COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VIKKI MACE Complainant v. CACO THREE, INC. d/b/a MCDERMITT CONCRETE, INC. Respondent	:	PHRC CASE NUMBERS 200101823 & 200209894

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant, Vikki Mace, filed a complaint of employment discrimination against Respondent Caco Three, Inc., with the Pennsylvania Human Relations Commission on or about January 7, 2002. (S.F. 1; N.T.I. 10.)

2. At the time of the filing of the complaint, Complainant's legal name was Vikki Arentz and was an adult female. (S.F. 2; N.T.I. 10.)

3. At the time the Complainant was rehired, Respondent was doing business as McDermitt Concrete, Inc. (S.F. 3; N.T.I. 11.)

4. The initial complaint was amended to reflect the correct legal names of the Complainant and Respondent. (S.F. 4; N.T.I. 11.)

5. The PHRC served Respondent with a copy of the complaint on or about February 7th, 2002. (S.F. 5; N.T.I. 11.)

6. Respondent filed its Answer on or about April 5, 2002. (S.F. 6; N.T.I. 11.)

7. Respondent is an "employer" within the meaning of Section four of the Pennsylvania Human Relations Act. (S.F. 7; N.T.I. 11.)

8. The PHRC served Respondent with a Finding of Probable Cause on or about December 30, 2002. (S.F. 8; N.T.I. 11.)

9. PHRC scheduled a conciliation conference for January 14, 2003. (S.F. 9; N.T.I. 11.)

10. Conciliation was not successful. (S.F. 10; N.T.I. 11.)

11. Complainant filed a second complaint with the PHRC, Case Number 200209894, alleging retaliation on or about June 6th, 2003. (S.F. 11; N.T.I. 12.)

12. PHRC served Respondent with a copy of the second complaint on June 16, 2003. (S.F. 12; N.T.I. 12.

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

N.T. I	Notes of Testimony – 9/17/2007
N.T. II	Notes of Testimony – 9/18/2007
C.E.	Complainant's Exhibit
R.E.	Respondent's Exhibit

13. Complainant amended her second complaint on or about September 9, 2003. (S.F. 13; N.T.I 12.)

14. PHRC served the amended complaint on September 10, 2003. (S.F. 14; N.T.I 12.)

15. Respondent filed its Answer to the amended complaint on or about September 12, 2003. (S.F. 15; N.T.I 12.)

16. On or about November 21st, 2005, PHRC notified Respondent that probable cause existed to credit the allegations of the second complaint. (S.F. 16; N.T.I 12.)

17. PHRC scheduled a conciliation conference regarding the second complaint for December 5, 2005. (S.F. 17; N.T.I 12.)

18. At Respondent's request, the conciliation conference was rescheduled for January 18, 2006. (S.F. 18; N.T.I 12.)

19. Conciliation was not successful. (S.F. 19; N.T.I 13.)

20. On or about March 1, 2007, PHRC Executive Director Homer C. Floyd notified the parties that both cases were approved for public hearing. (S.F. 20; N.T.I 13.)

21. The procedural prerequisites for public hearing have been satisfied. (S.F. 21; N.T.I 13.)

22. The Complainant is Vikki Mace (hereinafter "Complainant" or "Mace"), formerly Vikki Arentz. (S.F. 2.)

23. The Complainant is an adult female, who at all times relevant to this matter resided in the Commonwealth of Pennsylvania. (S.F. 2; N.T.I 53.)

24. The Respondent is Caco Three, Inc. (hereinafter "Respondent" or "McDermitt"), doing business as McDermitt Concrete, Inc. (S.F. 3.)

25. The Respondent employed more than four individuals within the Commonwealth at all times relevant to this case and is considered an "employer" under the Pennsylvania Human Relations Act. (S.F. 7; R.E. 5.)

26. The Respondent is an asphalt and concrete trucking company with plants in Gettysburg, PA and Hanover, PA. (N.T.I. 261; N.T.II. 82.)

27. McDermitt is managed by Robert Mumma (hereinafter "Mumma"), an adult male who owns approximately a half interest in McDermitt. (N.T.I. 224.)

28. Mumma is not directly involved in the daily operation of McDermitt, does not have an office at either plant and actually spends part of the year in Florida. (N.T.I. 257.)

29. At all times relevant to this matter, Phil Klocek (hereinafter "Klocek"), an adult male, was employed as the Operations Manager of the Gettysburg Plant, and was the Complainant's direct supervisor. (N.T.I 104, N.T.II 73.)

30. In October 2003, Klocek resigned from McDermitt. (N.T.II 72-73.)

31. Ginger French (hereinafter "French") is an adult female who had been employed as the Respondent's office manager since 1996. (N.T.I 282.)

32. As the Office Manager, French was placed in charge of accounting and personnel, including the maintenance of employee files. (N.T.I 282; N.T.II 17.)

33. The Complainant was first hired by the Respondent in 1993. (N.T.I 54.)

34. The Complainant was employed continuously from 1993 to April 7, 2000, when she voluntarily quit for personal reasons. (N.T.I 53-54, 95.)

