

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

TRACY L. DIXON,
Complainant

v.

CIRCLE BOLT & NUT COMPANY, INC.,
Respondent

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PHRC CASE NO. 200002677

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

Tracy Dixon,	:	
Complainant	:	
	:	
v.	:	PHRC Case No. 200002677
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	:	
Circle Bolt & Nut Company,	:	
Respondent	:	
	:	
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STIPULATIONS OF FACT

The parties hereby stipulate that the following facts are true and no additional proof thereof is required:

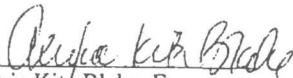
1. Complainant Tracy L. Dixon is an adult female.
2. At all times relevant, Respondent Circle Bolt & Nut Co., Inc. was an employer within the meaning of section 4 of the Pennsylvania Human Relations Act, 43 P.S. § 954.
3. Respondent hired Complainant on or about June 18, 2000 as an order inspector at its facility located in Pittston, Pennsylvania.
4. Complainant's employment with Respondent ended on or about September 1, 2000.
5. Complainant filed the captioned verified complaint with the Pennsylvania Human Relations Commission ("PHRC") on February 9, 2001.
6. A PHRC representative served a copy of the complaint on Respondent on April 30, 2001.
7. Respondent filed a timely verified answer to the complaint.
8. On or about December 6, 2005, the PHRC notified Respondent that it believed probable cause existed to credit the allegations of the complaint.
9. PHRC scheduled a conciliation conference for February 15, 2006.

10. Conciliation was not successful.
11. Complainant was employed by Respondent for eleven weeks.
12. During her eleven weeks of employment with Respondent, Complainant worked 391.5 regular hours and one overtime hour. That period included one unpaid holiday (July 4).
13. Complainant's final hourly rate of pay was \$8.50.
14. During the year 2000, Complainant received \$2424.00 in unemployment compensation benefits.
15. During the year 2001, Complainant received \$1878.00 in unemployment compensation benefits.
16. During the year 2002, Complainant received \$3356.00 in unemployment compensation benefits.
17. Beginning June 1, 2002, Complainant began to fully mitigate for any damages resulting from the termination of her employment with Respondent and Complainant does not seek any damages for the period June 1, 2002 to the present.
18. From October 19 through October 30, 2000, Complainant was employed by U.S. Metal Forms at an hourly rate of \$7.50.
19. Complainant had no other earned income between September 1 and December 31, 2000.
20. During the year 2001, Complainant had earned income in the amount of \$5,841.
21. During the year 2002, through May 31, 2002, Complainant had no earned income.
22. Complainant makes no claim for out-of-pocket expenses related to any loss of health insurance coverage.
23. Respondent paid discretionary monthly bonuses in varying amounts to warehouse employees, none of whom were guaranteed a bonus.

24. The following sets forth the number of employees eligible for the bonus and the total amount of bonuses paid to the employees in the corresponding month:

September 2000	21 employees	3025.00 bonuses
October 2000	21	2675.00
November 2000	20	2450.00
December 2000	20	2450.00
January 2001	18	2450.00
February 2001	18	2600.00
March 2001	18	2475.00
May 2001	17	2465.00
July 2001	17	2475.00
September 2001	17	2475.00
October 2001	16	2275.00
November 2001	15	2325.00
December 2001	15	2400.00
January 2002	15	2350.00
February 2002	15	2440.00
March 2002	15	2175.00
April 2002	15	2300.00
May 2002	12	2150.00

25. During her employment with Respondent, Complainant did not receive any such bonus payments.


 Alexia Kita Blake, Esq.
 For Respondent


 Joseph Bednarik, Esq.
 For Commission Staff

8/16/07
 Date

8/16/07
 Date

FINDINGS OF FACT *

1. Prior to June 2000, the Complainant, Tracy L. Dixon, (hereinafter "Dixon"), a single mother of three children, had worked for Pride Mobility Products for two and a half years. (N. T. 67, 93, 104).
2. In the summer of 2000, the Respondent, Circle Bolt & Nut Company, Inc., (hereinafter "Circle"), was a wholesale distributor of nuts and bolts from its single location in Wilkes-Barre, Pennsylvania. (N. T. 61, 62, 117, 118).
3. The husband and wife team of James Spurling and Mary Kay Spurling opened Circle in 1979. (N. T. 117).
4. Owner, James Spurling, is Circle's President and CEO and co-owner Mary Kay Spurling, is Circle's Secretary/Treasurer. (N. T. 117).
5. In the summer of 2000, Circle employed approximately 15 employees in Circle's warehouse. (N. T. 53, 108, 136).
6. While still an employee at Pride Mobility Products, Dixon was approached by Carl Bush, a Circle sales representative who told Dixon that Circle was looking to hire warehouse workers and that Dixon should apply. (N. T. 67).
7. Dixon did apply for a Shipping Clerk position with Circle and was initially interviewed by Edward Grant, (hereinafter "Grant"), Circle's Warehouse Manager. (N. T. 68, 95, 118, 140).

