COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD A. OVERBY, Complainant
v.
ACME TREE SERVICE & LANDSCAPING, Respondent

DOCKET No. E-98440

STIPULATIONS OF FACT

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OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
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ACME TREE SERVICE & LANDSCAPING, Respondent

Docket No, E-98440

STIPULATIONS OF FACT

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

1. Richard A. Overby (hereinafter "Complainant") is an African American.
2. The Respondent herein is Acme Tree Service & Landscaping (hereinafter "Respondent").
3. The Respondent, at all times relevant to the case at hand, has employed four or more persons within the Commonwealth of Pennsylvania.
4. On or about February 20, 2001, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number E-98440. A copy of the complaint will be included as a docket entry in this case at time of hearing.
5. On or about May 9, 2001, Respondent filed an Answer in response to the complaint. A copy of the response will be included as a docket entry in this case at time of hearing.
6. On or about August 9, 2001, the Complainant filed a verified amended complaint with the Commission. A copy of the complaint will be included as a docket entry in this case at time of hearing.
7. On or about October 5, 2002, Respondent filed an Answer in response to the amended complaint. A copy of the response will be included as a docket entry in this case at time of hearing.
8. In correspondence dated November 5, 200l, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause 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 subsequent correspondence dated January 3l, 2002, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

By Counsel for the Commission:	Charles L. Nier, III	6/19/02
By Complainant:	Richard Overby	6/27/02
By Counsel for the Respondent:	Sean O'Brien, Esquire	6/20/02

FINDINGS OF FACT*

1. The Respondent, Acme Tree Service & Landscaping, (hereinafter "Acme"), is a seasonal tree trimming/removal and landscaping business. (N.T. 39, 243).
2. For approximately 40 years, William Burkholder was the President of Acme. (N.T. 245).
3. Each year, due to lack of work, Acme's work force is laid off between approximately October and November and recalled between February and March. (N.T. 44, 88, 204, 250).
4. In the fullness of its summer season, Acme employed approximately eight employees in the positions of climbers and groundsman. (N.T. 251-252).
5. Between 1986 and 1994, William Burkholder employed his son, Eric Burkholder, as the head of sales and as a climber. (N.T. 242, 243).
6. In 1994, Eric Burkholder left Acme and went to Connecticut to run a motorcycle race track. (N.T. 246).
7. On or about 1998, after William Burkholder had a stroke, Eric Burkholder returned to Acme to help his father run Acme. (N.T. 207, 246).

* The foregoing "Stipulations of Facts" are hereby incorporated herein as a 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
S.F. Stipulation of Fact

8. While Eric Burkholder was away, the Complainant, Richard Overby, (hereinafter "Overby"), approached William Burkholder about a job. (N.T. 39, 89, 179).
9. In 1997, William Burkholder hired Overby as a groundsman at the rate of $9.00 per hour.
10. Overby lived next door to Acme. (N.T. 63, 72, 73).
11. Acme's groundsman duties generally included: preparing wood chippers; cleaning debris created when limbs are removed from trees; stacking and chipping branches; removing stumps; spraying for insects; fertilizing trees; and trimming shrubbery. (N.T. 40, 342).
12. Normally, Acme work crews consisted of two individuals: a climber and a groundsman. (N.T. 162, 171).
13. The climber on an assigned work crew supervised the groundsman. (N.T. 206, 251, 252).
14. Until Eric Burkholder's return in 1998, Acme's work hours were 8:00 a.m. to 4:30 p.m. (N.T. 40, 43, 180, 256).
15. After Eric Burkholder returned, he installed a time clock and instructed employees to report to work at 7:45 a.m. to ready Acme's equipment. (N.T. 41, 165, 203, 250).

16. Employees did not work either when it rained or when it was too hot. (N.T. 41, 165, 203, 250).
17. Normally, Overby was assigned as the groundsman under climber, Matt Gormley. (N.T. 47, 98, 161, 343, 351).
18. When Matt Gormley was not there, Overby would usually be sent home. (N.T. 97, 150).
19. Less frequently Overby would be assigned to work with another climber. (N.T. 48, 97, 151-152).
20. When Acme had large jobs, more employees worked together including Eric Burkholder. (N.T. 96, 206).
21. Work crews drove to job assignments in an Acme truck. (N.T. 172, 329).
22. This necessitated at least one crew member to have a driver's license. (N.T. 329).
23. Overby did not have a driver's license. (N.T. 115, 126-127, 130).
24. William Burkholder had asked Overby when he was going to get a driver's license but Overby had difficulty because he owed money for having several times been cited for driving without a license (N.T. 127, 130, 150).
25. Eric Burkholder instructed Overby to train all groundsman hired after Overby. (N.T. 55, 56).
26. Shortly after Overby began, Overby went to William Burkholder and informed him that he intended to be with Acme for a while and that he wanted to progress in the company. (N.T. 177, 233, 234).
27. Overby mentioned to William Burkholder that he had heard of a school which provides instruction in a climber's duties. (N.T. 177).
28. William Burkholder instructed Matt Gormley to show Overby what he knew about climbing and that afterwards, Overby would be sent to climber school. (N.T. 178, 233, 316, 324-325).
29. Matt Gormley helped Overby learn the duties of a climber. (N.T. 179, 233, 316).
30. While employed with Acme, Overby did perform some climber duties although he was never paid climber wages. (N.T. 316, 325, 331).
31. Overby and Matt Gormley were praised by Acme customers numerous times. (N.T. 208; CE 2).
32. Some Acme customers specifically requested Matt Gormley and Overby. (N.T. 55).
33. After working for Acme for approximately three years, Overby asked Eric Burkholder for a raise. (N.T. 48, 142).
34. William Burkholder approved a $1.00 per hour raise for Overby. (N.T. 52).
35. In or around the spring of 1999, Acme hired three workers from Mexico who were in the United States on working visas. (N.T. 224, 319, 324).
36. Upon their request, in or about June 2000, Eric Burkholder gave these workers a pay raise. (N.T. 320, 321, 330).
37. Overby was often late for work. (N.T. 72, 143, 221, 286).
38. When Jeremy Olsen, a white climber, was hired he too was frequently late. (N.T. 211, 277, 278, 290, 318, 355-356).
39. On occasion, all Acme employees were late. (N.T. 74, 229, 279).
40. Eric Burkholder mentioned to Acme employees that they can not be late for work. (N.T. 73).
41. Overby also often missed work either with continued stomach problems and other illnesses or with family related problems. (N.T. 72, 144, 148, 222.).

