COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RUSSEL E. HANDY, Complainant	:	
v.	:	PHRC CASE NO. 200401428
HARSCO CORPORATION d/b/a TAYLOR WHARTON Respondent	:	

STIPULATIONS OF FACT

ADDITIONAL STIPULATIONS OF FACT

ADDITIONAL STIPULATIONS OF FACT (REMEDIES)

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Russel E. Handy,	:	
	:	
Complainant	:	
	:	
v.	:	**PHRC Case No. 200401428**
	:	
Harsco Corporation d/b/a Taylor Wharton,	:	
	:	
Respondent	:	

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof should be required.

1. The Complainant herein is Russel E. Handy (hereinafter "Complainant"), who is an adult individual residing in Harrisburg, Pennsylvania.

2. The Respondent herein is Harsco Corporation d/b/a Taylor Wharton (hereinafter "Respondent") with a mailing address of 1001 Herr Street, Harrisburg, Pennsylvania 17105.

3. The Complainant is African American.

4. The Respondent, at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.

5. On or about September 1, 2004, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") against the Respondent at Commission Case No. 200401428. A copy of the complaint will be included as a docket entry in this case at time of hearing.

6. The employment actions challenged in the complaint allegedly occurred in Dauphin County.

7. On or about October 25, 2004, Respondent filed a verified answer to the complaint. A copy of the answer will be included as a docket entry in this case at the time of hearing.

8. In correspondence dated February 8, 2006, Commission staff notified the Complainant and Respondent that probable cause existed to credit the allegations found in the complaint.

9. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

10. In correspondence dated January 5, 2007, Commission Permanent Hearing Examiner Carl H. Summerson notified the Complainant and Respondent that a public hearing had been approved.

11. All jurisdictional prerequisites for a public hearing have been satisfied.

Ronald W. Chadwell, Esquire
Assistant Chief Counsel
(Counsel for the Commission
in support of the complaint)

2/5/07
Date

Andrew L. Levy, Esquire
Attorney for Respondent

2/5/07
Date

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

Russel E. Handy,	:	
Complainant	:	**PHRC Case No. 200401428**
	:	
v.	:	
	:	**EEOC No. 17FA464138**
Harsco Corporation d/b/a Taylor Wharton,	:	
Respondent	:	

ADDITIONAL STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case, and no further proof thereof should be required. The following stipulated facts are in addition to the Stipulations of Fact agreed to by the parties on February 5, 2007.

12. Complainant began working for Respondent in 1966.

13. At the time of his discharge on August 24, 2004, Complainant was working for Respondent as a Press Crew operator.

14. For a period of time during the early 1990s, Complainant worked as a supervisor for Respondent.

15. With the sole exception of the period of time during the early 1990s when he worked as a supervisor for Respondent, Complainant was a member of a Union and covered by a collective bargaining agreement throughout his employment with Respondent.

16. At all times during which Complainant was a member of a Union and covered by a collective bargaining agreement during his employment with Respondent, the applicable collective bargaining agreements required that Respondent have proper or just cause before

suspending or discharging any bargaining unit member, including but not limited to Complainant.

17. At all times relevant hereto, Respondent has had Plant Rules and Regulations that apply to its employees.

18. Respondent's Plant Rules and Regulations are divided into three Classes: Classes A, B, and C.

19. For violations of Class A rules, Respondent's Plant Rules and Regulations set forth the following progression of discipline: a written reprimand for a first offense, a three-day suspension for a second offense within a one-year period, and a five-day suspension with notice of discharge for a third offense within a one-year period.

20. For violations of Class B rules, Respondent's Plant Rules and Regulations set forth the following progression of discipline: a three to five-day suspension for a first offense and a five-day suspension with notice of discharge for a second offense within a five-year period.

21. For violations of Class C rules, Respondent's Plant Rules and Regulations state that a first offense will result in a five-day suspension with notice of discharge.

22. During his employment with Respondent, Complainant received multiple unpaid suspensions for disciplinary reasons.

23. On August 20, 2004, Respondent issued Complainant a five-day suspension with notice of discharge.

24. Respondent's stated reason for the August 20, 2004 suspension with notice of discharge was Complainant's violation of Rules C-9 and B-5, as listed in Respondent's Plant Rules and Regulations.

25. On August 24, 2004, a discharge hearing was held in response to the August 20, 2004 suspension of Complainant.

26. On August 24, 2004, Respondent discharged Complainant.

27. Frank Koller, Respondent's Director of Manufacturing, made the decisions to suspend and discharge Complainant in August 2004.

28. The Union filed a grievance in response to Complainant's August 24, 2004 discharge.

29. On March 15, 2005, a hearing was held before Arbitrator J. Joseph Loewenberg in response to the Union's grievance challenging Complainant's August 24, 2004 discharge.

30. Complainant has made no effort to seek employment at any time from August 20, 2004 to the present.

31. Since 1972, Complainant has owned and operated a fuel oil delivery business.

32. For approximately thirty years prior to his discharge on August 24, 2004, Complainant operated his fuel oil delivery business while working for Respondent.

33. Since his discharge by Respondent on August 24, 2004, Complainant has not increased his involvement with his fuel oil delivery business.

34. Complainant's fuel oil business has remained consistent both before and after his discharge on August 24, 2004.

35. Since approximately 1972, Complainant has owned rental properties.

36. Since his discharge by Respondent on August 24, 2004, Complainant has not increased the amount of time devoted to his rental properties.

