

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

**BRENDA M. BURNEY,**  
**Complainant**

**v.**

**PENNSYLVANIA DEPARTMENT**  
**OF REVENUE,**  
**Respondent**

**PHRC Case No. 199902863**  
**EEOC Charge No. 17FA01789**

**STIPULATIONS**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF HEARING PANEL**

**FINAL ORDER**

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Brenda Burney, :  
: :  
Complainant :  
: :  
v. : PHRC Case No. 199902863  
: :  
Commonwealth of Pennsylvania :  
Department of Revenue :  
: :  
Respondent :  
: :

STIPULATIONS OF FACT

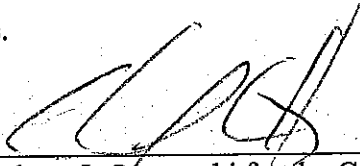
Complainant Brenda Burney and Respondent Commonwealth of Pennsylvania, Department of Revenue, hereby stipulate that the following facts are true and no further proof thereof is required:

1. Complainant Brenda Burney is a Black female.
2. Respondent Pennsylvania Department of Revenue is an agency of the Commonwealth of Pennsylvania and is an employer as defined by the PHRA Act.
3. Respondent hired Burney as a Permanent, Part-Time Clerk I on or about April 5, 1999.
4. Burney was paid at a rate of \$9.71 per hour.
5. Employees in Burney's position, permanent part-time Clerk I's, worked 37.50 hours per week from January through approximately June and 75.00 hours per month from July through December.
6. Nancy Hughes, a White female, was Burney's direct supervisor.
7. Respondent discharged Burney on September 22, 1999.


8. At the time of her discharge, Burney was in her probationary period.
9. Respondent hired Molli Rossi as a Permanent, Part-Time (PPT) Clerk I on or about April 5, 1999.
10. Rossi is a White female.
11. Respondent determined that Rossi successfully completed her probationary period.
12. Burney and Rossi received interim evaluations on or about August 10, 1999.
13. At the time of her August interim evaluation, Burney's work results were recorded as PC Entry – 1324/hour and Paperwork/E-Voucher – 213/hour.
14. At the time of her August interim evaluation, Rossi's work results were recorded as PC Entry – 1107/hour and Paperwork/E-Voucher – 121/hour.
15. At the time of the interim evaluation, the performance standards for employees in the position were PC Entry – 1800/hour and Paperwork/E-Voucher – 450/hour.
16. Burney and Rossi also received interim performance evaluations on or about September 16, 1999.
17. At the time of the subsequent September interim performance evaluation, Burney's work results were recorded as PC Entry – 1317/hour and Paperwork/E-Voucher – 201/hour.
18. At the time of the subsequent September interim performance evaluation, Rossi's work results were recorded as PC Entry – 1324/hour and Paperwork/E-Voucher – 182/hour.
19. During Burney's probationary period, Burney used emergency leave on three occasions.
20. During Rossi's probationary period, Rossi used emergency leave on two occasions.
21. PPT's in Burney's position were permitted to use no more than four instances of emergency leave per year.
22. During the period between January 1, 1997 and December 31, 1999, only two other Permanent Part-Time Clerks (Tammy Folks and Sharea Vasser) under the supervision of Nancy Hughes were dismissed during their probationary period.

23. Folks and Vasser are Black females.

Date: 12/21/05

  
\_\_\_\_\_  
Andrew J. Ostrowski for the Complainant

Date: 12/21/05

  
\_\_\_\_\_  
Julia A. Sheridan for the Respondent

## FINDINGS OF FACT \*

1. The Respondent, Pennsylvania Department of Revenue (hereinafter "Revenue"), is composed of four Divisions, one of which is the Imaging and Document Division. (N. T. 24; J. E. 1).
2. The Imaging and Document Division processes, controls and deposits tax payments. (J. E. 1).
3. In this division, tax documents and payment checks are numbered, encoded and endorsed in preparation for depositing tax monies received. (N. T. 25; J. E. 1).
4. The Imaging and Document Division is composed of two closely working units that together perform four main functions: Front Unit, which scans and enters check amounts; and the Proof Unit that is responsible for stub amounts and balancing transactions.
5. All work in the division is done on a computer as no physical documents are used. (N. T. 27, 28).
6. The division employs approximately 6 to 8 full-time employees; 4 to 6 permanent part-time employees; and in tax season, approximately 15 temporary employees who work for only 4 to 6 weeks. (N. T. 25, 29).
7. At all relevant times, Nancy Hughes (hereinafter "Hughes"), held the position of Clerical Supervisor II in the Imaging and Document Division. (N. T. 24, 49).