* 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
C. E. Complainant's Exhibit
R. E. Respondent's Exhibit
S. F. Stipulation of Fact

8. Grant testified that during Dixon's interview, he told her that the work environment is "very dominant male", and "if anybody said anything that she felt was inappropriate that she should report it to [Grant]." (N. T. 140).
9. Dixon was hired by Circle in mid-June 2000, as a boxer/sorter. (N. T. 69, 93).
10. At all relevant times, Mark Gubbiotti, (hereinafter, "Gubbiotti") was Circle's Operations Manager; Grant was the Warehouse Manager; and Bernie Chalawich, (hereinafter, "Chalawich") was the Assistant Warehouse Manager. (N. T. 17, 46, 118, 136, 152, 182).
11. During her employment with Circle, Dixon was the only female working in the warehouse. (N. T. 110).
12. Dixon performed a variety of jobs including: boxing; sorting; quality control; shipping; inventory; receiving; and stocking. (N. T. 69; 254).
13. Dixon worked 40 hours a week while employed by Circle. (N. T. 110).
14. After a 90 day waiting period, Circle warehouse employees became eligible for monthly bonus ranging from \$50.00 up to \$200.00. (N. T. 113, 114, 143, 201).
15. Circle's warehouse employees worked on two floors: an upper warehouse area and a lower warehouse area. (N. T. 53-54).
16. There was only one restroom in the lower warehouse area available for use by both male and female employees. (N. T. 41).
17. Dixon testified that she used a ladies restroom that was upstairs rather than use the lower warehouse area restroom. (N. T. 41).
18. For years, "nasty" graffiti was on the walls of the lower warehouse area bathroom. (N. T. 35).
19. During the time Dixon worked in Circle's warehouse, Circle also employed Gene Walker, (hereinafter, "Walker") as an order puller and forklift driver. (N. T. 17, 54, 70, 139, 167).
20. In 2000, Walker was in his early 20's. (N. T. 147).

21. Walker often picked on fellow co-workers. (N. T. 18, 33, 89).
22. Warehouse co-worker, Harold Gaskill, (hereinafter, "Gaskill") testified that Walker's harassment of others was constant and made it "pure hell" working everyday. (N. T. 18).
23. Gaskill testified that Walker kept telling Gaskill he was gay and that Walker would leave signs in Gaskill's work-area saying Gaskill was old, a drunk, and that he had to pay child support. (N. T. 19, 25, 70-72, 97).
24. Gaskill also testified that he spoke with Grant daily about Walker and that, while Grant would say he would take care of the harassment, Walker was continually allowed to get away with harassing Gaskill. (N. T. 21, 22, 27).
25. Dixon testified that, in effect, she was annoyed by Walker continually picking on others, especially older co-workers. (N. T. 74, 107).
26. Dixon also testified that she had observed Grant demeaning, criticizing, and embarrassing employees in front of everyone by doing things like calling employees "stupid idiots", saying to an employee "you're dumber than a box of rocks", or "you don't know what you're doing". (N. T. 74, 75, 91, 106).
27. Dixon indicated that while she felt that Grant had demeaned others he had not treated her poorly. (N. T. 74, 91).
28. Similarly, until an incident in mid-August 2000, Walker had not done anything to offend Dixon directly. (N. T. 93, 96).
29. However, in mid-August, Dixon heard Walker singing a song with lyrics of the song changed into sexually explicit lyrics that referred to young boys sucking on grown men's penises. (N. T. 72, 73).
30. Dixon testified that she asked Walker to stop but he just laughed and continued. (N. T. 72, 73).
31. Grant testified that Dixon did ask him to do something about Walker and that Walker had said something to Dixon but that Grant did not hear it. (N. T. 145)

32. Grant testified that Dixon only asked Grant to tell Walker to leave her alone and that he did not ask either Walker or Dixon what Walker had said. (N. T. 145).
33. Dixon offered that within 24 hours of Walker's sexually offensive song, she spoke with Gubbiotti telling him that she enjoyed her job and liked working there but she was having a problem and could not handle either sexually explicit songs or Walker continually picking on other employees, especially the older workers. (N. T. 73, 74, 106, 107).
34. Dixon also indicated that she informed Gubbiotti that she did not take her problem to Grant because she felt Grant demeans employees and that Grant just laughed at Walker's behavior. (N. T. 74, 107).
35. Dixon testified that Gubbiotti told her he would get back to her. (N. T. 75).
36. Later, the same day, Gubbiotti spoke with Dixon and asked her if she would like to work in Circle's purchasing department. (N. T. 75).
37. Gubbiotti testified that the position of Expeditor came open and that the position had to be filled relatively quickly. (N. T. 190).
38. Gubbiotti said that only Dixon was considered for the Expeditor position and that he understood Dixon's attitude and work performance in the warehouse had been "really good". (N. T. 190).
39. Gubbiotti specifically denied that Dixon had complained to him about either Walker or Grant prior to offering Dixon the Expeditor position. (N. T. 192).
40. Dixon accepted Gubbiotti's offer and beginning the following Monday, for three days, Dixon worked half a day in the warehouse and the remaining half day Dixon simply watched Carinne Pace, (hereinafter "Pace") and Krista Coolbaugh (hereinafter "Coolbaugh"). (N. T. 75-76, 96, 220).
41. Coolbaugh was the Expeditor that Dixon was to replace and Pace was the supervisor of the purchasing department. (N. T. 108, 190).