35. Approximately six weeks later, the Complainant asked for her job back and was re-hired by Klocek in June 2000. (N.T.I 54, 96-97.)

36. For the duration of both terms of employment the Complainant was a cement truck driver. (N.T.I 53.)

37. There are few women cement truck drivers in general, but the Respondent prides itself on employing women whenever possible. (N.T.I. 245; R.E. 5.)

38. Each driver is assigned to a truck and is responsible for ensuring the truck's maintenance in addition to their primary duties of loading the truck and delivering loads to customers. (N.T.I 36-38.)

39. Occasionally drivers would be assigned to a different truck for the day or the duration of a job. (N.T.I 228.)

40. The Complainant received a copy of the Respondent's Employee Handbook. (N.T.

I 97.)

41. From time to time, the Company would amend the Employee Handbook in the form of memoranda, which would be distributed to employees for their notice and insertion into their Handbook. (N.T.I 212.)

42. In relevant part, the Respondent's Employee Handbook contains the following provisions regarding corrective action and employee conduct: (R.E. 2, 7-10.)

§ 3 – EMPLOYEE RULES AND REGULATIONS:

--EMPLOYEE INFORMATION AND RECORDS - ...In regards to any disagreement on subjective matters such as evaluation or disciplinary actions,

employees will be permitted to submit concise statements of rebuttal, in written form only, for inclusion in their files.

--**EMPLOYMENT PROBLEM RESOLUTION** – Our policy is to resolve employment problems, including harassment, as fairly as possible. An employee who encounters work-related problems is encouraged to discuss the problem with the supervisor. If the supervisor is unable to resolve the problem to the employee's satisfaction, the employee should discuss the problem with Personnel... If the employee would prefer not to discuss the problem with his supervisor or Personnel, he may go directly to the President.

--**CORRECTIVE ACTION** – ...Forms of corrective action may include oral counseling, written warnings, probationary status, suspension from work and discharge. The degree of corrective action, whether first offense or one of several, will be determined by management, in its sole judgment and discretion will primarily depend upon the gravity of the offense and the circumstances under which it occurred.

The following lists are considered misconduct and are grounds for corrective (sic) action...

1. Gross Negligence, i.e., actions caused through excessive carelessness which endangers the physical welfare of oneself or others and/or subjects Company property to costly damage or abuse – a violation of operational policy resulting in a loss to the Company or its customers.

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6. Insubordination – The refusal to carry out the work related orders or instructions of a supervisor.

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8. Use of abusive, offensive, or obscene language or gestures.

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20. Failure to maintain equipment properly.
21. Contributing to unsanitary conditions or poor housekeeping.

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36. Threatened physical violence or profane abusive language toward another employee or customer.

43. At McDermitt, corrective actions are typically handled by the direct supervisor of the employee. (N.T.I 214.)

44. The employee handbook is the only direction given to supervisors on how to handle employee complaints and issue corrective actions. (N.T.I 214-16.)

45. As a result, corrective actions are largely based on the employee's past record and the discretion of the issuing supervisor. (N.T.I 216-17.)

46. On November 7, 2001, there was an altercation involving the Complainant and Kim Bucher (hereinafter "Bucher"). (N.T.I 58.)

47. Another McDermitt employee, Deb Leedy (hereinafter "Leedy"), allegedly witnessed this incident. (N.T.II 32, 58.)

48. Bucher's legal name at the time of this hearing is Kim McDermott, but for clarity and consistency, she will be referred to by her name at the time relevant to this matter, "Bucher." (N.T.II 27.)

49. Bucher was an adult female employed by McDermitt as a Quality Control Manager from 2001-02. (N.T.II 28.)

50. Bucher's position at McDermitt required that she create concrete designs and test the product being delivered to customers, ensuring that it was mixed to the correct specifications. (N.T.I 246, 250, 286; N.T.II 28.)

51. Bucher's duties necessarily placed her in a quasi-supervisory position over the drivers. (N.T.I 246, 250; N.T.II 29.)

52. Leedy is an adult female who had previously been employed as a driver, but at the time in question was a lab technician under Bucher's supervision. (N.T.II 9, 28, 55.)

53. Leedy left McDermitt in the spring of 2002. (N.T.II 55.)

54. On November 7, 2001 there was an issue with machinery at the plant, creating a concern that the wrong type of stone, an MD-3, may have been included in the mix. (N.T.II 31-32.)

55. Bucher approached all of the drivers that day, asked them to keep an eye out for any MD-3s and inform dispatch if they found any. (N.T.II 32.)

56. Bucher specifically asked Leedy to accompany her when she went to talk with the Complainant, as she felt uncomfortable around Mace. (N.T.II 32, 37, 59-60.)

57. The Complainant was filling the water tank of her truck when Bucher approached her. (N.T.I 59.)

58. Bucher and Mace remained at opposite ends of the truck throughout the entire exchange. (N.T.II 41, 47.)

59. The engine in the Complainant's truck was running during the exchange, forcing both parties to yell to be heard. (N.T.I. 66-67; N.T.II 47.)