37. Since his discharge by Respondent on August 24, 2004, Complainant has not increased his activities related to his rental properties.

Date: 15 June 2007

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Date: 6/15/07

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COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Russel E. Handy,	:	
	:	
Complainant	:	
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v.	:	**PHRC Case No. 200401428**
	:	
Harsco Corporation d/b/a Taylor Wharton,	:	
	:	
Respondent	:	

ADDITIONAL STIPULATIONS OF FACT (REMEDIES)

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required. The following stipulated facts are in addition to the Stipulations of Fact agreed to by the parties on February 5, 2007, and the Additional Stipulations of Fact agreed to by the parties on June 15, 2007.

38. Complainant's total gross wages for his last 26 pay periods (comprising one year) was $57,348.95.

39. As of November 4, 2004, the applicable Collective Bargaining Agreement established a 3% wage increase for Respondent's union workers.

40. As of January 2, 2006, the applicable Collective Bargaining Agreement established a 2% wage increase for Respondent's union workers.

41. As of January 2, 2007, the applicable Collective Bargaining Agreement established a 3% wage increase for Respondent's union workers.

42. Attached hereto as Exhibit "A" is a true and correct copy of Respondent's payroll printout reflecting hours worked, hourly rates and gross pay for Complainant, a member of Respondent's "press crew," for 2001, 2002, 2003, and 2004

43. Attached hereto as Exhibit "B" is a true and correct copy of Respondent's payroll printout reflecting hours worked, hourly rates and gross pay for each individual member of Respondent's "press crew" for pay period "January 11, 2004" through "July 8, 2007."

44. Complainant's date of birth is November 15, 1944.

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August 23, 2007
Date

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8/23/07
Date

FINDINGS OF FACT *

1. The Complainant, Russel E. Handy, (hereinafter "Handy") is an African American who was born November 15, 1944. (N.T. 23; S.F. 3).

2. The Respondent, Harsco Corporation d/b/a Taylor Wharton (hereinafter "Taylor-Wharton"), manufactures high pressure gas cylinders. (N.T. 219; S.F. 2).

3. Taylor-Wharton production workers are members of the United Steelworker's Union and are covered by a collective bargaining agreement. (N.T. 222; R.E. 2, 3, 4).

4. In 2004, Taylor-Wharton had 105 employees, approximately 30% of the production workers were African American, and 6 or 7 were Hispanic. (N.T. 303).

5. Handy began working for Taylor-Wharton on January 13, 1966. (N.T. 23).

6. With the exception of two to three years between 1991 and 1993, when Handy was made a foreman, Handy was in the Union and was covered by a collective bargaining agreement. ("CBA"). (N.T. 63, 64, 65, 73, 92).

* The foregoing "Stipulations of Facts", "Additional Stipulation of Fact", and Additional Stipulations of Fact (Remedies) 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. Stipulations of Fact. –Additional Stipulations of Fact. – and Additional Stipulations of Fact (Remedies)

7. Whenever an employee challenged discipline, the CBA required Taylor-Wharton to prove it had "just cause" to discipline or discharge an employee. (N.T. 226, 227; R.E. 2, 3, 4).

8. At all relevant times, Taylor-Wharton had Plant Rules and Regulations. (S.F. 17; R.E. 5, 6).

9. Taylor-Wharton's Plant Rules and Regulations are divided into classes: A; B; and C. (S.F. 18).

10. Class A violations follow a progressive discipline scheme: written reprimand for a first offence; 3 day suspension for a second offense within 1 year; and 5 day suspension with notice of discharge for a third offense within 1 year. (S.F. 19).

11. Class B violations also follow a progressive discipline scheme: 3 to 5 day suspension for a first offense; and 5 day suspension with notice of discharge for a second offense within 5 years. (S.F. 20).

12. Class C violations are the most serious and subject an employee to a 5 day suspension with notice of discharge for a first offense. (N.T. 229; S.F. 21).

13. Uniquely, during his employment with Taylor-Wharton, Handy was suspended multiple times and discharged more than 5 times. (N.T. 101, 105, 232, 233; S.F. 22).

14. On February 1998, Taylor-Wharton hired Frank Koller, (hereinafter "Koller"), as its Human Resources Manager. (N.T. 48, 219).

15. On 2001 Koller became Taylor-Wharton's Director of Manufacturing. (N.T. 219).

16. At all times, Koller had the responsibility for all hiring, firing, discipline, and interaction with the Union. (N.T. 220).

17. On August 24, 1999, instead of 5 day suspension with notice of discharge, Koller merely gave Handy a verbal warning after Handy attempted to receive unwarranted pay by listing on his time sheet, higher paying work than he had performed. (N.T. 233, 235, 236, 353, 383-384; R.E. 7).

18. Handy's August 1999 time sheet falsification amounted to Class C violations: C-5 falsification of company records; and C-8 falsification of production records. (N.T. 239, 241; R.E. 5).

19. Approximately 6 months later, Handy committed the same violation. (N.T. 239).

20. Once again, Handy falsified his time sheet by indicating he had performed a higher paying job when, in fact, Handy had selected to perform a lower paying task. (N.T. 239; R.E. 8).

21. Since Handy had been previously warned and his action again constituted C-5 and C-8 falsification violations, Koller initially issued Handy a 5 day suspension with notice of termination. (N.T. 240, 365, 384; R.E. 8).