\*The foregoing "Stipulations of Facts" 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 Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N. T. Notes of Testimony  
J. E. Joint Exhibit  
R. E. Respondent's Exhibit  
S. F. Stipulation of Fact

8. Between April and September 1999, 6 to 8 employees were hired into the Division. (N. T. 30).
9. Four to six of those hired were permanent part-time employees. (N. T. 30)
10. Normally, permanent part-time employees would work full-time from January through June and roughly the last 10 days per month from July through December. (N. T. 26, 80).
11. Working full-time consisted of working 7.5 hours a day, Monday through Friday. (N. T. 80).
12. A new employee begins employment with a zero balance in all leave categories. (N. T. 77).
13. New full-time employees begin to earn leave at the rate of 5% per pay-period for sick leave and 2.03 hours of annual leave per pay period. (N. T. 82).
14. Permanent part-time employees, when working less than full-time, earn pro-rated leave amounts. (N. T. 79).
15. A record of each employee's use of time off is kept by that employee's supervisor. (J. E. 6, 7).
16. Revenue uses the following designations for time off taken by an employee:

- A – Annual Leave
- P – Personal Leave
- S – Sick Leave
- SF – Sick Family
- S EX – Sick with doctor's excuse
- EA – Emergency Annual
- EP – Emergency Personal
- AO – Approved leave without pay
- AW – Disapproved leave without pay (N. T. 63, 64, 65, 69).

17. Normally, a doctor's excuse is only required for absences of three days or more, however, when an employee is on probation it is considered best to bring in a doctor's excuse for all sick absences. (N. T. 75, 76).
18. Linda Miller, (hereinafter "Miller") Revenue's Chief of Employee Services Division, Bureau of Human Resources, testified that supervisors are instructed to review sick leave usage and if a pattern of abuse is noted, to counsel the employee that a pattern has been noted and if no improvement is shown, the employee faces potential discipline. (N. T. 172).
19. Full-time and permanent part-time employees are permitted four emergencies per calendar year. (N. T. 57).
20. Emergency leave is used when an employee has no control over the situation. (N. T. 173).
21. Use of annual and personal leave must be pre-scheduled. (N. T. 173).
22. Under a union contract new Revenue employees are on probation for a period of 180 days. (N. T. 174).
23. Revenue expects probationary employees to come to work everyday and to meet production standards. (N. T. 70).
24. If a probationary employee appears to be having a problem either with attendance or job performance, an interim performance evaluation is given to such an employee to let that employee know what the problems are and to afford that employee an opportunity to improve. (N. T. 40, 41).
25. If a probationary employee is not having problems, no interim performance evaluation is done. (N. T. 42, 85, 88).

26. Interim probationary performance evaluations are usually done after approximately 3 months. (N. T. 40).
27. In Revenue's experience, a probationary employee who has received an interim evaluation almost always improves. (N. T. 59).
28. At the conclusion of the probation period performance evaluations are prepared for an employee. (N. T. 41).
29. At the end of a probationary period, Revenue has the option of extending probation an additional 3 months. (N. T. 75, 89, 170).
30. Supervisors who have probationary employees who have problems, get advice from Revenue's HR Department. (N. T. 84).
31. On or about April 5, 1999, Revenue hired the Complainant, Brenda Burney (hereinafter "Burney"). (N. T. 93; S. F. 3).
32. Burney was hired as a permanent part-time Clerk I and assigned to the division's Proof Unit. (N. T. 30, 94).
33. Burney considered her job as simple and not challenging. (N. T. 96, 114).
34. Burney keyed dollar amounts from tax returns and balanced checks with tax returns by simply entering a taxpayer's social security number and the tax payer's initials. (N. T. 27, 96).
35. Hughes had been involved in the interview process that resulted in Burney's hire. (N. T. 25)
36. Initially, Hughes reviewed a comprehensive employee orientation checklist with Burney. (N. T. 153-154; R. E. 1).



37. Hughes also sat with Burney and reviewed Revenue's job standards, work objectives, the performance review process, the attendance policy, punctuality; leave requests, reporting off, and the critical nature of the probationary period. (N. T. 32, 154, 155).
38. Mollie Rossi, (hereinafter "Rossi") began the same day as Burney. (N. T. 118; S. F. 9).
39. Both Burney and Rossi were assigned to identical work under Hughes' supervision. (J. E. 2, 3, 4 5).
40. On August 10, 1999, Burney and Rossi were given interim performance evaluations. (J. E. 2, 3, 4, 5).
41. Revenue Employee Performance Reviews rate 6 categories with possible rating marks of either Outstanding; Commendable, Satisfactory, Needs Improvement or Unsatisfactory. (J. E. 2, 3, 4, 5).
42. Employees are also given an overall rating. (J. E. 2, 3, 4, 5).
43. Burney and Rossi's August 10, 1999 interim evaluations were entirely identical in four categories. (J. E. 2, 4).
44. Both Burney and Rossi were rated unsatisfactory in "work results" on their interim evaluations. (J. E. 2, 4).
45. On their interim evaluations, in the category "work habits" Burney was rated unsatisfactory while Rossi was rated needs improvement. (J. E. 2, 4).
46. Burney's interim evaluation rated her as overall unsatisfactory while Rossi was rated needs improvement. (J. E. 2, 4).