60. Leedy overheard the confrontation from a position behind the Complainant's truck. (R.E. 9.)

61. When Bucher approached the Complainant and asked her to check for MD-3s, Mace became agitated and began to yell at Bucher. (N.T.II 32, 59.)

62. The Complainant's tirade contained inappropriate and abusive language, and was only ended by Bucher's leaving. (N.T.II 32, 61.)

63. Bucher subsequently reported the incident to French, and both Bucher and Leedy met with both Klocek and French on the afternoon of November 7, 2001. (N.T.I 286, 290.)

64. That day, Bucher and Leedy each wrote a statement recounting the incident. (N.T.I 288-91; N.T.II 33, 61; R.E. 8; R.E. 9.)

65. The Complainant was later called into Klocek's office, where Klocek and French delivered a corrective action. (N.T.I 60; C.E. 8.)

66. French and Klocek reached the conclusion that the Complainant had spoken to Bucher in a threatening manner and decided that a three-day suspension was warranted. (N.T.I 293; N.T.II 78.)

67. Dated November 7, 2001 the Complainant received a three-day suspension for "use of abusive, offensive or obscene language or gestures" and "threatened physical violence or profane abusive language toward another employee..." in violation of the employee handbook. (C.E. 8.)

68. The written notice of suspension noted that the decision to suspend was based on "information gained through parties involved & witnesses who heard or seen (sic) what happened unless other evidence can be obtained." (C.E. 8.)

69. This conclusion was supported by the facts that Bucher was merely doing her job, Mace had admitted to yelling and Leedy had verified Bucher's story. (N.T.I 294.)

70. The Complainant served the three-day suspension. (N.T.I 104, 296; N.I, II 16.)

71. During the three-day suspension, the Complainant visited the PHRC and began the process of filing a claim. (N.T.I 113.)

72. In her written statement dated November 8, 2001, the Complainant wrote a rebuttal to the charge wherein she gave her version of the incident. (C.E. 9.)

73. In her statement, the Complainant states "I call that discrimination! Against me! And so does the labor board!" (C.E. 9.)

74. In testimony, the Complainant explained that by "labor board" she actually meant the PHRC. (N.T.I 111-13.)

75. On or about November 15, 2001, the Complainant also gave McDermitt a written letter in which she alleged that Leedy's statement was false. (N.T.I 107; C.E. 10.)

76. The Complainant identified and spoke with several individuals that she believed had witnessed the confrontation. (N.T.I 109.)

77. After showing the letter to each person, the Complainant asked them to sign if they agreed with the statement. (N.T.I 110.)

78. The November 15, 2001 letter was signed at the bottom by six people, who included five employees of McDermitt and an independent contractor. (N.T.I 107-10; C.E. 10.)

79. On December 18 and 20, 2001, Klocek conducted interviews with each of the signatories to investigate the claims made in the letter. (N.T.II 80; C.E. 18.)

80. Bernie M., Dan B. and Randy B. stated that they had not actually witnessed the incident, but signed the paper when the Complainant asked. (N.T.I 298; C.E. 18.)

81. Joe S. stated that Leedy was not in the area, but he did not actually see or hear any of the confrontation. (N.T.I 298; C.E. 18.)

82. Dan S. was not available for questioning. (N.T.I 298; C.E. 18.)

83. The sixth signatory, Paul Smith, was an independent contractor, who did not wish to get involved in employee disputes. (N.T.I 298; C.E. 18.)

84. Since the investigation did not substantiate the claims made in the November 15, 2001 letter, the suspension was not revoked. (N.T.I 299.)

85. On October 19, 2001, two weeks before the incident involving Mace and Bucher, Klocek issued a written warning to another employee for the use of abusive language. (C.E. 5.)

86. This warning was given to Raymond Unger (hereinafter "Unger"), an adult male employee. (N.T.I 28; C.E. 5.)

87. Unger had worked as a driver for McDermitt for approximately 15 years and had no previous disciplinary record. (N.T.I 28, 33.)

88. Klocek was the supervisor involved in the incident and also the one who wrote and delivered the warning notice. (N.T.II 81.)

89. The written warning documented the incident and included a notation that should the incident occur again, Unger would be given a three-day suspension without pay. (N.T.I 301; C.E. 5.)

90. Unger and Klocek had a disagreement in the dispatch office and Klocek told Unger to go down and get in his truck. (N.T.I 24.)

91. Upon leaving the office, Unger slammed the door, prompting Klocek to follow Unger out and tell him that there was no reason to be slamming doors. (N.T.I 25.)

92. Unger then turned around and yelled "f*** you" to Klocek. (N.T.I 25; N.T.II 82.)

93. Klocek testified that he did not issue a suspension because he had not felt threatened by Unger, who was just frustrated, and that Unger then went on to doexactly what had been asked of him. (N.T.II 81-82.)

94. On January 7, 2002, the Complainant filed an official complaint of disparate treatment with the PHRC at Case No. 200101823. (S.F. 1.)