22. However, prior to a discharge hearing, mandated by the CBA, union officials met with Koller indicating they knew what Handy had done was wrong but still asked if Koller would consider giving Handy one more chance. (N.T. 244, 384).

23. Koller responded by reducing Handy's violation to a Class B level violation converting the discipline from a discharge to a five-day suspension without pay. (N.T. 108, 245; R.E. 10).

24. The union agreed with Koller's action: (NT. 245).

25. At Handy's March 1, 2000 discharge hearing, Handy was informed of the reduced disciplinary action and warned that the next Class B rule violation would result in a five day suspension with a notice of termination. (N.T. 108-109; R.E. 10).

26. On March 13, 2002, Handy received a written reprimand for two Class A violations. (N.T. 247; R.E. 12).

27. Handy's discipline was for: leaving his assigned work area without permission, loafing, and overstaying breaks and lunch periods. (N.T. 247; R.E. 12).

28. On April 12, 2002, Koller gave Handy a verbal warning for failing to properly punch his time card. (N.T. 250; R.E. 12).

29. Koller had spoken to Handy numerous times about his failure to properly punch his time card. (N.T. 251-252).

30. On June 6, 2002 a note went into Handy's file indicating that a supervisor spoke with Handy about Handy's May 31, 2002 action of writing on his time card that he began work at 3:00a.m. when Handy had not arrived until around 3:30a.m. (N.T. 252-254; R.E. 14).

31. On June 26, 2002, less than a month later, Koller issued Handy a written reprimand with a three day suspension because Handy had failed to properly punch his time card on multiple occasions. (N.T. 254, 259; R.E. 15).

32. On July 1, 2002, Handy punched out and left the facility for at least one hour on personal business. (N.T. 113, 261; R.E. 16).

33. Upon retiring, Handy did not punch back in but, instead reported that he had worked the entire day. (N.T. 113, 261; R.E. 16).

34. Handy's action again constituted C-5 and C-8 violations. (N.T. 262; R.E. 5, 17).

35. Koller issued Handy a five-day suspension with a notice of termination. (N.T. 261, 359-360; R.E. 17).

36. The Union grieved Handy's discharge which was denied and the matter went to an arbitration hearing held on January 9, 2003 and February 20, 2003. (N.T. 266-267; R.E. 19, 20).

37. Due solely to Handy's years of service, Arbitrator Joel Weisblatt ordered Handy reinstated without back pay, converting Handy's discharge into a nine-month suspension. (N.T. 272, 365; R.E. 20).

38. Arbitrator Weisblatt's decision expressly states that Handy "shall be on notice that his disciplinary record is at the end of the road. Further, significant rule violations could clearly warrant a penalty of termination and such penalty would be progressive in nature". (R.E. 20).

39. Koller also warned Handy that further rule violations would result in discharge. (N.T. 272).

40. On August 20, 2004, Handy's actions resulted in his termination. (N.T. 273).

41. At Taylor-Wharton, blocks of steel weighing up to 150 pounds are gradually heated in a large furnace until they are soft enough to be pierced to make seamless cylinders. (N.T. 30, 32, 279, 467).

42. Employees who work on this process are paid according to the number of pieces produced. (N.T. 35).

43. The process at the furnace involves a four person operation: a charge heater person who shoves the raw steel pieces into the back of the furnace; a puller who pulls the heated steel out of the furnace; a press person; and a running transfer person who transfers the cylinder from the press to a bench. (N.T. 32, 34, 180).

44. The area around the furnace is loud and employees are required to wear earplugs. (N.T. 203).

45. The puller also wears protective clothing when pulling the steel out of the furnace as the furnace temperature is between 1900° F. and 2480° F. (N.T. 30, 32, 279).

46. In addition to pushing steel into the furnace, the charge heater also has the responsibility to make control setting adjustments to the furnace so the operation runs at an appropriate temperature. (N.T. 467).

47. The charge heater is at one end of the approximately 40 foot long furnace and the puller, press person, and running transfer person are stationed at the other end. (N.T. 32, 34, 278, 467, 574).

48. The outside of the furnace is hot and the temperature adjustments, rods and controls are on the side. (N.T. 279).

49. Approximately once or twice a week the furnace runs too hot requiring corrective adjustments. (N.T. 33, 82).

50. On the morning of August 20, 2004, Handy, Elmer Keiter (race, white) and Eugene Keath (race, white) rotated every 20 minutes on the puller, press, and transfer positions. (N.T. 32)

51. Barry Straw (hereinafter "Straw") was the charges heater. (N.T. 467).

52. On August 20, 2004, Sam Johnson, an Inspector Foreman, was filling in for the regular forge supervisor, Frank Dietrick, who was on vacation. (N.T. 29, 510, 511, 552, 567).

53. As Handy, Keiter, and Keath rotated, when Handy was the puller, he made adjustments to the furnace because he felt the furnace was too hot. N.T. 33-34, 187).

54. When Keath became the puller, he informed Handy that the furnace was getting to hot and unless something was done, he would stop. (N.T. 34-35, 513).

55. From Straw's location, he could not see the front of the furnace where the others were assigned to work. (N.T. 278).

56. Handy called Johnson over to the forge area and told him to "wake Barry Straw up", that he had not responded when Handy tried to buzz him. (N.T. 29, 35, 36, 273-274, 512).

57. Handy also took the unusual step of stopping the production line, which action entailed varied problems. (N.T. 35, 470, 571).