47. The categories of "work results" and "work habits" are important categories, especially during peak periods. (N. T. 58).
48. To rate an employee's "work results", Hughes referenced monthly production reports. (N. T. 31).
49. For the four-month period between April 5, 1999 and August 10, 1999, Burney's average PC entry was 1324. (N. T. 35; J. E. 2).
50. The standard for PC entry was 1800. (N. T. 29, 35; J. E. 8).
51. Burney's average paperwork e-voucher was 213 per hour. (N. T. 35; J. E. 2).
52. The standard for paperwork e-voucher was 450 per hour. (N. T. 35).
53. Rossi's four-month average PC entry was 1107. (N. T. 35; J. E. 4).
54. Rossi's paperwork e-voucher averaged 121 per hour. (N. T. 35; J. E. 4).
55. To measure an employee's key strokes, the employee's computer has to be on and the employee entering data. (N. T. 161).
56. Between April 5, 1999 and August 10, 1999, Burney used the following leave:

April 19	7.5 hours	AO
April 21	1.0 hours	AO
April 26	1.75 hours	AW
May 7	.08 hours	EA
May 10	7.5 hours	EP
May 13	1.5 hours	A
May 28	3.0 hours	A
June 7	7.5 hours	Sick
June 29	2.0 hours	Sick
June 8	4.0 hours	Sick
July 12	7.5 hours	Sick
July 19	7.5 hours	A
July 20	4.39 hours	A
	3.11 hours	AW
July 21	7.5 hours	AW
July 22	7.5 hours	AW (J. E. 6).

57. Between April 5, 1999 and August 10, 1999, Rossi used the following leave:

April 19	7.5 hours	AO	
April 26	3.75 hours	EX-SF	
	3.75 hours	AO	
April 28	7.5 hours	EX-AO	
May 6	7.5 hours	A/EX-S/AO	
May 24	1.33 hours	Sick	
June 4	7.5 hours	Sick	
June 7	4.0 hours	Sick	
June 8	1.5 hours	Sick	
June 16	.03 hours	EA	
June 17	.03 hours	EA	
June 22	2.0 hours	Sick	
July 2	1.0 hours	A	
August 3	7.5 hours	A	(J. E. 7).

58. Hughes sat with Burney and went over each interim evaluation category telling Burney that she felt Burney could successfully complete her probationary period.

(N. T. 156).

59. Hughes offered Burney the opportunity to try a process that often increases statistics for some employees. (N. T. 156).

60. The process that helps some employees is a "key-ahead" system. (N. T. 43, 44, 74).

61. This process has the potential to help an employee go faster by automatically moving to the next image earlier rather than waiting for the entry presently being worked on to be completed. (N. T. 43).

62. A computer can be set-up to move forward as soon as less than the full digit entry is completed saving time. (N. T. 43).

63. Burney rejected Hughes' suggestion of trying the key-ahead process. (N. T. 156).

64. Rossi tried the key-ahead process. (N. T. 74).

65. Both Burney and Rossi were again evaluated on or about September 16, 1999. (J. E. 3, 5).
66. Once again, Burney and Rossi were given identical ratings in four rating categories. (J. E. 3, 5).
67. In the category "work results", once again Burney was rated unsatisfactory but Rossi was rated needs improvement. (J. E. 3, 5).
68. Burney's September 16, 1999 evaluation listed Burney's PC entry average for the period of April 5, 1999 through September 16, 1999 as 1317 per hour, a 2% drop from Burney's August interim evaluation. (N. T. 58; J. E. 3).
69. In Pagework/e-voucher, Burney's statistics dropped 4%. (N. T. 59; J. E. 3).
70. Rossi's September 16, 1999 evaluation shows that Rossi's PC entry increased by 12%. (N. T. 68; J. E. 5).
71. After her August interim evaluation, Rossi averaged 1864 per hour in PC entry above the 1800 standard. (N. T. 69).
72. It is apparent that the key-ahead process worked for Rossi. (N. T. 74).
73. In their September 1999 evaluations, Burney was again rated unsatisfactory in "work habits" and Rossi was rated satisfactory. (J. E. 3, 5).
74. After August 10, 1999, Burney used the following leave:
- |              |           |          |
|--------------|-----------|----------|
| August 16    | 7.5 hours | Sick     |
| August 24    | 1.5 hours | Personal |
| August 25    | .05 hours | EA       |
| August 27    | 2.0 hours | Personal |
| September 20 | 4.0 hours | Sick     |
- (J. E. 6).

75. After August 10, 1999 and before September 16, 1999, Rossi used the following leave:

August 13	1.17 hours	Sick	
August 18	4.75 hours	Sick	
August 27	2.0 hours	A	(J. E. 7).