95. The Respondent filed an answer on or about April 5, 2002. (S.F. 6.)

96. Leedy left McDermitt in April 2002, and shortly thereafter received a letter from Mace. (N.T.II 63; R.E. 3.)

97. In the letter, Mace demands that Leedy write a new letter to McDermitt, telling the "TRUTH" about the incident. (R.E. 3.)

98. The letter then states that the PHRC investigator attached to the disparate treatment case, Mr. Kaiser, told Mace to write this letter. (R.E. 3.)

99. The letter also states that Mr. Kaiser had all of Leedy's personal information and would make sure that Leedy never held a job in Pennsylvania again. (R.E. 3.)

100. When questioned, the Complainant admitted that she wrote the letter on her own, without Mr. Kaiser's knowledge or consent, and made up these threats in order to make Leedy change her story. (N.T.I 123-26.)

101. Drivers are routinely transferred from one facility to another, depending on the needs of the company. (N.T.I 127, 225.)

102. Shortly before October 10, 2002, the Complainant was transferred from Gettysburg to the Hanover facility. (N.T.I 72.)

103. The Complainant made several complaints about her transfer over the company radio, where she used inappropriate language. (N.T.I 233-34.)

104. On October 10, 2002, Mumma sent the Complainant a letter, warning her that inappropriate conduct would not be tolerated, and that any further violations of company policy would result in termination. (N.T.I 237.)

105. On October 31, 2002, Mumma visited the Hanover facility and saw that Mace's truck was unwashed and parked in the wrong spot. (N.T. 264.)

106. That day, several of the trucks did not meet Mumma's standards for cleanliness, and 11 other drivers were issued warnings. (N.T.I 267, 269.)

107. As stated in the October 10 letter, Mumma decided to terminate the Complainant. (N.T.I. 266.)

108. The Complainant received a letter informing her of her termination on October 31, 2002. (N.T.I. 73.)

109. The Complainant allegedly called Mumma to ask why she had been terminated (N.T.I. 144.), but never protested her termination to anybody at McDermitt. (N.T.I 73, 145.)

110. A Finding of Probable Cause in the disparate treatment case was served upon the Respondent on or about December 24, 2002, over one month after the Complainant had been terminated. (S.F. 8.)

111. The 180 day filing period with the PHRC for any claims arising out of this termination ended on May 19, 2003. (C.E. 1.)

112. The Complainant's March 1, 2003 letter was received by the PHRC on March 3, 2003; 123 days after the Complainant's termination. (C.E. 14.)

113. The March 1, 2003, letter was apparently the first contact between the Complainant and the PHRC which indicated that she had been terminated. (N.T.

I 145.)

114. This letter expresses the Complainant's dissatisfaction with a proposed settlement agreement for the disparate treatment claim, primarily the fact that it does not require the removal of the written disciplinary action from the Complainant's employee file. (C.E. 14.)

115. The Complainant wrote that her disparate treatment case was "because of the letter. It always was about the letter in my file. The money was not the issue...." (C.E. 14.)

116. In conclusion, the Complainant made a vague reference to her termination on October 31, 2002, claiming that she was terminated "for no reason" and alleging that it was "because of this." (C.E. 14.)

117. The final sentence of the letter reads: "[s]o why can't we go with the original agreement?" (C.E. 14.)

118. In testimony concerning the March 1, 2003, letter, the Complainant stated that she couldn't "remember why [she] wrote it." (N.T.I 149, 208-09.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission") has jurisdiction over the parties under the Pennsylvania Human Relations Act of 1955, P.L. 744, No. 222, as amended, 43 PS §§ 951, *et seq.* (hereinafter "PHRA").

2. The Commission has jurisdiction over the subject matter of the complaints under the PHRA.

3. The parties and the Commission have fully complied with the procedural prerequisites for a public hearing in this matter.

4. The Complainant is a "person" within the meaning of Section 4(a) of the PHRA.

5. The Respondent is an "employer" within the meaning of Section 4(b) of the PHRA.

6. The complaint of disparate imposition of discipline, filed at Case No. 200101823, satisfies the filing requirements set forth in Section 9(a) of the PHRA.

7. The Complainant established a *prima facie* case of disparate treatment by proving that:
   1) the Complainant is a member of a protected class; and
   2) the Complainant suffered an adverse employment action; and
   3) a similarly situated employee, who is not a member of the Complainant's protected class, was treated differently in a comparable situation.

8. The Respondent has offered a legitimate and non-discriminatory reason for issuing the Complainant a suspension.

9. The Complainant has not succeeded in showing that the Respondent's reason is actually pretext to mask an act of intentional discrimination.

10. A Complainant can successfully establish a *prima facie* case of retaliation by proving that:
    1) the Complainant engaged in a protected activity; and
    2) the Respondent knew of the Complainant's protected activity; and
    3) the Complainant suffered an adverse employment action; and
    4) there is a causal connection between the protected activity and the adverse employment action.