42. As Coolbaugh and Pace trained Dixon, by Monday of the second week, Dixon continued to take notes and also did some filing. (N. T. 76, 109).
43. On Tuesday of Dixon's second week in the purchasing department, Dixon was entering lists of parts inventories into the computer. (N. T. 76).
44. On Wednesday, Dixon began to make telephone calls to vendors and by Thursday of her second week, Dixon was by herself. (N. T. 76-77).
45. Neither Grant nor Chalawich had been involved in Dixon's transfer to the purchasing department. (N. T. 147, 163).
46. Chalawich testified that he did not know Dixon was transferred to purchasing and wondered what was going on and that he found the situation "curious". (N. T. 164).
47. By Friday of Dixon's second week in purchasing, Dixon was called into an office to meet with Gubbiotti and Mary Kay Spurling where she was terminated. (N. T. 77, 203, 225, 228, 231).
48. Dixon left and went home. (N. T. 79).
49. After her arrival home, Dixon received a telephone call from Gubbiotti informing Dixon of another job working for Circle at Pride Mobility Products' facility. (N. T. 79).
50. The job at Pride Mobility Products entailed removing boxes of nuts, bolts and fasteners from a pallet and emptying the boxes into bins. (N. T. 79-80).
51. Prior to Dixon, no Circle employee was assigned this job. (N. T. 207, 220).
52. After approximately one week, Gibbiotti terminated Dixon from the newly created position located in the Pride Mobility Products' facility. (N. T. 80).
53. Dixon's hourly rate of pay at Circle was \$8.50 per hour. (S. F. 11, 13).
54. At Circle's discretion some warehouse employees received bonus payments. (S. F. 23).
55. Bonus payments ranged between \$50.00 and \$200.00. (N. T. 64).

56. There was a 90 day waiting period before a new hire could receive a bonus. (N. T. 113, 201).
57. Following her termination from Circle, Dixon looked for employment in newspaper, on Career link, through word-of-mouth, and submitted applications to various places. (N. T. 81, 102).
58. For a period of two weeks in October 2000, Dixon worked at U. S. Metal Forms where she earned wages comparable to the wages she had earned with Circle. (N. T. 81, 99).
59. Dixon's initial assignment at U. S. Metal Forms was as a Shipping Clerk but shortly after beginning her employment there, Dixon was assigned to be a *Quality Inspector of parts for military aircraft*. (N. T. 83).
60. Feeling unqualified to inspect parts for airplanes, Dixon quit her job with U. S. Metal Forms. (N. T. 83, 99).
61. Dixon's next job began approximately 6 months later when Dixon took a job as a repair technician with Medex. (N. T. 84, 100).
62. Dixon worked with Medex until lack of work forced Medex out of business. (N. T. 86, 100).
63. While employed by Medex, Dixon earned the same rate of pay she had earned when employed by Circle. (N. T. 100).
64. *Between her job at U. S. Metal Forms and Medex, Dixon had looked in newspapers, and applied to between 20-30 potential employers.* (N. T. 86, 102).
65. By the end of May 2002, Dixon began to fully mitigate any damages that resulted from her termination from Circle and seeks no damages for the period of June 1, 2002 to the present. (S. F. 17).

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. Dixon is an individual within the meaning of the PHRA.
4. Circle is an employer with the meaning of the PHRA
5. 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 actions were either severe or pervasive and regular;
 - (c) that a discrimination detrimentally affected her;
 - (d) that the reasonable person of the same sex would have been detrimentally affected; and
 - (e) respondeat superior.
6. Dixon failed to establish that conduct of a sexual nature was severe, pervasive and regular.
7. 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.

8. Circle offered legitimate non-discriminatory reasons for Dixon's twice leaving the employ of Circle.
9. Dixon proved that Circle's reasons were a pretext for unlawful discrimination and that the reason Dixon was twice terminated was in retaliation for her expression of opposition.

OPINION

The case arises on a complaint filed by Tracy L. Dixon (hereinafter "Dixon") against Circle Bolt & Nut Company, Inc., (hereinafter "Circle") on or about February 6, 2001, at PHRC Case Number 200002677. In her two count complaint, Dixon generally alleged sex-based discriminatory treatment in the form of a hostile work environment between June 2000 and September 1, 2000 and that on September 1, 2000, she was terminated in retaliation for expressing opposition regarding the work environment. Dixon's claims allege that Circle 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 Dixon'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 August 16, 2007, in Wilkes-Bare, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. Post-Hearing briefs were submitted by the parties at the end of October 2007.

Initially there is recognition that there are fundamental and glaring discrepancies in the versions of events that constitute the factual background that must be evaluated before the law can be applied to the facts present in this case. There is agreement on basic events, however, on important aspects surrounding several critical events, there is wide disparity between much of the testimony offered. Because of this, an initial assessment of credibility is imperative. Once

credibility has been assessed, the law can be applied to the versions of events found to be more credible.

In her complaint, Dixon alleged that throughout her employment between June 19, 2000 and September 1, 2000 she witnessed "crude, vulgar, sexually-explicit and offensive remarks" in the work place, that there was offensive sexual graffiti on the walls and beams in the warehouse, and that her supervisor Edward Grant, (hereinafter "Grant") "not only failed to do anything about the problem but had even joined in or laughed at the offensive behavior..."