76. On August 9, 1999, Hughes counseled Burney about her use of disapproved leave. (N. T. 46, 60, 62, 122).

77. On August 17, 1999, Hughes counseled Burney about suspected sick leave abuse. (N. T. 46, 60, 62).

78. Burney's record of absences shows that she called off sick on three full Mondays: June 7, July 12 and August 16. (J. E. 6).

79. On August 25, 1999, Hughes counseled Burney about use of emergency leave. (N. T. 46, 60, 62).

80. Burney used emergency leave three times: May 7, May 10 and August 25. (J. E. 6).

81. Hughes also had occasion to counsel Rossi for use of emergency leave on June 16 and 17. (N. T. 47; J. E. 7).

82. Burney's September 1999 "overall" rating stayed unsatisfactory. (N. T. 48; J. E. 3).

83. When Burney was presented with her September evaluation, she refused to sign it and stormed out of Hughes' office. (N. T. 101, 156).

84. Rossi's September 1999 "overall" rating was raised to satisfactory. (J. E. 5).

85. Before an employee is terminated, the employee's circumstance is reviewed by Revenue's Human Relations Department. (N. T. 60).

86. Hughes discussed Burney's record with HR and HR recommended Burney's dismissal. (N. T. 60, 177).
87. Hughes had been involved in the termination of two other African American permanent part-time employees: Tamme Folks and Sharee Vasser.
88. If the decision had been up to Hughes, neither Folks nor Vasser would have been terminated. (N. T. 49, 72).
89. Folks had been a good performer with a good attitude, however, Folks failed to list a prior retail theft conviction on her pre-employment application. (N. T. 49, 70-71, 178).
90. When a criminal record check discovered Folks' omission, Folks was terminated to be consistent with Revenue's policy of not retaining any employee with a record of theft due to employee access to cash and checks. (N. T. 178, 180).
91. Like Folks, Vasser's work was also good, however she had problems coming to work and had numerous disapproved leaves. (N. T. 71-72).
92. Hughes was prepared to extend Vasser's probation, but the H. R. Department said no, Vasser was not dependable. (N. T. 72).
93. When asked whether there had been African American employees who had complained about Hughes, Miller testified that she was not aware of any. (N. T. 183).

## 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. Burney is an individual within the meaning of the PHRA.
4. The Pennsylvania Department of Revenue is an employer with the meaning of the PHRA.
5. When a Respondent has done everything that would be required of it if a Complainant had properly made out a *prima facie* case, whether the Complainant really did so is no longer relevant.
6. When a Respondent articulates its reasons for an action, the case proceeds directly to the question of whether the reasons offered were discriminatory.
7. The Pennsylvania Department of Revenue offered legitimate non-discriminatory reasons for terminating Burney.
8. Burney failed to prove the Pennsylvania Department of Revenue's reasons were a pretext for unlawful discrimination.
9. The Pennsylvania Department of Revenue's termination of Burney has not been shown to violate the PHRA.

## OPINION

This case arises on an amended complaint verified on or about March 22, 2000, by Brenda M. Burney (hereinafter "Burney") against the Pennsylvania Department of Revenue (hereinafter "Revenue"), with the Pennsylvania Human Relations Commission (hereinafter "PHRC"). Burney's complaint alleged that she was terminated because of her race, African American. This race-based allegation alleges a violation of Section 5 (a) of the Pennsylvania Human Relations Act of October 27, 1955, P. L. 744, as amended, 43 P. S. §§951 et seq. (hereinafter, "PHRA").

PHRC staff investigated the allegation and at the investigation's conclusion, informed Revenue that probable cause existed to credit Burney's allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that it had approved a Public Hearing.

The Public Hearing was held on December 21, 2005, in Harrisburg, PA, before a three member panel of commissioners consisting of Raquel Otero de Yiengst, Panel Chairperson; Toni M. Gilhooley, Panel Member; and Timothy Cuevas, Panel Member. PHRC staff attorney Joseph Bednarik was available to represent the State's interest in the complaint. Julia Sheridan, Esquire, appeared on behalf of Revenue and Andrew Ostrowski, Esquire represented the Complainant. Following the Public Hearing, the parties were afforded the right to file post-hearing briefs. The PHRC Harrisburg regional office's post-hearing brief was received on February 10, 2006. Both Revenue's and the Complainant's post-hearing briefs were received on March 22, 2006.



Section 5(a) of the PHRA states in pertinent part:

It shall be an unlawful discriminatory practice...[f]or any employer because of the race...of any individual...to discharge from employment such individual...

In cases of alleged disparate treatment, the evidence presented is normally viewed through the lens of the oft repeated McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), three part allocation of proof formula, which requires an initial *prima facie* showing by the Complainant, and if a *prima facie* case can be established, a burden of production shifts to a Respondent to articulate a legitimate non-discriminatory reason for its actions. Finally, a burden of persuasion shifts back to a Complainant to prove by a preponderance of evidence that the reasons offered by a Respondent for its actions are a pretext and that actual discriminatory reasons motivated the Respondent.