11. The Complainant has not succeeded in showing a *prima facie* case of retaliation.

OPINION

This opinion deals with two separate complaints that were filed with the Pennsylvania Human Relations Commission and eventually consolidated for a Public Hearing. On or about January 7, 2002, the Complainant, Vikki "Arentz" Mace, filed a verified complaint with the Commission against McDermitt Concrete, Inc. This complaint was assigned PHRC Case No. 200101823. The Complainant alleged that she was subjected to disparate treatment due to her sex, female, in violation of Section 5(a) of the Pennsylvania Human Relations Act of 1955, P.L. 744, No. 222, as amended, 43 P.S. §951, *et seq.* (hereinafter "PHRA"). On or about June 6, 2003, the Complainant filed a second complaint against the Respondent, alleging retaliation in violation of Section 5(d) of the PHRA. The second complaint was assigned Case No. 200209894. Both complaints were subsequently amended to reflect the correct legal names of the parties.

On December 24, 2002, after completing investigation, PHRC staff notified the Respondent that probable cause existed to credit the allegations of disparate treatment made in Complaint 200101823. After the entry of a finding of probable cause, PHRC staff attempted to resolve the matter through conference, conciliation and persuasion, but they were unable to do so.

On November 21, 2005, PHRC staff notified the Respondent that probable cause also existed to credit the allegations of retaliation made in Complaint 200209894. After the entry of a finding of probable cause, PHRC staff attempted to resolve the matter through conference, conciliation and persuasion, but they were unable to do so. On March 1, 2007, Executive Director Homer C. Floyd notified the parties that both cases had been approved for public hearing.

The Public Hearing in this consolidated matter was held in the Adams County Courthouse on September 17 and 18, 2007, before Phillip A. Ayers, Permanent Hearing Examiner. Joseph Bednarik, Esq., appeared on behalf of the state's interest in the Complaint. Mark J. Swerdlin, Esq. and Teresa D. Teare, Esq. appeared on behalf of the Respondent. The Respondent and the Commission both filed post-hearing briefs on November 15, 2007.

Complaint of Disparate Treatment

The first issue we will address is the Complainant's initial claim of disparate treatment regarding her 3-day suspension in November 2001. This claim is established in Section 5(a) of the PHRA, which states that it is an unlawful discriminatory practice "[f]or any employer because of the...sex...of any individual...to otherwise discriminate against such individual...with respect to compensation, hire, tenure, terms, conditions or privileges of employment... ." 43 P.S. §955(a).

The basic framework used in evaluating a case of employment discrimination was provided by the United States Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), and was expanded upon by Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Use of this formula cures some of the inherent evidential issues that arise in employment discrimination claims by allowing the burden of production to shift between the parties. McDonnell-Douglas, 411 U.S. at 802-05.

First, a Complainant must present a *prima facie* case of discrimination. In order to prove a *prima facie* case of disparate treatment, the Complainant must show 1) that she is a member of a protected class; 2) that she suffered an adverse disciplinary action; and 3) that other employees, who are not members of the protected class, were

not subject to the same disciplinary action. Once a *prima facie* case has been made, the Respondent must offer a legitimate, non-discriminatory reason for their action in order to rebut the presumption of discrimination. After a Respondent has offered this legitimate reason, the Complainant may only prevail by showing, upon a preponderance of the evidence, that they were still the victim of intentional discrimination. Allegheny Housing Rehabilitation Corp. v. PHRC, 532 A.2d 315, 318-19 (Pa. 1987). While the burden of production does shift between the parties, the ultimate burden of persuasion always remains with the Complainant. Id.

In the interest of protecting employees from the more subtle forms of discrimination, the Complainant's initial burden is not an onerous one. Burdine, 450 U.S. at 253. In this case, the Complainant has successfully met this burden. She has shown that she is a member of a protected class, female. (S.F. 2.) The Complainant suffered an adverse employment action when she was given a 3-day suspension for "use of abusive, offensive or obscene language or gestures." (C.E. 8.)

To satisfy the third element, the Complainant has offered by comparison an incident that had taken place two weeks earlier and the resultant in corrective action. *See* Ogden v. Keystone Residence, 226 F.Supp.2d 588, 603 (M.D.Pa. 2002) (similarly situated employees "must have dealt with the same supervisor... been subject to the same standards, and have engaged in [substantially] the same conduct."). Here, Raymond Unger a male employee, was given a written warning for "using abusive language towards [a] supervisor." (N.T.I 28; C.E. 5.) Unger and the Complainant were similarly situated employees in that they both reported to the same supervisor (Klocek), had the same job title, Cement Truck Driver, and had both been with the company for several years with no prior disciplinary issues. (N.T.I. 28, 33.) Unger was also involved in a confrontation with a supervisor which involved the use of abusive language. (N.T.I.

24.) Unger was only given a written warning, but was told that he would be given a 3-day suspension if anything similar occurred again. (C.E. 5.)