During the Public Hearing, Circle's managers, Grant, Mark Gubbiotti, (hereinafter "Gubbiotti"), and Bernie Chalawich, (hereinafter "Chalawich") collectively testified that they were generally unaware of any harassing conduct. (N. T. 48-49, 53, 59-60, 140, 153, 185-186, 189). Dixon's testimony pointed principally to the conduct of Eugene Walker, (hereinafter "Walker") as the source of the offensive conduct. However, Walker generally denied committing any offensive conduct. (N. T. 170,171).

On the question of whether a manager was aware of purported offensive conduct, Harold Gaskill, (hereinafter "Gaskill") credibly testified that he had spoken with Grant many times about harassing conduct by Walker that he found offensive. (N. T. 20, 21, 27). Gaskill testified that Walker's constant harassment of him and others made it "pure hell" to work at Circle every day. (N. T. 18, 20, 22). Further, Gaskill offered that at times Grant was present when Walker harassed him and that generally Grant knew what was happening. (N. T. 20, 21).

During the Public Hearing, it became clear that the only incident of a sexual nature that had been allegedly directed at Dixon was Walker singing a sexually explicit song to Dixon. While Dixon's PHRC claim suggest the work environment

was generally polluted with sexually offensive remarks, the only incident visited on Dixon was a single cretinous vulgar display of crude behavior by Walker when he sang a song to Dixon in which he had substituted sexually offensive words for the song's actual words.

Walker denied doing this (N. T. 171), and Grant denied he overheard it (N. T. 59). Dixon offered that Walker both sang the song and that Grant overheard it and addressed the issue *right then*. (N. T. 93).

The testimony in this regard reveals that no one was entirely credible. First, Dixon's PHRC complaint claim that, in effect, there was constant sexually offensive comments in the workplace appears to be an exaggeration. Next, Walker clearly sang a sexually explicit song that would have offended most anyone who heard it. In this regard, Walker is found to lack credibility. As for Grant, it simply appears that he knew Walker had offended Dixon and just told Walker that that kind of language was not acceptable in the presence of women. (N. T. 73). Grant offered that Dixon had asked him to do something about Walker and that he had heard Walker say something to Dixon (N. T. 146). Grant submits that Dixon only asked that Grant tell Walker to leave her alone and he did. (N. T. 145).

Additionally, both Gubbiotti and Grant confirmed that there was graffiti in the warehouse restroom. (N. T. 57, 59, 187-188, 213). Gubbiotti offered that there was nothing sexual about the graffiti. (N. T. 187-188, 213). Grant offered that the graffiti was sometimes sexual. (N. T. 59). On this question of whether the graffiti was "sexually offensive" Gubbiotti's testimony lacked credibility.

Between Dixon and Gubbiotti, it is imperative that a conclusion be made regarding who was more credible. Critical evidence supportive of either Dixon or

Circle depends on who is found credible in several fundamental respects as the question of liability is evaluated.

Already, we have indicated that neither Gubbiotti nor Dixon are wholly credible. On the circumstance of the motivation for Dixon's transfer to purchasing, Dixon testified that within 24 hours of Walker's offensive song, she went to Gubbiotti to complain about Walker. (N. T. 73-74, 93, 105). Conversely, Gubbiotti testified that Dixon never complained to him. (N. T. 192). Dixon says that she told Gubbiotti that she could not handle sexually explicit songs and Walker continually picking on older workers. (N. T. 74, 106). Dixon also offered that she informed Gubbiotti that she had not gone to Grant because of embarrassing and demeaning comments Grant often made to employees like calling them "stupid idiot" or "you're dumber than a box of rocks" or asking an employee, "don't you know what you're doing?".

For several reasons, we find Dixon's version of her encounter with Gubbiotti more credible. First, Gubbiotti himself offered that he had limited interaction with Dixon. (N. T. 186). Gubbiotti suggested that during several conversations with Dixon, she had expressed an interest in a career with Circle, but there would have been no reason for Dixon to express an interest in an office position. All of Dixon's past experience had been warehouse work.

The record reveals that when an office position opens, Circle preferred to fill those openings with individuals from the warehouse. In Dixon's circumstance, she had only been with Circle for several months and her transfer to purchasing jumped over numerous warehouse workers with far more experience at Circle. Gubbiotti confirmed that no one else from the warehouse had even been considered for the open position. (N. T. 190). Added to this we find Chalawich's testimony that he

found the situation of Dixon's transfer "curious", (N. T. 164) and that he does not know why Dixon was transferred to purchasing. (N. T. 163).

We find that Gubbiotti is not credible when he says that Dixon did even not complain to him. Indeed, Dixon did complain to Gubbiotti and her complaint wholly motivated her transfer.

The next major area where critical testimony stands in stark contrast is the cause of Dixon's termination from the purchasing department. There are numerous discrepancies that collectively lead to the conclusion that Gubbiotti again lacks credibility.

In effect, Gubbiotti offered that Dixon was terminated because she had "snapped" at Corinne Pace, (hereinafter "Pace"), the woman who was training Dixon. Gubbiotti offered that Mary Kay Spurling told him there had been an incident involving Dixon snapping at Pace. (N. T. 193). However, Mary Kay Spurling testified that the first time she had spoken about Dixon was at the meeting where Dixon was terminated from the purchasing position. (N. T. 227).