Neither the Complainant's nor Revenue's post-hearing brief trace this proof formula. Indeed, the Complainant simply focuses on treatment she received in comparison to one other employee. Essentially, Burney's contention is that disparate treatment equivalent to discrimination occurred because a harsher penalty was inflicted on her in a comparable situation than that imposed on Rossi, a white employee. Similarly, Revenue made no attempt to address whether Burney can establish a *prima facie* case. Revenue's brief resolutely suggests that Burney just did not meet the standards required to successfully complete her probationary period.

The case of U. S. Postal Service Board of Governors v. Aikens, 31 FEP 609, 460 U. S. 711 (1983), illustrates that our factual inquiry need not focus on the limited question of whether a *prima facie* case has been shown. In Aikens, the Supreme Court noted that when a case has been fully tried on the merits the job of the fact finder is to

decide whether the alleged action was intentionally discriminatory. Did the employer treat some people less favorably than other because of their race, citing Furmco Construction Corp. v. Waters, 438 U. S. 567, 577, (1978), quoting International Brotherhood of Teamsters v. U. S., 431 U. S. 324, 335 n. 15 (1977).

The Aikens court stated, “[w]here the defendant has done everything that would be required of him if the Plaintiff had properly made out a *prima facie* case, whether the Plaintiff really did so is no longer relevant.” 31 FEP at 611. When a Respondent articulates their reasons for an action, a case should proceed directly to the specific question of whether the Respondent’s reasons were discriminatory.

The inquiry now turns from the few generalized factors that establish a *prima facie* case to the specific proof and rebuttals of discriminatory motive the parties have introduced. St. Mary’s Honor Ctr. V. Hicks, 113 S. Ct. 2742, 2752, 62 FEP 96 (1993). The ultimate issue in an employment discrimination case is whether a Complainant has proven that it is more likely than not that the adverse employment decision was motivated, at least in part, by an impermissible reason. See Fields v. New York State Office of Mental Retardation & Developmental Disabilities, 115 F-3d 116, 119 (2<sup>nd</sup> Cir. 1997). Did a Respondent intentionally discriminate against a Complainant. Texas Department of Community Affairs v. Burdine, 450 U. S. 248 (1981). In resolving this complex question, the burden of persuasion by a preponderance of evidence rests with a Complainant.

In the present case, Revenue generally presented evidence that Burney was terminated at the end of a 180 day probationary period because her job performance failed to meet established standards and her leave record was unsatisfactory. On the

issue of Burney's job performance, Revenue submits that Burney's situation presented a unique situation. Indeed the evidence shows that following an interim performance evaluation given to Burney on August 10, 1999, statistically, Burney's averages decreased in the only two performance areas measured. On the question of leave, Revenue basically submits that during her probationary period, twice Burney took unapproved leave, was suspected of sick leave abuse, and had three instances of emergency leave usage.

Burney generally attempted to establish that one other permanent part-time white employee was similarly situated to her and that the white employee was treated more favorably. Before we focus on this claim, there is a fundamental issue of credibility that grows out of the evidence presented. Accordingly, we first address whom to believe when the evidence presented is in conflict.

We find several relevant versions of events in dramatic conflict. For instance, Burney suggests that, in effect, Hughes neither trained her nor counseled her regarding problem areas. Hughes contends that not only did she help train Burney, but she also continually counseled and encouraged Burney on ways to pass probation. A specific disputed area of training is whether Hughes did or did not apprise Burney of the potential benefits of the key-ahead process.

Another area in stark contrast is whether Burney was or was not told portions of leave taken to attend a conference in July 1999 would be approved or disapproved. Burney contends she was told such leave would be approved. Hughes submits that it was made abundantly clear to Burney that such leave would be categorized as unapproved.

Next, Burney contends that towards the end of her employment she was frequently assigned jobs outside her department. Hughes counters by suggesting Burney's version is an extreme exaggeration. Finally, the versions of what occurred at Burney's termination meeting directly conflict.

A careful review of the testimony and evidence presented in this case reveals that much of Burney's testimony was unreliable. Strong equivocal circumstances and tangible instances of self-contradiction permeate Burney's testimony. Even Burney's general bearing and demeanor while testifying diminish the believability of her testimony.

Collectively, at least 9 separate areas lead to the conclusion that Burney lacks credibility. First, Burney suggests that a co-worker trained her not Hughes. (N. T. 96). Burney went so far as to suggest that Hughes had no conversations with her about "work results" when presented with the August 10, 1999 interim evaluation. Almost immediately, Burney added, "she just basically told me that the job knowledge and this and that". (N. T. 99). Even later, Burney contradicted herself by saying she had regular ongoing conversations with Hughes about job performance. (N. T. 101). Burney even acknowledged that Hughes told Burney that she didn't see her having any problems passing probation. (N. T. 101). As for training, Burney testified that she felt she was not having problems with the work, (N. T. 99) that the job was simple, (N. T. 96) and the job was "mediocre" and Burney could train her seven year old grandson to do it, and there was nothing real challenging about it. (N. T. 114).