58. Johnson walked around the furnace to speak with Straw, telling him it had been reported that there was a problem with the furnace and would he check it. (N.T. 36-37, 468).

59. As Straw and Johnson walked around from the back of the furnace, Handy, Keath and Keiter were there in Straw's area. (N.T. 36, 468, 513, 575).

60. Straw was upset that the production line had been stopped and that Handy, Keath and Keiter were in his area saying in effect that now he had three guys doing his job. (N.T. 273-274, 468, 469, 513, 575).

61. Straw went up to Handy and asked him why he had stopped the mill. (N.T. 469, 497).

62. With Johnson, Keath and Keiter looking on, Straw and Handy began hollering at each other, at a volume more than was necessary in the loud environment where hollering to be heard was normal. (N.T. 495, 513, 527, 529, 560).

63. Straw and Handy exchanged profanities, and approximately 10 to 15 seconds into the argument, Handy told Straw to get out of his face and shoved Straw backwards causing Straw to stagger back two, or three steps and to lose his hat. (N.T. 37, 405-406, 469, 482, 483, 495, 514, 515, 518, 533, 534, 535, 536, 548).

64. In conversation with each other, employees commonly used profanity. (N.T. 498, 581).

65. When Handy shoved Straw, Straw was standing stationary approximately two feet in front of Handy. (N.T. 480).

66. Straw's back was to the furnace approximately 3 to 5 feet from the side of the furnace. (N.T. 472, 515).

67. Johnson, Keath and Keiter all personally observed Handy shove Straw. (N.T. 473, 515; R.E. 22, 23).

68. Following the shove, Straw sat down to catch his breath and collect himself. (N.T. 469, 515).

69. After collecting himself, Straw returned to work. (N.T. 474, 516).

70. Johnson went to the forge office and called Koller on his cell phone to apprise him of what had occurred. (N.T. 274, 307, 385, 516).

71. Koller was on his way to work. (N.T. 274).

72. When Koller arrived he met with Johnson in the forge office where Johnson related that he had been called to the furnace area, that he spoke with Straw, that Straw came around to the side of the furnace saying "now I have three guys dong my job, that Straw and Handy began talking loud to each other, that Handy shoved Straw two times causing Straw to fall back and caused him to fall off. (N.T. 274, 307, 308-309, 324, 386, 578).

73. Koller separately asked Keath and Keiter for their versions of what happened. (N.T. 274, 313).

74. Both, Keath and Keiter in effect stated that Handy had shoved Straw. (N.T. 275, 317, 318; R.E. 23).

75. Koller called Bill Banget, the then Union President, to the forge office. (N.T. 275).

76. Koller also spoke with Straw who confirmed there had been a verbal confrontation that ended when Handy shoved him. (N.T. 276)

77. Straw indicated to Koller that he had known Handy for almost 40 years and did not want to see him fired, but would prefer that the matter was simply dropped. (N.T. 276, 318, 473, 474).

78. Finally, Koller called Handy to the office and asked him what happened. (N.T. 50).

79. In response, Handy initially asked if Straw had filed a complaint, to which Koller said no, but that someone said he had pushed Straw. (N.T. 50, 51, 131, 134).

80. Handy indicated he had not pushed Straw and basically that nothing happened and he never touched Straw. (N.T. 51, 321, 275; R.E. 21).

81. Koller formed the belief that Handy had pushed Straw, that given the proximity to the furnace, debris on the floor and controls on the side of the furnace, the incident posed a potential danger to Straw. (N.T. 279, 337, 339, 341).

82. Koller concluded that Handy had assaulted Straw and sent Handy home. (N.T. 47, 345).

83. Koller issued Handy a five-day suspension with notice of discharge for violation of Rules C-9 (fighting) and B-5 (threatening). (N.T. 285, 286; R.E. 24).

84. On behalf of Handy, the union filed a grievance claiming Handy's suspension with notice of discharge was without just or proper cause. (N.T. 287-288; S.F. 28; R.E. 25).

85. On August 24, 2004, a discharge hearing was held at which time Handy offered that all he did was put up his hands while he and Straw were involved in a verbal confrontation and that he did not recall shoving Straw. (N.T. 291; R.E. 26).

86. After the discharge hearing, Handy's suspension was converted into a discharge. (S.F. 26; R.E. 26).

87. On September 1, 2004, the third step of the grievance process, Handy added "discriminated against" to his August 20, 2004 general allegation of unjust suspension. (N.T. 288-289; R.E. 25).

88. After Handy's grievance was denied, the union submitted the matter to arbitration. (N.T. 292; R.E. 28).

89. On March 15, 2005, Arbitrator J. Joseph Loewenberg heard the matter. (N.T. 144, 291; R.E. 28; S.F. 29).

90. Arbitrator Loewenberg upheld Handy's termination finding Taylor-Wharton had "just cause" to terminate Handy and that Handy had not been treated differently because of his race. (N.T. 294; R.E. 28).