For some reason, Gubbiotti attempted to divorce himself from the decision to terminate Dixon. Gubbiotti testified that he was only involved in "executing" the decision to remove Dixon, (N. T. 193), and that he did not make the decision to terminate Dixon, (N. T. 203), but only had input into the decision. (N. T. 194). Mary Kay Spurling offered that she did not observe Dixon's performance, (N. T. 225), and that she was not involved in the decision to remove her. (N. T. 225). Clearly, the decision to terminate Dixon from purchasing was wholly Gubbiotti's.

Gubbiotti testified that he had asked Pace about Dixon snapping at her, (N. T. 194), but Pace testified that she did not even recall an incident with Dixon, only that

Pace herself became frustrated and told Gubbiotti that Dixon was unable to multi-task. (N. T. 241).

Gubbiotti testified that Dixon had been in purchasing for three weeks, (N. T. 219), but the evidence reveals that Dixon had been in purchasing less than two weeks. The first three days Dixon was in purchasing only ½ days, then Dixon simply observed two additional days. In Dixon's second week, she again took notes for two more days, then entered information into the computer on the third day. It was not until the fourth day of the second week that Dixon was alone on the job for the first time. On the fifth day of the second week, Dixon was called in by Gubbiotti and terminated.

Gubbiotti's credibility is further diminished with respect to what happened next. While Gubbiotti offered that Dixon "snapped" at a co-worker and that this resulted in her termination, Gubbiotti called Dixon later the very same day offering her a job at the facility of one of Circle's customers where Dixon would have direct interaction with employees of the customer. It is simply not believable that a manager would send a disrespectful employee who was just terminated to work at a place where that same employee would be interacting with customers.

Gubbiotti's lack of credibility is further exposed by a statement he made in Circle's answer to Dixon's complaint. In the answer Gubbiotti said that he liked Dixon's work and he did not want to lose Dixon. (N. T. 205; (E 3). There is no question that Dixon did a good job and had no problems with her work assignments in Circle's warehouse. (N. T. 143, 147). Indeed, Dixon credibly testified that she boxed, sorted, shipped, did quality control, inventoried, received, and stocked without difficulty. (N. T. 254). Gubbiotti testified that before he put Dixon in purchasing his opinion of Dixon's attitude and work performance in the warehouse

was really good. (N. T. 190). Dixon offered that at the meeting where she was terminated from purchasing she was told the job was too stressful for her. Dixon indicated that she disagreed saying she felt she was doing a good job and with a little more training would have no problem. (N. T. 77, 78). Dixon testified that she then asked to be returned to the warehouse. (N. T. 16). In effect, Gubbiotti disputed that Dixon even asked to be returned to the warehouse.

If Gubbiotti liked Dixon's work and did not want to lose her, he would have returned her to the warehouse. Instead, a new position was created at a customer's facility rather than return Dixon to the warehouse. As Dixon indicated, she was told, she had been the only one to complain so nothing was going to be done to Walker. (N. T. 18)

Yet another instance of extreme conflict between Dixon's and Gubbiotti's versions of events deals with whether Gubbiotti offered to return Dixon to Circle's warehouse after Dixon was again terminated after she had been at Pride Mobility Products for only several weeks. Clearly, Dixon was the first Circle employee ever to be assigned to unload boxes at Pride. (N. T. 207, 220). Gubbiotti says that he "became aware" of an opening at Pride, when in fact, he simply created a new position. Before Dixon, there had been no "opening" to become aware of. Again, Gubbiotti fabricated a story.

The circumstance of Dixon leaving the Pride position, as told by Gubbiotti, again fails to meet a credibility test. Gubbiotti indicates that he learned from a Circle sales representative that Dixon was planning to quit so he called Dixon in to discuss the situation. Gubbiotti says that Dixon confirmed her intention to quit so an offer was extended to Dixon to return to Circle's warehouse but Dixon declined. (N. T. 196-198). Dixon's more credible version is that, after only a short time at Pride, she

was simply called into Gubbiotti's office and told she could not lift the weights necessary and that Circle had no job for her. (N. T. 80). Dixon testified that she did not know what Gubbiotti was talking about. Dixon testified that she asked about returning to the warehouse if her concerns had been resolved but was told that she was the only one complaining so there was nothing else for her. (N. T. 80).

As an aside, the extent of Grant's lack of credibility was demonstrated when he suggested Dixon was not returned to Circle's warehouse because Circle was in a slow period. (N. T. 149-150). Grant's assistant, Chalawich, countered Grant's suggestion by indicating that Circle's slow period was in the winter and that in September Circle was still busy. (N. T. 164-165).

In summary, although the evidence presented falls short of the scope of the allegations Dixon's PHRC complaint makes, her testimony at Public Hearing is found far more credible than either Gubbiotti's or Grant's. Accordingly, we generally apply the law to the version of events as told by Dixon.

Dixon's independently cognizable sexual harassment claim involves a hostile environment sexual harassment claim. In Hoy v. Angeline, 91 A.2d 476, 480 (Pa. Super. 1997), *aff'd* 720 A.2d 745 (Pa. 1998), the Pa. Superior Court stated 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 either severe or 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, Dixon's claim fails because she cannot establish the second requisite element.