While Burney testified that she felt she was not having problems, she also acknowledged that she would be watched on probation. (N. T. 120-121). Burney admits

that Hughes discussed performance standards with her, (N. T. 121) and that Hughes reviewed the August 10, 1999 performance review with her, (N. T. 99) and that she signed the interim performance review, (J. E. 2). However, Burney also testified that she did not understand her interim performance review until she spoke with a co-worker. (N. T. 101). Looking at the interim review, there could not be more clarity that Burney was marked "unsatisfactory" in both "work results" and "work habits" and also received an unsatisfactory in the "overall" category. Clearly, Revenue's expectations were communicated to Burney.

Regarding Burney's use of unapproved leave, we begin with Burney's stating that the only time she took unapproved leave was for her July 1999 trip to Columbus, Ohio. (N. T. 107). In fact, on April 26, 1999, Burney was charged with 1.75 hours of unapproved leave. (J. E. 6). Accordingly, the 18.11 hours of unapproved leave for July 20, 21 and 22 was not the only instance of her use of unapproved leave.

On the same issue, Burney stated she decided to go to the conference knowing she did not have enough leave, she stated, "Why not go? There was no work to be done." (N. T. 120). "So I took a day without pay. What's wrong with that?" (N. T. 120). Of course, it was not a "day", but nearly 2 ½ days unapproved leave without pay.

On the question of Burney's statement that, "there was no work to be done," (N. T. 120), it is clear there was work to be done. Indeed, Burney confirmed that it was not until August when she and other permanent part-time employees went into a part-time status. (N. T. 120, 125).

When Burney's direct examination and cross examination testimony was completed, Panel Chairperson Yiengst asked Burney several questions about her trip

and in response Burney offered that she was told that all the time she took to go to a conference would be approved. (N. T. 139). Hughes credibly testified that Burney was specifically told by the Department Manager, Bob Wagner, that she could only take accrued leave, and since it was a peak period, all leave beyond accrued leave would be disapproved, without pay. (N. T. 151). Hughes also credibly testified that she directly told Burney that if she took the leave, it would be "AW" not "AO", and that she should not take the leave because it was peak time and Burney was needed. (N. T. 56, 164). Further, Hughes warned Burney that if she took the leave it would go against her. (N. T. 164).

At no time did Burney ever contest either the counseling she received on August 9, 1999 regarding use of disapproved leave, or the clearly stated basis for an unsatisfactory rating in "work habits" on Burney's August 10, 1999 interim performance evaluation. (J. E. 2). The write up for the unsatisfactory rating specifically references two occurrences of disapproved leave and three times Hughes having discussed the matter with Burney. Indeed, Burney agrees that Hughes discussed the matter with her on August 9, 1999. (N. T. 122).

It is abundantly clear that Burney offered unreliable testimony regarding how many instances of unapproved leave she had, saying there was no work, and suggesting she was told 2 ½ days of unaccrued leave would be approved. Burney's testimony lacks credibility on the entirety of the circumstances surrounding her use of 4 days leave in July, 1999, to attend a conference.

The next area of less than credible testimony offered by Burney involves her general statement that she did not understand her interim performance review. (N. T. 101). One would have to simply read the review to know with certainty that she was

being informed there were both performance problems and negative issues with leave usage. For Burney to suggest she did not understand is patently absurd.

Moving on, we come to Burney offering varying accounts about the "key-ahead" process. We find Burney first saying that Hughes never spoke to her about the key-ahead process. (N. T. 105). Burney suggests she only overheard Hughes talking to Rossi about it and that other co-workers explained the process to her. (N. T. 105). Later in her testimony, Burney acknowledged that Hughes did ask her if she wanted her "key-ahead" set, but Burney said "no". (N. T. 123). Burney then added Hughes did not explain it and she only said no because she did not know what it was. (N. T. 123). Of course, Hughes offered that she had a conversation with Burney, indeed, with all employees, about the potential benefits of "key-ahead" and Burney simply rejected the idea. (N. T. 44, 156).

Next, Burney offered testimony that she was frequently assigned jobs in other departments "a couple of days a week" until, towards the end of her probation, she was working half in the department and half on other assignments. (N. T. 108, 109). Burney went so far as to suggest that eventually, towards the end of her employment, she was not even working in the section. (N. T. 122). At one point, Burney extended her story to suggest she was the only employee to be loaned out to other departments. (N. T. 113, 138, 141). Earlier, Burney had offered that Rossi had also been assigned out of the department. (N. T. 110, 142). Of course, Burney's testimony is self-contradictory. As to the frequency of assignments out of the department, Revenue offered credible documentation that Burney had been loaned on only two days. (J. E. 3).

