant was evasive. For example, after clear testimony on direct examination, on cross examination the Complainant at times refused to be straightforward. When asked the simple question how many times the Complainant had bid on different jobs, the

Complainant in effect refused to testify. (N.T. 108-110) Later, on cross examination, the Complainant began to develop forgetfulness with respect to the timing of the events of March 12, 1985. (N.T. 139)

Another instance of selective memory revolved around the Complainant's cross examination testimony regarding how close Bailey's reception area was to the outside. (N.T. 163-165) The Complainant unsuccessfully attempted to evade questions which probed the distinctness of his recollection. Finally, with respect to the Complainant's testimonial elusiveness, the Complainant's testimony regarding his knowledge of the state of his plow upon returning from the medical department was revealed as at least speculative if not completely fabricated. (N.T. 231-232)

Quite clearly, these factors when tallied, lead to the inescapable conclusion that the Complainant's testimony was wholly unreliable. On the other hand, the testimony of witnesses for the Respondent did not suffer from such credibility defects. Instead, as a whole, the Respondent's witnesses were found to be consistent with each other and only inconsistent with the Complainant's version of many incidents.

Considering the evidence as a whole, it is very likely that the Complainant never did actually vomit into plow 17. The only physical evidence found anywhere was described by Slade as a small amount of spit in the animal feed barrel. Even an analysis of the discarded product failed to confirm the presence of vomit.

Despite this speculation, the important consideration in this case is Bailey's state of mind because Bailey was the person who actually suspended and eventually terminated the Complainant in March, 1985. It can easily be seen that Bailey acted reasonably under the circumstances. Approximately one hour prior to the Complainant's report that he had vomited into plow 17, the Complainant had threatened to do that very thing.

Bailey was described by all witnesses as angry during the meeting in Slade's office after the Complainant's report. His anger is understandable in light of the Complainant's previous threat to contaminate the Respondent's product. During the meeting in Slade's office, the Complainant was asked repeatedly if he actually had done such a thing. Initially, the Complainant would not even answer this simple straight-forward question. Instead, he simply repeated he was ill and wanted to go home. Finally when the Complainant gave confirmation that he had vomited into plow 17, he was suspended.

In the light of common experience, it was reasonable for Bailey to believe that if the Complainant had done that, his actions were intentional. Not many people vomit without some advance warning. Certainly enough to at least turn one's head. The Complainant said he had time to put a hand to his mouth. It would seem that at the same time an appropriate reaction would be to turn away from a bowl filled with 2,500 pounds of chocolate milk crumb.

The Complainant testified that he was a boxer. Clearly, he had to have good reflexes. He would have us believe he had time to get a hand to his mouth but not enough time to turn away. Such a position is inconsistent with common experience and therefore rejected.

Following the Complainant's suspension, Bailey reviewed the Complainant's entire discipline record and decided to terminate the Complainant. Clearly, this stated action meets the Respondent's production burden to articulate a legitimate non-discriminatory reason for the Complainant's termination.

Since the Respondent has met its burden, the burden shifts to the Complainant to show by a preponderance of the evidence that the Respondent's reasons are either pretextual or not credible. We have already discussed credibility from the perspective of witnesses offered at hearing and determined that the Respondent's witnesses were credible. The remaining question is the issue of pretext.

The Complainant takes the position that White Respondent employees were treated more favorably than the Complainant. After a complete review of the evidence presented on this issue, we cannot agree.

The Complainant offered what he obviously considers comparison evidence, contending that he was treated less favorably than comparable situated White employees. However, the comparisons offered are inappropriate because, first, the individuals cited as comparisons are not comparably situated and second, there is evidence of a comparably situated White employee who received similar treatment.

Regarding the similarly situated White employee, the Respondent differed credible testimony that product contamination is a dischargeable offense. Just several months before the Complainant was terminated, a White employee had placed lifesavers into one of the Respondent's products. As a result, a large quantity of product had to be discarded. That employee was terminated.

The White comparison employees offered by the Complainant were Vernon Yost, David Catina, Janice Fake, Kenneth Weiss, Jr., Dorean Gulliver, and George Gulliver. A review of the disciplinary files of these employees discloses a variety of work rule infractions and mainly discipline for excessive absenteeism for which progressive discipline was issued. However, none of these employees' discipline records can be said to contain evidence of the major type of infraction believed to have been committed by the Complainant: willful product contamination.

Employee Yost's record does reflect progressive discipline for several instances of negligent operation of a plow resulting in powder spills. However there is a fundamental distinction between negligent operation and willful contamination. The only other employee who had "willfully contaminated" the Respondent's product was also fired.

Accordingly, the Complainant has failed to establish by a preponderance of the evidence that the Respondent's action was pretextual. Therefore, the Complainant having failed to meet its burden of proof, his case must be dismissed. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND TALTOAN, Complainant

v.

HERSHEY CHOCOLATE COMPANY, A DIVISION OF HERSHEY FOOD CORPORATION, Respondent

Docket No. E-32826-D

RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes that Respondent did not violate the Pennsylvania Human Relations Act, and therefore recommends that the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be adopted by the full Pennsylvania Human Relations Commission, and that a Final Order of dismissal be entered, pursuant to Section 9 of the Act.

Carl H. Summerson
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

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HERSHEY CHOCOLATE COMPANY, A DIVISION OF HERSHEY FOOD CORPORATION, Respondent

Docket No. E-32826-D

FINAL ORDER

AND NOW, this 7th day of July, 1988, following review of the entire record in this case, including the transcript of testimony, exhibits, briefs, and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

ORDERS

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Thomas L. McGill, Jr.
Thomas L. McGill, Jr.
Chairperson

ATTEST:

John P. Wisniewski
John P. Wisniewski, Secretary