Dixon's claim of a hostile environment points to harassment of several older workers, one instance of sexually offensive conduct directed to her by a co-worker, and some unspecified graffiti. As for harassment directed to older male co-workers, the record reveals that Walker, an employee in his 20's, did tend to annoy older workers. However, Rob Girvan, one of Dixon's witnesses offered that the harassment visited on him by Walker had occurred for approximately 2-3 months in 1998, two years before Dixon became a Circle employee. (N. T. 31, 33, 39, 42). Girvan offered that Walker picked on just about everyone.

At no time was the harassment that Girvan alluded to described as sexually offensive. Further, Girvan offered that once he "blew up" at Walker, they became "sort of friends". (N. T. 38).

Another witness offered by Dixon was Harold Gaskill. Gaskill too offered that Walker was known to generally constantly harass others. (N. T. 18). Gaskill testified that Walker kept telling him he was gay and that otherwise Walker's

remarks and innuendos were not sexual. (N. T. 25). Walker would post signs in Gaskill's area indicating Gaskill was old, a drunk, and had to pay child support. (N. T. 97). Such childish conduct made it hard for Gaskill to do a days work and working at Circle "pure hell" for Gaskill. (N. T. 18, 20).

As for Dixon, the first and only time Walker ever harassed her was an instance when he sang a song with sexually explicit lyrics in her presence. (N. T. 72, 96). No one else at Circle had done anything to directly offend Dixon. (N. T. 88, 89). Further, the one and only complaint Dixon made was her complaint to Gubbiotti after she heard Walker's song. (N. T. 94-95, 123, 140, 153).

As instances of work environment claims are to be viewed by a review of a totality of the circumstances, see Meritor Savings Bank v. Vinson, 47 US. 57, 69 (1986), one must ask why Walker would suddenly subject Dixon to a sexually explicit song. Both Walker and Chalawich testified that Dixon had related to them that while partying over a weekend she had lost her underwear in a hot tub. (N. T. 155, 158, 171). Perhaps this would help explain why, after several months, Walker would suddenly think it was alright to sing sexually explicit lyrics to Dixon. Indeed, Dixon's revelation of a personal story to Walker could, and likely did contribute to him approaching her as he did.

Here, under the totality of the circumstances standard, Walker's conduct directed to Dixon, combined with unspecified graffiti in a restroom Dixon did not use, does not amount to conduct that is either sufficiently severe or pervasive and regular to constitute an actionable hostile environment sexual harassment claim. Incidents must be more than episodic. To be actionable, instances must be sufficiently continuous and concerted to be deemed pervasive and regular. See e.g. Snell v. Suffolk County, 782 F. 2d 1094 (2nd Cir. 1986); Lopez v. S. B. Thomas, Inc., 831 F.

2d 1184 (2nd Cir. 1987); and Andrews v. City of Philadelphia, 895 F. 2d 1469 (3rd Cir. 1990). Here, this did not occur.

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

1. that she engaged in a protected activity;
2. that Circle was aware of the protected activity;
3. that subsequent to the protected activity Dixon was subjected to an adverse employment action; and
4. that there is a casual connection between Dixon'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 Gubbiotti disputes whether Dixon actually protested Walker's behavior, we have determined that Dixon did complain to Gubbiotti within 24 hours of Walker's obnoxious conduct. By doing so Dixon opposed a practice made unlawful under the PHRA.

While we have determined that the circumstances Dixon was complaining of do not amount to an actionable discriminatory work environment claim, this fact is not controlling. We find that it is enough that Dixon had a good faith belief that she had a legitimate ground for protest. Employees must be permitted to pursue, without fear of retaliation, claims they feel are in need of vindication. See Johnson v. Univ. of Cincinnati, 82 FEP Cases 1767 (6th Cir. 2000). Here, Dixon's concerns are found to have been held in good faith and reasonable.

Clearly, Gubbiotti was aware of Dixon's expressed opposition and subsequently Dixon was terminated not once, but twice from Circle. The fourth

element of the requisite *prima facie* showing is satisfied here by the inference created by the short proximity in time between Dixon's expression of opposition and her terminations. Dixon's first termination occurred only two weeks after her opposition, and the second termination the following week. Accordingly, Dixon successfully makes out a *prima facie* case of retaliation.

In response Circle generally articulates that it had legitimate non-discriminatory reasons for twice terminating Dixon. First, Circle submits that Dixon was terminated from the purchasing department because Dixon "snapped" at her trainer, Pace, and because Dixon was not capable of effectively multi-tasking. Second, Circle submits that, in effect, Dixon was prepared to quit the position at Pride and when offered the opportunity to return to Circle's warehouse, Dixon declined.

These articulated reasons satisfy Circle's burden of production. Accordingly, the remaining question is whether Dixon can prove by a preponderance of evidence that Circle's articulated reasons are a pretext for retaliatory discrimination.

At the beginning of this opinion reasons were stated regarding why we found that Gubbiotti's testimony, in critical respects, was less than forthright and in several significant and material respects false and incredible. Indeed, Gubbiotti's version of events deserves little credence as compared to Dixon's with respect to the circumstances surrounding both her terminations.

Considered as a whole, the evidence in this case shows that once Dixon expressed opposition to Gubbiotti, a course of events began that, from the start, had the intended result of Dixon's ultimate termination from Circle. The same day of Dixon's opposition, she was transferred from a warehouse position to an office job. She was removed from the warehouse where it was known that Dixon's attitude and

work performance were good and placed into a position known to be stressful. Interestingly, neither Grant nor Chalawich, Dixon's warehouse supervisors, were involved in Dixon's transfer. Also, neither James Spurling nor Mary Kay Spurling were involved in the transfer. Only Gubbiotti activated the change and the resultant termination.