On this issue, Hughes offered credible testimony that employees who are on probation are the last to be sent out of the department, and that when employees are selected to be sent out on other assignments, the selection is equal. (N. T. 150).

The seventh area in question involves Burney's testimony that at first she had no concerns that she would not pass probation, but became concerned at some point after several employees told her she would not pass probation because she is black. (N. T. 97, 98, 102, 135). First of all, Burney admitted that she did not believe what she was purportedly told until she was terminated. (N. T. 127). On this issue, Burney named five employees as the source of such a scurrilous rumor; however, she called not one of the named employees as a witness. (N. T. 102, 135).

What is most interesting about Burney's testimony on this point is that by submitting she initially did not believe "rumors", it makes even clearer that Hughes had given her no reason to give credence to the purported slanderous rumors. Once again, Burney's testimony is questionable.

Next, we come to Burney's version of why she refused to sign her September 16, 1999 performance review. Although Burney had testified that she never perceived Hughes would not treat her fairly because of her race until she was terminated, (N. T. 127) Burney offered that she did not sign the review because she had already formed the perception that Hughes did not pass black probationary employees. (N. T. 102). Interesting, Burney says she even told Hughes that she was concerned there was a racial motivation. (N. T. 104).

However, when asked what she said to Hughes, Burney offered that she said, "I just basically told her I wasn't signing it because I didn't agree with the things she was



saying". (N. T. 104). Burney then tellingly offered that there had been no specific discussion about race between Burney and Hughes. (N. T. 104). Burney offered that it had only been an impression she had. (N. T. 104). Once again, Burney's self-contradictory testimony reveals quite clearly that Burney was simply making it up as she went along.

Finally, there is conflicting evidence about what happened at Burney's termination meeting. All agree that those present were Burney, Hughes and Wagner. (N. T. 111). Unfortunately, that is about all that was agreed upon. Burney's version finds Burney asking to read a document she was asked to sign and Hughes saying, "No, you don't need to read it – just sign it". (N. T. 111). Purportedly, Hughes slammed her fist on the table when she demanded Burney to just sign the document. Burney then suggests she just signed the document and was told, "Get out". (N. T. 111).

What Burney was being asked to sign was a receipt that she had received Revenue's termination letter. (N. T. 146-147). Hughes flatly denies either slamming the table or not allowing Burney to read the receipt. (N. T. 146-147). Frankly, in common experience, and considering the evidence as a whole, there is absolutely no reason anyone would not allow an employee who is being terminated the time to read a simple receipt for a termination letter. Burney's version is simply not credible.

Having reviewed nine areas where Burney was less than credible, we now turn to Burney's primary claim, that she was "similarly situated" to Rossi but she was treated differently for a record of similar problems. Fundamentally, Burney has the burden of proving that she and Rossi were similarly situated in all relevant respects. See Harvey v. Anheuser-Busch, Inc. 66 FEP 91 (8<sup>th</sup> Cir. 1994). Moreover, Burney must present more than conclusory allegations of an unlawful motivation. See Minor v. Lakeview

Hospital, 434 F.Supp. 633 (E. D. Wisc. 1977), aff'd w/o opinion 582 F2d 1284 (7<sup>th</sup> Cir. 1978).

As far as whether Burney and Rossi were "similarly situated", there are several factors that could not be more identical, however, there are several critical differences as well. Here, both Burney and Rossi were hired on the same day for the same position, working for the same supervisor in a 180 day probationary period, and subject to identical standards governing performance evaluation and discipline. See Escalante v. IBP, Inc. 88 FEP 1349, (DC Kan. 2002). However, the evidence shows that there are differentiating circumstances with regard to job performance and applicable attendance issues that distinguish their conduct and Revenue's treatment of them for it.

On August 10, 1999, both Burney and Rossi were given interim performance reviews because neither Burney nor Rossi was performing to set standards. Neither Burney nor Rossi was meeting an important legitimate expectation. Between their date of hire and the interim evaluation, Burney averaged 1324 key strokes per hour as compared to the PC entry standard of 1800 per hour, and Rossi's average was even less at 1107 per hour. Similarly, Burney averaged 213 key strokes per hour on Pamework/E-Voucher, and Rossi averaged 121 per hour. In this category, the standard was 450 per hour. Both Burney and Rossi were informed that their work results were unsatisfactory. At least an 80% performance level in these two areas was expected in order for an employee to pass probation.

The key stroke averages covered the entire period between April 5, 1999 and August 10, 1999 and was not reflective of the current level of performance. Both Burney and Rossi were offered the opportunity to attempt to increase their production

statistics by using a key-ahead process. Rossi accepted the challenge, but Burney rejected it.

By the end of her probation, Burney's average statistics in both PC entry and Pagework/E-Voucher dropped. Between August 10, 1999 and September 16, 1999, Burney was actually doing less work than she had averaged before August 10, 1999. Conversely, in August 1999, Rossi's average PC entry key strokes were 1864 per hour, above the set standard. (N. T. 69).