91. Arbitrator Loewenberg noted there was overwhelming evidence Handy had shoved Straw, that there was no evidence of disparate treatment, that Handy had an extensive disciplinary record, and that Taylor-Wharton had proper cause. (R.E. 28).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant, the Respondent and the subject matter of the complaint under the Pennsylvania Human Relations Act ("PHRA").
2. The parties have fully complied with the procedural prerequisites to a Public Hearing in this matter.
3. Handy is an individual within the meaning of Section 5(a) of the PHRA.
4. Taylor-Wharton is an employer within the meaning of the PHRA.
5. The complaint filed in this case satisfies the filing requirements found in the PHRA.
6. The PHRA prohibits employers from discriminating against individuals because of their race.
7. Handy has the burden to established a *prima facie* case by a preponderance of evidence by showing:
   a. That he is a member of a protected group;
   b. That he was qualified for the position he held;
   c. That he was suspended and terminated; and
   d. That his suspension and termination were under circumstances that give rise to an inference of discrimination.
8. Handy failed to establish a *prima facie* case of race discrimination, because he failed to establish that he was suspended and discharged under circumstances that gave rise to an inference of discrimination.

OPINION

This case arises on a complaint filed by Russel E. Handy, (hereinafter "Handy"), against Harsco Corporation, d/b/a Taylor-Wharton, (hereinafter the "Taylor-Wharton") on or about September 1, 2004, at PHRC Case No. 200401428. In his complaint, Handy alleged that Taylor-Wharton suspended him then terminated him from his position as a Press Crew Operator because of his race, African American. Handy's claims allege that Taylor-Wharton violated 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")

Pennsylvania Human Relations Commission, (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit Handy's allegations of unlawful discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. However, these efforts were unsuccessful, and this case was approved for Public Hearing. The Public Hearing was held on June 14, and 15, 2007 and on August 7 and 29, 2007 before Carl H. Summerson, Permanent Hearing Examiner. Post-Hearing briefs were received on January 22, 2008.

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

> It shall be an unlawful discriminatory practice... for any employer because of the... race...of any individual...to discharge from employment such individual...if the individual...is the best able and most competent to perform the services required...

When a Complainant alleges disparate treatment, liability depends on whether race actually motivated the termination decision. Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 141, (2000) citing Hazen Paper co. v. Biggins, 507 U.S. 604, 610 (1993). Generally, Complainants have an opportunity to demonstrate intentional race discrimination

in two ways: (1) by presenting direct evidence of discrimination under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); or (2) by presenting indirect evidence of discrimination that satisfies the oft-cited familiar three-step analytical framework of McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973).

Here, since no direct evidence was presented, we turn to a disparate treatment analysis under the McDonnell Douglas 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. Throughout this formula, Handy retains at all times the ultimate burden of persuasion that his termination was motivated by discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 62 FEP Cases 96 (1993).

Both, the PHRC post-hearing brief and Taylor-Wharton's post-hearing briefs submit there are four elements to a requisite *prima facie* showing. First, Handy must establish that he is in a protected class. Second, Handy must show that he was qualified for the position. Third, Handy must establish that he suffered an adverse employment decision. Finally, that Handy must establish that he was discharged under circumstances that give rise to an inference of discrimination. Spanish Council of York, v. PHRC, 879 A.2d 391 (Pa. Commonwealth Ct. 2005).

In McDonnell Douglas, the U.S. Supreme Court observed that the elements of a *prima facie* showing will necessarily vary. 411 U.S. at 802. Indeed, the fourth element of the requisite *prima facie* showing in termination cases is frequently listed as the element

suggested by the post-hearing briefs of the parties. However, in certain circumstances, the fourth elements of the requisite *prima facie* showing can be something as simple as after a Complainant's termination, the employer had a continued need for someone to perform the same work after the Complainant left. See Harden v. South Wark Metal Manufacturing Co., 85 FEP Cases 1617, 1619 (3rd Cir. 2001), citing Pivirotto v. Innovative Systems, 80 FEP Cases 1269, 1275 (3rd Cir. 1999), and Cumpiano v. Banco Somtander, 902 F-2d 148 (1st Cir. 1990); see also Kendrick v. Penske Transportation Services, 83 FEP Cases 959, 964 (10th Cir. 2000).

We are mindful that a major purpose of requiring a *prima facie* showing is to eliminate the most obvious lawful reasons for an adverse action. In Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978), the U.S. Supreme Court explained that the *prima facie* showing was never intended to be rigid, mechanized, or ritualistic.

In effect, Taylor-Wharton's post-hearing brief concedes that Handy can establish the first three elements of the requisite *prima facie* showing. Taylor-Wharton focused its argument on the *contention* that Handy failed to prove his suspension and discharge were under circumstances that give rise to an inference of discrimination.

Conversely, the PHRC regional office post-hearing brief submits that an inference of discrimination arise in two respects: (1) the circumstances surrounding Handy's suspension and discharge raise a question regarding the motivation for the suspension and discharge; and (2) purportedly individuals similarly situated to Handy who are not in his protected class received more favorable treatment.

Regarding the general argument that the circumstances surrounding the incident that precipitated Handy's suspension and termination give rise to an inference of discrimination, the PHRC regional office first appears to argue that Handy did not shove Straw at all, but

simply defended himself when Straw purportedly charged at him. This argument seems to suggest that because Koller, Straw and all three of the witnesses to the confrontation between Handy and Straw are white, Koller rejected Handy's version of the encounter.

For several reasons, the fact that Koller, Straw, Johnson, Keath and Keiter are all white fails to suggest Koller's actions were not taken based on Koller's honest belief that Handy had shoved Straw. Indeed, an employer's reasons for terminating an employee may be "mistaken, ill considered or foolish", so long as those reasons are honestly believed. See Jones v. Union Pacific R. R. Co., 89 FEP Cases 1444, 1450 (7th Cir. 2002), citing Jordan v. Summers, 205 F.3d 337, 343, 82 FEP Case 311 (7th Cir. 2000).