The record shows that Circle has a 90 day probationary period for new hires, however, Dixon's opportunity to become acclimated to the stressful purchasing job was less than two weeks. Indeed, for the first three days of the transfer, Dixon spent one half of the day in the warehouse and the other half day in purchasing. The next two days, Dixon simply continued to observe the work done in the purchasing department.

For the first two days of Dixon's second week she took notes of the process and procedures and on the third day she was tasked with entering information into the computer. On the fourth day of the second week, Dixon was left alone. The next morning, Gubbiotti called Dixon to a meeting and terminated her.

The job Dixon was to do in the purchasing area was the position of Expeditor. An Expeditor call vendors to determine when an order is to be shipped and then update Circle's system with the information. Gubbiotti terminated Dixon in less than two weeks suggesting Dixon had "snapped" at her trainer.

As a whole, the record reveals that this did not occur. Pace, the employee Dixon was supposed to have snapped at, testified that she did not recall that happening. Also, when asked whether Dixon's termination was disciplinary or performance-related, Mary Kay Spurling testified that the discharge was due to performance issues. (N. T. 237). Mary Kay Spurling also testified that she had had no discussions with Pace about either Dixon's performance or attitude before the

termination meeting. (N. T. 226). Indeed, Mary Kay Spurling confirmed that she was not involved in the decision to terminate Dixon. Clearly, Gubbiotti was the force behind Dixon's termination.

If Dixon was actually experiencing difficulty "multi-tasking", as asserted, one has to wonder why no corrective action was even considered. (N. T. 219). At the termination meeting Dixon expressed disagreement when told the job was too stressful for her and offered that with just a little more training she would not have a problem. (N. T. 77-78). Of course, Dixon's protest fell on deaf ears.

Furthermore, when Dixon realized Gubbiotti was going to remove her from the purchasing department, Dixon asked to be returned to the warehouse. Dixon also asked about the status of the complaint about Walker and was told, only she had complained therefore, Circle was not going to do anything. Thus, instead of returning Dixon to a job where she was doing well, she was sent home.

What happened next must have occurred because Gubbiotti spoke to someone about the circumstances of terminating Dixon. Remarkably, Gubbiotti created an entirely new position and offered it to Dixon later the same day he terminated her. It would appear that Gubbiotti became uncomfortable with how his termination of Dixon from purchasing would fare under potential scrutiny.

When offered the newly created position, Dixon accepted. However, although she had not complained and did not tell anyone she was planning on quitting, a week after starting the new job, on September 1, 2000, Gubbiotti called Dixon in and told her she could not lift the weight required and that Circle had no job for her. (N. T. 80). When Dixon told Gubbiotti she had not complained and she did not know what he was talking about, Gubbiotti told Dixon that he would rather have a man do the job. (N. T. 80).

Finally, when Dixon again asked about returning to the warehouse, she was told that she was the only one complaining and that Circle had nothing else for her. Rather than terminate Dixon the moment she expressed opposition, Gubbiotti set into action a plan to create the appearance that Dixon was either disruptive or not able to perform multi-tasking in the purchasing department and then create the appearance that Dixon was unhappy at Pride and unwilling to return to a job at Circle's warehouse. However, none of the components of Gubbiotti's plan actually happened. Instead, Dixon was twice terminated because she had opposed Walker's behavior.

Accordingly we turn to consideration of an appropriate remedy:

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

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

The function of the remedy in employment discrimination cases is not to punish the Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which he would have been, absent the discriminatory practice. See Albermarle Paper Co., v. Moody, 422 U.S. 405, 10FEP 1181 (1975); PHRC v. Alto-Reste Park Cemetery Assoc., 306 A.2d 881 (Pa. S. Ct. 1973).

The first aspect we must consider regarding making Dixon whole is the issue of the extent of financial losses suffered. When complainants prove an economic

loss, back pay should be awarded absent special circumstances. See Walker v. Ford Motor Co., Inc., 684 F2d 1355, 29 FEP 1259 (11th Cir. 1982). A proper basis for calculating lost earnings need not be mathematically precise but must simply be a "reasonable means to determine the amount [the complainant] would probably have earned ..." PHRC v. Transit Casualty Insurance Co., 340 A2d 624 (Pa. Commonwealth Ct. 1975), *aff'd.* 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim since the wrongdoer caused the damages. See Green v. USX Corp., 46 FEP 720 (3rd Cir. Mar 29, 1988).

The post-hearing brief on behalf of the complaint observes that the parties stipulated that beginning on June 1, 2002, Dixon does not seek any damages. After June 1, 2002, Dixon found employment that pays her more than she would have earned had she remained with Circle. Accordingly, the period in question regarding back pay lost is limited to September 1, 2000 to May 31, 2002.

The parties also stipulated that for the 11 week period of Dixon's employment at Circle, she worked a total of 391.5 hours at the rate of \$8.50 per hour. Dividing 391.5 hours by 11 weeks equals approximately 35.6 hours per week. 35.6 hours times \$8.50 per hour equals \$302.60 average earnings per week at Circle.