While Burney's work performance average was going down, Rossi's had dramatically improved. It appears that the key-ahead process was working for Rossi while Burney would not even try it.

For their final probation evaluations, Burney once again received an "unsatisfactory" in work results while Rossi now received a "needs improvement". On this comparison, Burney fails in her attempt to establish that her conduct was similar to Rossi's who was treated better. Revenue's awarding Rossi a "needs improvement" while giving Burney an "unsatisfactory" in the work results category has not been shown to have been racially motivated. Instead, Revenue's evaluation of Burney and Rossi in the work results category are fully supportable.

Burney next suggests that she and Rossi had similar attendance records but that Rossi was treated more favorably. On their August 10, 1999 interim evaluations, Burney was rated as "unsatisfactory" in the work habits category while Rossi was rated as "needs improvement".

Revenue asserts that the difference in rating is principally attributable to Burney having taken 2 ½ days of unapproved leave in July 1999 and Rossi had no similar

instance of unapproved leave usage. In fact, the evidence shows that, like Burney, Rossi had also requested time off beyond leave she had accrued. However, when Hughes informed Rossi that she did not have enough accrued leave, Rossi cancelled her vacation and came to work. (N. T. 67). Hughes had spoken to both Burney and Rossi about two occurrences of emergency leave usage, but only to Burney regarding her twice having taken unapproved leave.

This difference sufficiently explains the different ratings between Rossi and Burney. Leave usages, on which Burney attempts to build a foundation, are simply not comparable. Indeed, Burney fails to show race played any part in the August 1999 interim evaluation ratings between Burney and Rossi in the work habits area.

When Burney was given her end of probation evaluation, she received another "unsatisfactory" rating in work habits. Revenue argues that Burney's rating continued to be "unsatisfactory" for two additional reasons: suspected sick leave abuse and additional use of emergency leave. On the question of suspected sick leave abuse, Burney's record of absence shows that on three separate instances Burney called off sick on a Monday: May 7, July 12 and August 16. Even after Hughes spoke to Burney about this issue on August 17, 1999, Burney again called off sick on Monday, September 20, 1999. Rossi had no similar pattern. Indeed, although not required to do so, Rossi often brought a doctor's excuse for her instances of sick leave. Burney did not.

On August 25, 1999, Burney was also counseled for her third emergency leave usage. Burney's three instance emergency leave usage total during her probationary period was 7.63 hours. Rossi's two instances of emergency leave amounted to .06 hours, a significant difference.

When Burney's two instances of unapproved leave are combined with her three instances of emergency leave and suspected sick leave abuse, an "unsatisfactory" rating is understandable. Conversely, Rossi's record had no instance of unapproved leave, only two extremely minor emergency leave uses, and no pattern that would support suspected sick leave abuse. Accordingly, the difference in rating in the work habits category in Burney's and Rossi's end of probation evaluations has not been shown to have been race-based. Once again, Burney has not met her burden of showing that her conduct was similar to Rossi's.

Burney also attempted to show that Hughes harbored ill will towards African-American employees. In this regard, Burney suggested that Hughes had also terminated two other African-American permanent part-time employees: Folks and Vasser. Of course, the record shows that if the decision had been Hughes', both Folks and Vassers would not have been terminated. Folks was terminated after Revenue learned that Folks had not included a prior retail theft criminal conviction on her application. Folks was terminated consistent with Revenue's policy to not employ anyone who had been convicted of a retail theft.

The record shows that Vasser was only terminated because she had numerous instances of unapproved leave and generally could not come to work. Nothing that Burney presented would support the slightest inference that Hughes treated employees any different because of an employee's race.

Finally, Burney's post-hearing brief suggests that another African-American employee, Earlene Smith, had similar experiences with Hughes. Burney's problem with this argument is that it rests wholly on hearsay testimony. During the Public Hearing,

circumstances surrounding the purported experience Smith had with Hughes was admitted for the limited purpose of Burney's state of mind. (N. T. 102-103). Burney may not now use this testimony for a purpose beyond the limited purpose for which it was admitted.

In summary, Burney fails to show that Revenue's exercise of management prerogatives was in any way race-based. Considering the totality of the evidence presented, Burney's termination has not been shown to have been race-based. Instead, the variance in treatment in this case is attributable to non-racial factors.

An Order dismissing this matter follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BRENDA M. BURNEY,  
Complainant

v.

PENNSYLVANIA DEPARTMENT  
OF REVENUE,  
Respondent

PHRC Case No. 199902863  
EEOC Charge No. 17FA01789

RECOMMENDATION OF HEARING PANEL

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Raquel Otero de Yiengst  
Raquel Otero de Yiengst  
Hearing Panel Chairperson

By: Toni M. Gilhooley  
Toni M. Gilhooley  
Panel Member

By: Timothy Cuevas  
Timothy Cuevas  
Panel Member