The PHRC regional office post-hearing brief on behalf of the complaint points to Handy's Public Hearing testimony that suggests he initially told Koller he neither pushed nor hit Straw. Of course, a credibility issue arises since Koller testified that, during his initial interview with Handy, Handy told him he never touched Straw.

Handy's discipline record is replete with instances of Handy falsifying pay records and receiving warnings and discipline. Further, we note Handy's testimony regarding an instance where he was as witness to another union member's improper conduct. Handy indicated that he would not testify against a union member. (N.T. 148, 177). Finally, Taylor-Wharton's post-hearing brief reviews the significance of the changing evolution of Handy's version of events as the grievance process went on. Stacked against Koller, Handy falls short on the credibility scale. Accordingly, we find that here, Handy initially told Koller that he never touched Straw.

Everyone else related to Koller that Handy had shoved Straw. Further, the evidence presented reveals that Straw and Handy stood face to face arguing for approximately 15

seconds until Handy shoved Straw backwards. Considering the evidence as a whole, it was entirely reasonable for Koller to have concluded that Handy shoved Straw.

To argue about an employer's assessment of a situation constitutes a distraction. The question is not whether the reasons for a given decision are right but, instead, whether the employer's description of its reasons is honest. See Kariotis v. Navistar International Transportation Corp., 131 F.3d 672, 677 (7th Cir. 1997); Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 560, 44 FEP Cases 1137 (7th Cir. 1987); and Billups v. Methodist Hospital of Chicago, 922 F.2d 1300, 1304, 54 FEP Cases 1274 (7th Cir. 1991). Here, Handy simply cannot demonstrate Koller was dishonest when he says he believed Straw, Johnson, Keath and Keiter's versions of the incident over Handy's version All Handy does is to suggest that Handy is African American and those who told Koller he shoved Straw are white.

The PHRC post-hearing brief further infers that Keath and Keiter made up a story because Handy's seniority substantially prevented them from working overtime. This unsupported premise is wholly undermined by undisputed evidence that after Handy's termination, the frequency of overtime worked by either Keiter or Keath did not change.

The PHRC regional office post-hearing brief also suggests that Koller should have also disciplined Straw. This argument relies on the notion that for no reason, Straw came from the back of the furnace and immediately charged Handy yelling and hollering as he approached.

Once again, considered as a whole, the record fails to support Handy's version. Without question, Handy and Straw had a loud verbal argument. However, the evidence is clear that arguments between co-workers were common, physical conflict was not. Here, the evidence does not support Handy's version that suggests Straw simply charged at him. Instead, credible evidence shows that Handy was in Straw's area, and had taken the dramatic step of stopping the mill. Straw and Handy simply argued face-to-face for a time

before Handy took it to the next level and shoved Straw backwards. Once again we look to whether Koller was honest when he articulated his appraisal of the circumstances after hearing from everyone involved. Again, Handy has not established Koller was untruthful.

The PHRC regional office post-hearing brief also suggests that somehow an inference can be drawn from the fact that Straw never lodged a complaint, never said he wanted Handy disciplined, and actually asked that the matter be dropped. Koller's action in suspending and then terminating Handy is termed "drastic" and based on "dubious proof" of a "dubious violation".

Regarding the "drastic" comment, unlike an arbitrator such as Arbitrator Weisblatt, who returned Handy to work after 9 months off solely because of Handy's long term service, the PHRC is obliged to only evaluate whether a Respondent's actions were discriminatory. It is a well settled principle that we are instructed not to attempt to sit as a super-personnel department that examines whether discipline imposed seems fair or harsh. See Robertson v. Central Steel & Wire Co., 84 FEP Cases 1440, 1445 (N.D. ILL. 2000); Dale v. Chicago Tribune., 797 F2d 458, 464, 41 FEP Cases 714 (7th Cir. 1986); and Kephart v. Inst. Of Gas Technology, 630 F.2d 1217; 1223 (7th Cir. 1980). Instead, we are limited to assess whether discrimination permeated a given decision. A question of whether a termination was "drastic" should only be viewed in the context of whether there was disparate treatment or not. Employers may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its actions are not for a discriminatory reason. See Dent v. Federal Mogul Corp., 84 FEP 1711, 1715 (ND Ala. 2001), citing Nix v. WLCY Radio/Rahall Communications, 738 F2d 1181, 1187 (11th Cir. 1984).

On the issue of purported "dubious proof" we have indicated that Koller based his assessment of what occurred on a reasonable investigation supported by 4 witnesses.. On

this point Straw did tell Koller he wanted to just drop the matter, but he also said he knew Handy for almost 40 years and he did not want to see Handy fired. (N.T. 473, 474).

Turning then to the "dubious violation" claim, the PHRC regional office brief submits that neither Rule C-9 nor B-5 are applicable to an incident of shoving. Rule C-9 generally addresses fighting and Rule B-5 covers threats. After considering the circumstances of the shove, we find it both reasonable and legitimate that Rules C-9 and B-5 were used to support the suspension and discharge of Handy. At one point Handy's own testimony clarified that he understood and agreed that the C-9 rule against fighting covered instances of shoving. (N.T. 44).