On these facts, the Complainant has met her burden, which raises an inference that the Respondent acted in a discriminatory manner. Burdine, 450 U.S. at 254. Thus, the burden of production now shifts to the Respondent, who must articulate a legitimate, non-discriminatory reason for the action in question to effectively rebut the presumption of discrimination. Id. The Respondent has offered a legitimate, non-discriminatory reason for suspending the Complainant by claiming that supervisory personnel were given substantial discretion to evaluate the seriousness of an offense in determining what disciplinary action to take. (N.T.I. 214-17.)

Our purpose in evaluating these events is not to determine whether or not the actual suspension was warranted, but whether the Respondent's supervisor was acting legitimately and within the limits of his discretion in giving the Complainant a suspension. Title VII of the Civil Rights Act of 1964, and accordingly the PHRA, were "not intended to 'diminish traditional management prerogatives,' " but to provide remedies for victims of intentional discrimination. Burdine, 450 U.S. at 259 (quoting Steelworkers v. Weber, 443 U.S. 193, 205-06 (1979)).

Management at McDermitt was given little guidance and significant discretion in determining what type of action should be taken when dealing with employee misbehavior. (N.T.I. 214.) While hindsight and the course of time indicate large discrepancies between each party's versions of the events of November 7, 2001, our inquiry must look at the information available to the Respondent at the time the disciplinary action was taken. (N.T.I. 59-67; N.T.II. 31-33, 41-47.) Klocek and French were confronted with a frustrating situation where two employees presented substantially identical versions of an event, but which the third, and arguably at-fault

employee, denied. While the testimony and evidence show varying discrepancies after nearly 6 years, no showing has been made that any of the three employees had disciplinary issues prior to this event, or that their credibility was in question at the time of the incident. Bucher, in fact, held a semi-supervisory position, even though she was not the direct supervisor of the Complainant. (N.T.I. 246, 250, 286; N.T.II. 28.)

The altercation that occurred on November 7, 2001, involved the Complainant and Bucher, and lasted for several minutes. (N.T.II. 32, 61.) The altercation was witnessed by Leedy, who fully supported Bucher's version of events. (R.E. 9.) Directly following the incident, both Bucher and Leedy approached their human resources supervisor, French. Written statements were requested of both parties, after which both French and the Complainant's supervisor, Klocek, approached the Complainant for her story. (N.T.I. 60, C.E. 8.) French and Klocek decided together that Mace had violated the Employee Code of Conduct and should receive a suspension. (N.T.I. 294; C.E. 8.) According to French, the decision to give Mace a suspension rested primarily upon Leedy's support of Bucher's statement, Bucher's semi-supervisory position, and the fact that Bucher had stated that she felt threatened. (N.T.I. 294.) The warning notice itself reflects the willingness of Klocek and French to re-evaluate the situation, and further gave the Complainant the opportunity to refute Bucher and Leedy's claims. (C.E. 8.) Based upon the information available on November 7, 2001, and the lack of substantiated rebuttal from the Complainant, Klocek and French acted well within their discretion in deciding that the Complainant's conduct warranted more serious action than a simple warning.

The ultimate burden of persuasion never leaves the Complainant, and so once the Respondent has stated a legitimate, non-discriminatory reason for their action, the Complainant may only prevail if, upon a preponderance of all the evidence, she has

persuaded the trier of fact that the Respondent had intentionally discriminated against her in violation of the PHRA. *See* Allegheny Housing, 532 A.2d at 318. A Complainant may either attempt to discredit the proffered non-discriminatory reason or affirmatively show, through persuasive evidence, that the offered reason was a pretext, and that a discriminatory reason was most likely the actual reason for the Respondent's action. Id.

In an employment discrimination case, the credibility of the parties plays a large role in the final determination, as "once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then decide which party's explanation of the employer's motivation it believes." Id. at 319 (internal quotations omitted). Here, it is necessary to note that the Complainant was a less than a reliable witness and her actions, demeanor and lack of candor make her testimony suspect.

The Complainant's testimony was littered with contradictions, the most obvious of which relate to her motives for submitting a letter, which she now claims to be her initial complaint in the retaliation claim discussed below. The Complainant's testimony regarding her personal behavior directly contradicted the testimony offered by every other witness in this matter, and was frankly incredible. While the substantive testimony offered was enough to put the Complainant's credibility into question, the Complainant also testified to several of her own actions which further indicate her lack of integrity. First, the Complainant testified that in order to rebut Bucher and Leedy's claims, she approached 6 people who were nearby during the altercation, and asked them to sign a memo that she had created, verifying her position. (C.E. 10; N.T.I. 109-10.) When Klocek and French investigated these claims, they found that none of the signatories were able to confirm the Complainant's story. (C.E. 18.)

The second and greatest blow to the Complainant's credibility is the letter that she sent to Leedy after she had initiated this complaint with the PHRC. (R.E. 3; N.T.I. 123-26.) In this letter, the Complainant stated that she was acting on the advice of the PHRC investigator attached to her case, purported to have access to Leedy's Social Security Number and Driver's License information, and threatened to ensure that Leedy would never be hirable in the state again, unless she told the truth about what had happened on November 7, 2001. *Id*. The use of a PHRC employee's name and position in such a fashion is completely unacceptable. The Complainant's actions here are indicative of a complete lack of integrity and showcase the willingness of the Complainant to lie and deceive in order to further her own agenda. For these reasons, the Complainant's testimony lacks credibility and was given little persuasive weight.