The period between September 1, 2000 and May 31, 2002 encompasses 91 weeks. Accordingly, average wages lost by Dixon in the relevant 91 week period was \$27,536.60.

The post-hearing brief on behalf of the complaint also notes that consideration should be given to Dixon's loss of potential bonus payments. Once again, the parties stipulated that many Circle warehouse employees received a monthly bonus based upon performance. Without question, had Dixon remained in

the warehouse, she would have been eligible for a bonus each month because her attitude and work performance were good.

We accept the proposed calculation found in the PHRC regional office's post-hearing brief of an average bonus of \$144.11 per month for 18 months for a total of \$2,593.98 in lost bonuses.

Accordingly, Dixon's total wage loss for the period between September 1, 2000 and May 31, 2002 equals \$30,130.58. Of course, interim wages must be deducted from this amount. Also, Circle argues that Dixon did not adequately mitigate her damages. Circle notes that Dixon only held two jobs between her termination from Circle and June 1, 2002. Additionally, Circle observes that, after only 2 weeks, Dixon left the first position she held after Circle. Then approximately 6 months later, Dixon began a second job that ended due to a lack of work. Circle generally submits that Dixon's efforts to mitigate her damages were woefully inadequate and any back pay award should be substantially reduced.

Dixon asserts that she made reasonable attempts at mitigation. Courts consistently hold that it is a Respondent's burden to produce evidence of a lack of diligence in pursuing other employment in mitigation. See Jackson v. Wakulla Spring & Lodge, 33 FEP 1301, 1314 (N.D. Fla. 1983); Sellers v. Delgado Community College, 839 F2d 1132 (5th Cir. 1988); Syvock v. Milw. Boiler Mfg. Co., 27 FEP 610, 619 (7th Cir. 1981); Maine Human Rights Comm. v. City of Auburn, 31 FEP 1014, 1020 (Maine Supreme Judicial Court 1981); and Michigan Dept. of Civil Rights v. Horizon Tub Fabricating, Inc., 42 EDP 36, 968 (Michigan Court of Appeals 1986). Diligence in mitigating damages within the employment discrimination context does not require every effort, but only a reasonable effort. It is a Respondent, not a Complainant, who has the burden of establishing that the

Complainant failed to make an honest, good faith effort to secure employment. Id.
At 46,704.

Regarding whether Dixon mitigated her damages, the evidence shows that shortly after her termination Dixon began looking in newspapers, on Careerlink, ads, and by word-of-mouth to find a job. Dixon began applying at other jobs and in October 2000, Dixon began working for U. S. Metal Forms at wages comparable to the wages she had earned at Circle.

Initially, Dixon's assignment at U. S. Metal Forms was Shipping Clerk, however, shortly after starting, Dixon was asked to be a Quality Inspector of parts for military aircraft. Indeed, Dixon did leave U. S. Metal Forms, but she did so because she felt unqualified to approve the quality of parts critical to the air worthiness of military planes. The reason Dixon voluntarily left U. S. Metal Forms is considered reasonable under this circumstance.

Subsequent to leaving U. S. Metal Forms, Dixon continued her conscientious efforts to find employment. When she did find employment with Medex approximately 6 months later she, stayed there until she was let go due to lack of work. Obviously, Dixon's efforts at securing alternative employment were ultimately successful enough to cause a stipulation that she does not seek a back-pay award beyond June 1, 2002.

We find that Dixon's mitigation efforts were sufficient and no deduction should be made because of a lack of diligence.

The parties stipulated to Dixon's interim wages during the period between Circle and June 1, 2002 and this amount is appropriately deducted from the gross wage loss calculated above. Accordingly, Dixon's back pay award is as follows:

Wages lost September 2000 – June 1, 2002 -	\$27,536.60
Minus interim wages	<u>- 6,841.00</u>
	\$20,695.60

Plus lost bonuses -	2,593.98
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Total back pay award -	\$23,289.58
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Further, the PHRC is authorized to award interest on the back pay award. Goetz v. Norristown Area School District., 16 Pa Commonwealth Ct. 389, 328 A.2d 579 (1975).

Finally, as noted by the post-hearing brief on behalf of the complaint, any unemployment compensation benefits received by Dixon are not deductible. Craig v. Y & Y Snacks., 721 F.2d 77 (3rd Cir. 1983).

An appropriate order follows:

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

TRACY L. DIXON, Complainant	:	
	:	
vi.	:	PHRC CASE NO. 200002677
	:	
CIRCLE BOLT & NUT COMPANY, INC., Respondent	:	
	:	


AND NOW, this 29th day of January, 2008 after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

ORDERS

1. That Circle shall cease and desist from retaliating against any employee that expresses opposition to any practice forbidden by the PHRA.
2. That Circle shall pay to Dixon within 30 days of the effective date of this Order the lump sum of \$23,289.58, which amount represents wages lost for the period between September 1, 2000 and June 1, 2002.
3. That Circle shall pay additional interest of 6% per annum on the award, calculated from June 1, 2002 until payment is made.

4. That Circle shall report the means by which it will comply with this Order, in writing to Joseph T. Bednarik, PHRC Assistant Chief Counsel, within thirty days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Stephen A. Glassman
Chairperson

ATTEST:


Dr. Daniel D. Yun
Secretary