The final point the PHRC post-hearing brief attempts to make is that the mill was a place where racist attitudes existed. However, on this point, the evidence presented focused on a period approximately 12 years earlier, when Handy was a foreman. Handy related that those working for him thought he was too strict in running the department. (N.T. 65). Handy then offered that he "thinks" whites complained because they did not like taking orders from a black. (N.T. 69). Handy also make a general unsubstantiated claim that there were employees taken into the office either because of racial remarks or their refusal to take orders.

While such allegations do speak directly to a polluted work environment, given that 30% of the work force was African American, surely, if some relevant occurrences of more recent vintage existed, Handy would have affirmatively presented such evidence. However, he did not. Accordingly, Handy's vague unsubstantiated recitation of a work place environment 12 years earlier offers little in support of Handy's present claim.

This brings us to the other main argument suggesting there is an inference of discriminatory animus sufficient to establish by a preponderance of evidence the fourth

requireable element of the *prima facie* requirement. Handy attempted to demonstrate that similarly-situated non-African American employees were treated more favorably. In this regard, Handy must show that Taylor-Wharton treated him differently than other similarly situated employees who violated work rules of comparable seriousness, see Kendrick v. Penske Transportation Services, 80 FEP Cases 1381, 1386 (DC Kan. 1999); Ricks v. Riswood Int'l Corp., 38 F3d 1016, 1019, 66 FEP Cases 257 (8th Cir. 1994); and McAlester v. United Airlines, Inc., 851 F2d, 1249, 1261, 47 FEP Cases 512 (10th Cir. 1988), and are similarly situated in all relevant respects, see Michelson v. Waitt Broad, Inc., 187 F. Supp. 1059, 90 FEP 1775, (ND Iowa 2002), aff'd 55 Fed Appx. 401 (8th Cir. 2003); Graham v. Long Island R.R. 84 FEP Cases 276, 280 (2nd Cir. 2000) and Holifield v. Reno , 115 F.3d 1555, 1562, 74 FEP Cases 511 (11th Cir. 1997), without any mitigating or distinguishing circumstances that distinguish treatment. Clark v. Runyon 84 FEP Cases 133, 135 (8th Cir. 2000); Lynn v. Deaconess Medical Center v. W. Campus, 160 F3d. 484, 487-88; 78 FEP Cases 595 (8th Cir. 1998); Das v. Ohio State University, 84 FEP Cases 691, 694 (SD. Ohio. 2000); and Humphries v. CBOCS West, Inc., 474 F.3d 387, 404-05, 99 FEP Cases 872 (7th Cir. 2007).

Handy attempted to identify several non-African American employees who allegedly received more advantageous treatment. Before a review of these individuals is made two important distinguishing circumstances must be announced. First, Handy's long history of disciplinary problems renders him unique. Clearly, Handy was not a model employee. His long history of continual problems resulted in his termination over five times, not to mention the numerous suspensions he was given. This feature alone sets Handy apart from anyone with whom he seeks to compare himself.

Second, the record clearly reveals that an encompassing culture held by bargaining unit members existed at Taylor-Wharton. Witness after witness testified that they would not testify against another union member at either a grievance meeting or arbitration. (N.T. 147, 148, 177, 301, 416, 417, 446, 475). Handy offered that it was not his job to report an incident he witnessed, and that generally, union members do not report the misconduct of other union members. (N.T. 147). Indeed, the union president offered that if a union member did see something, a union member would say they did not. (N.T. 417).

In this climate, members of management were understandably frustrated. Koller offered that there were instances when an employee would make an allegation against another employee only to rescind their allegation later during the resultant disciplinary review process. (N.T. 588). Koller related that in such instances, employees would go so far as to refuse to say anything. Koller submitted that on two occasions when a matter got to the grievance process, employees changed their stories. (N.T. 620). Such instances would result in the reinstatement of the employee with back-pay. This made Koller hesitant to act without a confirmed witness or a member of management having witnessed the action that precipitated discipline.

With these two circumstances outlined, we turn to the array of individuals with whom Handy seeks to compare himself. It is apparent that over the years, one employee had been involved in several physical altercations with other employees. Charles Marsh, Jr., who had been the Union President, is reported to have been involved in at least four altercations. Three of these altercations were unknown to Koller. These instances include: Marsh Jr., knocking Sale McCullough to the floor in the Taylor-Wharton locker room; (N.T. 42, 416, 425, 426). Marsh, Jr., slapping Glen Schwalm in the face knocking his glasses off. (N.T. 42, 83, 89, 147, 198, 301); and Straw and Marsh, Jr. were near the furnace when Marsh, Jr., pushed

Straw and Straw pushed Marsh, Jr., back pinning him against a post. (N.T. 40, 83, 91-92, 302, 303, 476).

It is not enough to simply show that other employees engaged in the same or similar misconduct but were never disciplined simply because they were not caught. See Dent v. Federal Mogul Corp., 84 FEP Cases 1711, 1714. (N.D. Ala. 2001); and Bogle v. Orange County Board of County Commissioners, 162 F.3d 653, 658-59, 78 FEP Cases 1081. (11th Cir. 1998). Similarly, misconduct that is witnessed by others is not similarly situated to misconduct without an eyewitness. See Mora v. Chicago Tribune. 47 F.Supp. 2d 626, 636, (N.D. ILL. 1999). Further if an employer has an admission of a wrongdoer, that person is not similarly situated to an employee only suspected of having committed the same or similar violation. See Abel v. Dubberly., 210 F.3d 1334, 1339, 82 FEP Case 1407. (11th Cir. 2000).