In an attempt to rebut McDermitt's legitimate, non-discriminatory reason for the suspension, the Complainant offers only a comparison to the disciplinary action taken against Raymond Unger. While this discrepancy was sufficient to satisfy the relatively low burden of proof necessary to establish a *prima facie* case, it alone is not persuasive enough to justify an inference of intentional, sex-based discrimination in light of McDermitt's offered non-discriminatory reason. In order to persuade us that the Respondent's reason is either false or a pretext, the Complainant must address the ultimate issue in a case of sex-based disparate treatment: that the adverse employment action she suffered was a result of an intentional discriminatory act, which was in turn based upon her sex, female. The Complainant has failed to provide any evidence that her treatment was a result of her sex. The only offer she made was that she is female and received a suspension, whereas Unger is male and only received a warning.

As discussed above, Unger and the Complainant can be considered similarly situated employees for our purposes. On October 19th, 2001, Klocek gave Unger, a

male truck driver, a written warning for "insubordination," slamming a door and "using abusive language" towards a supervisor. (C.E. 5.) Klocek and Unger were the only two parties involved in this incident, which Klocek described as the result of Unger's frustration and displeasure with his assigned job. (N.T.II. 81-82.) Klocek stated that he only issued a warning since he had not felt threatened and Unger had gone on to do as he was told after the incident. Id. The warning did, however, include a notation that should the incident happen again, Unger would be facing a 3-day suspension. (C.E. 5.)

In comparing the events that led to the Complainant's suspension, we are met with a similar situation, but notably different behavior. Both Mace and Unger were involved in altercations with a supervisor, although Bucher was not Mace's direct supervisor. (N.T.I. 246, 250; N.T.II. 29.) While Unger had been cited for using abusive language, it is uncontested that this confrontation was under a minute in duration, and only involved the use of one expletive. (N.T.I. 25; N.T.II. 82.) The confrontation between Mace and Bucher was at least several minutes in duration, and involved raised voices, swearing and threats. (N.T.II. 32, 59-61.) Klocek did not feel threatened by Unger's outburst and Unger promptly did as he was told. (N.T.II. 81-82.) One of the most important factors considered in deciding to give the Complainant a suspension was that Bucher had felt threatened by Mace's actions that day. (N.T.I. 286-91; R.E. 8; R.E. 9.)

There is considerable evidence from our earlier discussion of the Respondent's corrective action process to support the different outcomes in these two instances. The Complainant's offered comparison is neither conclusive proof that discrimination occurred, nor sufficiently persuasive evidence to support the conclusion that Mace was intentionally discriminated against because of her sex.

Complaint of Retaliation

The Complainant's second claim arises out of Section 5(d) of the PHRA, which states that it is an unlawful discriminatory practice "[f]or any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act...." 43 P.S. §955(d).

A claim of retaliation is also subject to the McDonnell-Douglas burden-shifting analysis that was utilized in the disparate treatment claim above. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this framework, the Complainant bears the initial burden of presenting a *prima facie* case of retaliation. The successful Complainant must present evidence that: 1) the Complainant engaged in a protected activity by opposing a discriminatory practice of the Respondent; 2) that the Respondent knew of their opposition; 3) that the Complainant suffered an adverse employment action; and 4) that there is a causal connection between the adverse employment action and the Complainant's opposition. Robert Wholey Co. v. PHRC, 606 A.2d 982, 983 (Pa. Cmwlth. 1992). The Complainant here has failed to meet this burden.

The Complainant engaged in a protected activity when she filed the initial claim of discrimination with the PHRC. The Respondent clearly knew of this activity, as they subsequently filed an answer to the complaint and then engaged in both fact-finding and settlement conferences with the Complainant and agency staff. (S.F. 5-9.) The Complainant suffered an adverse employment action when she was terminated on October 31, 2008. (N.T.I. 73.) The Complainant has met the first three elements, but has failed to provide sufficient evidence which will allow us to imply a casual connection between her opposition and termination.

There are two ways to successfully show causation in a retaliation case, either by a direct statement of the Respondent's or through inference. Since direct evidence of retaliation is found only in the rarest of cases, the Complainant is given an opportunity to show that the facts surrounding the adverse employment action would allow a reasonable trier of fact to infer that the employer likely acted with a discriminatory intent. One of the several ways to show that an inference of causation should be drawn is to provide evidence of inconsistent statements regarding the reason for action. In Waddell, inconsistencies in the reason given for termination of the Complainant were enough to provide an inference of causation. Waddell v. Small Tube Products, 799 F.2d 69, 73 (3d Cir. 1986).The court noted that such inconsistent statements are generally indicative of alternative motives. Id.

Alternatively, a complainant may show an "intervening period of antagonism," which may indicate animosity on the employer's behalf. The plaintiff in Woodson was successful in showing such antagonism by providing evidence that the defendant purposefully set him up to fail, so that they could then fire him for inadequate job performance. Woodson v. Scott Paper Co., 109 F.3d 917, 921 (3d Cir. 1997). This type of action clearly displayed animosity on the part of the Defendant, and an intent to retaliate against Woodson's earlier complaint.

A third and final way to justify the inference of causation is to prove that there was an unusually short time lapse between the Respondent's learning of the Complainant's opposition and the adverse employment action. The Third Circuit found that an intervening time period alone "may suggest discriminatory motives," but cautions that this will apply to very few cases. Jalil v. Avdel Corp., 873 F.2d 701 (3d Cir. 1989). In Jalil, the Plaintiff was discharged under questionable circumstances, only two days after he filed a report of discrimination. Subsequently, the Third Circuit has significantly

limited this type of inference to situations comparable to "the unusually suggestive facts of Jalil." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997).

The Complainant has indicated two instances of retaliation: the written warning from October 10, 2002, and the Complainant's termination on October 31, 2002. The Complainant claims that the temporal proximity of these adverse actions and the investigation into Mace's initial complaint is indicative of the Respondent's retaliatory motive. The Complainant further cites management's description of Mace as a "complainer" and the fact that Mace was the only employee fired on October 31, 2002 as indicative of management's retaliatory attitude.

First, it is important to note that the initial complaint was filed on January 7, 2002. (S.F.1.) The Respondent was served with a copy of the Complaint on or about February 7, 2002, and the Respondent's Answer was filed on April 5, 2002. (S.F. 4, 5.) The two incidences of alleged retaliation occurred on October 10, 2002 and October 31, 2002, more than 6 months after the Answer was filed. The Respondent was not served with a Finding of Probable Cause on the claim until December 24, 2002, more than a month after the Complainant was fired. (S.F. 8, 9.) The first conciliation conference was subsequently scheduled for January 14, 2003. (S.F. 10.)

When evaluating the temporal proximity of events, we must look not to the timing of the adverse action(s) taken, but to the lapse of time that occurred between the Complainant's act of opposition, the Respondent's learning of this opposition and the adverse action. The Third Circuit has explicitly stated that temporal proximity is to be applied only when the circumstances are so "unusually suggestive" as to mandate a finding of retaliation. Jalil, 873 F.2d at 708 (2 days between opposition and termination). The Complainant's own misbehavior provides enough reason to support the escalation of disciplinary action leading up to the Complainant's termination, and there is not

enough evidence presented to show a "pattern of antagonism" on the Respondent's behalf which would be sufficient to satisfy the Woodson criteria. (N.T.I. 123-27, 225, 233-37; R.E. 3.)

The Complainant successfully presented a *prima facie* case of disparate treatment, but was unable to provide persuasive evidence that the Respondent acted with discriminatory intent when they issued her the initial suspension. This does not overcome the legitimate, non-discriminatory reason for the disciplinary action offered by the Respondent. The Complainant was also not able to make a *prima facie* showing of retaliation in the second claim. In light of these findings, an order to dismiss both complaints follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VIKKI MACE	:	
Complainant	:	
	:	**PHRC CASE NUMBERS**
v.	:	**200101823**
	:	**&**
CACO THREE, INC. d/b/a	:	**200209894**
MCDERMITT CONCRETE, INC.	:	
Respondent	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned consolidated matters, the Permanent Hearing Examiner finds that the Complainant has failed to prove sex-based discrimination through disparate treatment in Case No. 200101823. The Complainant also failed to provide evidence of retaliation in Case No. 200209894, and both matters should be dismissed.

It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings 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

April 6, 2009
Date

By: Phillip A. Ayers
Phillip A. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VIKKI MACE **Complainant** **v.** **CACO THREE, INC. d/b/a** **MCDERMITT CONCRETE, INC.** **Respondent**	: : : : : : : :	**PHRC CASE NUMBERS** **200101823** **&** **200209894**

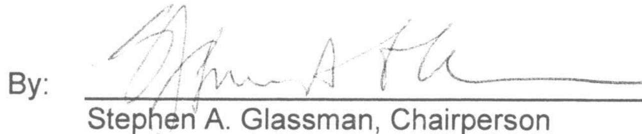
FINAL ORDER

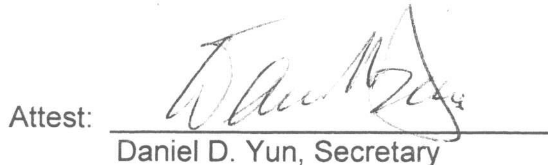
AND NOW, this 28th day of April, 2009, after a review of the entire record in these consolidated matters, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the full Commission adopts said Findings of Fact, Conclusions of Law, and Opinion as its own finding in these consolidated matters and incorporates the same into the permanent record of the proceeding, to be served on the parties to these complaints, and hereby

ORDERS

that the complaints in Case Numbers 200101823 and 200209894 be dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Stephen A. Glassman, Chairperson

Attest: 
Daniel D. Yun, Secretary