Eric Baltimore, a discharged ex-employee initially testified that the incident between Marsh, Jr., and Straw was witnessed by a supervisor. However, on cross examination Baltimore offered that he was not sure if a supervisor witnessed the incident. This fluxtation reduces the credibility of Baltimore's testimony. Conversely, Koller credibility testified that he had no prior knowledge of the incident.

Significantly, Handy says he actually witnessed two of these instances and did not report them. (N.T. 42, 95, 147). Despite this, Handy now seeks to compare his actions to these even though his act was witnessed by a supervisor and two employees that gave statements during an investigation. Clearly, neither of the three instances reviewed are similarly situated to Handy's circumstance.

Next, we turn to an incident that Koller was made aware of. It appears that on December 12, 2003, Marsh, Jr., assaulted Terry McHugh in the Taylor-Wharton lunch room. (N.T. 42, 297). Although no supervisor was present at the time of the physical altercation,

McHugh came out of the lunch room and ran into Johnson to whom he stated, he wanted Marsh, Jr., fired. (N.T. 519). Mc Hugh also reported the incident to Koller. (N.T. 297, 387).

Johnson testified that he then entered the lunch room and asked those present, including Handy, if they saw anything. Consistent with the culture of not saying anything against another union member, everyone there said no. (N.T. 519). Koller also went to the lunch room and questioned individuals, including Handy, but all of those questioned said they did not see anything. (N.T. 297, 298). Koller then spoke with McHugh who was now saying to just drop it. (N.T. 298).

Koller testified that he then told McHugh if a corroborating witness could be found, he would discipline Marsh, Jr. (N.T. 298). Again, Mc Hugh told Koller he just wanted the matter dropped. Koller then met with Marsh, Jr., and McHugh to tell them if this happened again and there were any witnesses, there would be discipline. (N.T. 298-99; RE 29).

Koller's testimony indicated that, despite McHugh asking that the matter be dropped, Marsh, Jr., would have been disciplined if a witness had stepped forward. (N.T. 299). A key distinction between this incident and Handy's incident is the existence of a supervisory witness in Handy's case and not in the Marsh, Jr., incident.

As noted in Taylor-Wharton's post hearing brief, it is permissible to treat allegations of assault that are confirmed by witnesses more severely than allegations that are not confirmed by witnesses. See Alverio v. Sam's Warehouse Club, 9 F.Supp. 2d 955, 963. (N.T. Ill. 1998). Here, once again, Handy witnessed an incident and remained silent when management was seeking to establish corroboration to McHugh's story. Again the Marsh, Jr., McHugh incident is not substantially similar.

One incident reported to have occurred does ring of being substantially similar. Leonard Turverna, white, was reported to have threatened to take another employee outside.

(N.T. 590). Koller offered that when he went to speak with Turverna, Turverna became angry and asked Koller if he would like to go outside. Turverna was discharged. (N.T. 591).

Two additional instances were reported that involved verbal arguments. Koller indicated he heard about an altercation between William Eckenrode and Ray Nye. When Koller spoke with the supervisor and other employees in the area, no one saw anything. (N.T. 300, 374). Eckenrode and Nye both informed Koller that it had been only a verbal argument, so Koller simply explained to them what would happen if their differences went to another level. (N.T. 300).

Similarly, a *verbal* argument between Duane Jones and Sam Weyant was reported to Koller. (N.T. 376, 377). In response Koller simply told them both to act professionally. (N.T. 377). These two incidents are clearly not similarly situated.

Finally, Eric Baltimore, a long term employee who had recently been discharged by Koller for absenteeism, testified about a purported incident. Baltimore offered that shortly after Koller arrived, Marsh, Jr., held a knife to Koller's neck. (N.T. 430). Koller denies that this ever occurred. (N.T. 615).

Again a question of credibility must be resolved. Several glaring points reveal Baltimore's lack of credibility. Baltimore said he met Koller when Baltimore was first hired in 1974. Of course, Koller was not hired until 1999. Further, it has been noted above that on direct examination Baltimore testified that a supervisor witnessed an incident between Marsh, Jr., and Straw. (N.T. 422). However, on cross examination Baltimore admitted he was not sure if a supervisor was present. Baltimore also admitted that he would lie to management when questioned about purported incidents of misconduct Baltimore had witnessed. (N.T. 450-51). Finally, Baltimore had to be subpoenaed more than once before he finally attended

the Public Hearing. Given Koller's denial that such an incident ever occurred, Baltimore's testimony is rejected.

After a thorough review of the purported similarly situated individuals, we find nothing in the series of events that sufficiently demonstrates that others were treated more favorably than Handy. Accordingly, we find that Handy has not sufficiently shown by a preponderance of the evidence that he was treated dissimilarly to any fellow employee.

An Order dismissing this matter for a lack of establishing a *prima facie* case follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RUSSEL E. HANDY, Complainant	:	
v.	:	PHRC CASE NO. 200401428
HARSCO CORPORATION d/b/a TAYLOR WHARTON Respondent	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

March 7, 2008
Date

By: _____
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RUSSEL E. HANDY, **Complainant**	:	
v.	:	**PHRC CASE NO. 200401428**
HARSCO CORPORATION d/b/a TAYLOR WHARTON **Respondent**	:	

FINAL ORDER

AND NOW, this 17th day of March., 2008, after a review of the entire record in this matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the full Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

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

By _____
Stephen A. Glassman, Chairperson

Attest:
_____
Dr. Daniel D. Yun, Secretary