42. On May 12, 2000, Overby injured his neck and shoulder at work causing him to miss work for approximately three days. (N.T. 43; CE 1).
43. Each year in the late fall, Overby and other Acme employees were laid off. (N.T. 44-46, 250).
44. It was Acme's practice to lay off climbers who had driver's licenses a few weeks after groundsman. (N.T. 222, 251).
45. In the late fall of 2000, Overby asked Eric Burkholder why he was being laid off before Jeremy Olsen, a white climber, with less seniority than Overby. (N.T. 57; 260, 261, 297).
46. When Overby expressed that he needed the work, Eric Burkholder responded by saying, "Tough". (N.T. 67).
47. Overby then went to his supervisor, Matt Gormley and together Overby and Matt Gormley went to Eric Burkholder to ask why Overby was laid off before Jeremy Olsen. (N.T. 62, 210).
48. Eric Burkholder informed Matt Gormley that Jeremy Olsen was kept longer because he had a driver's license. (N.T. 210).
49. After Overby was laid off in 2000, on or about February 1, 2001, Eric Burkholder became Acme's President. (N.T. 245, 248; CE 7).
50. When he became Acme's President, Eric Burkholder decided not to recall Overby in 2001. (N.T. 261).
51. In the winter of 2000, Overby underwent surgery for a hiatal hernia. (N.T. 63, 101-102, 104).
52. In or about January 2001, Overby spoke with Eric Burkholder and advised him he was ready to return to work. (N.T. 147).
53. Eric Burkholder told Overby that work had not picked up yet. (N.T. 147).
54. On or about February 12, 2001, in effect, Overby asked Eric Burkholder if he was going to recall him soon. (N.T. 65, 262).
55. Erick Burkholder told Overby, "I don't like you, and you don't like me… I bought the company from my dad and I'm not calling you back . . ." (N.T. 65, 262, 283).
56. Acme kept three white groundsman and in 2001, Eric Burkholder hired a fourth white groundsman, Paul Gray. (N.T. 230, 231, 281-282).
57. After returning to Acme, Eric Burkholder told Overby a "joke" which made reference to the KKK, lynching, and used the "N" word. (N.T. 78, 91, 98-99, 285).
58. Overby and Matt Gormley both testified that Eric Burkholder told other racial jokes in Overby's presence. (N.T. 145, 219, 283).
59. Matt Gormley testified that Eric Burkholder told inappropriate racial jokes in Overby's presence a few times per week. (N.T. 219).
60. Acme had a business relationship with Keystone Professional Employer, (hereinafter "Keystone"), whereby Keystone provided Acme with payroll services. (N.T. 292).
61. When a new employee is hired by Acme, the new employee completes payroll forms which are submitted to Keystone. (N.T. 293).
62. Keystone writes payroll checks for Acme employees. (N.T. 293).
63. After Overby was not recalled, Eric Burkholder caused a Keystone "Employee Termination Form" to be completed by his secretary. (N.T. 263-264; CE9).
64. On Overby's form, under the heading "Involuntary Termination" the following reasons were checked:

    Absenteeism or tardiness

Insubordination
Lack of cooperation
Violation of rules
Reduction in workforce (CE 9).
Disruptive influence on work force. (CE 9).

65. After he was not recalled, Overby applied for work at numerous places including Green Tree Design, another tree service company. (N.T. 83, 125).
66. Overby checked want ads and even attempted to join the military. (N.T. 86, 107, 111).
67. On occasion, Overby helped a friend by performing security services on Friday and Saturday when his friend had a fish fry. (N.T. 84).
68. Approximately 5 or 6 times Overby was a bodyguard for his sister who was an exotic dancer, earning approximately $25.00 per occasion. (N.T. 118).
69. Overby designed and sold tee shirts, (N.T. 118,120).
70. Overby also worked periodically with Thomas Gormley, Matt Gormley's brother, who after 18 years left Acme in 1979, and in 1995 started his own tree service company, Allwood Tree Service. (N.T. 110, 114, 188, 190, 191, 195-196, 199; CE 5).
71. In 2001, Overby worked with Thomas Gormley approximately 10 times earning under $600.00. (N.T. 112, 190, 195; CE5).
72. In 2002, Overby worked for Thomas Gormley between 25-30 times. (N.T. 199).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and subject to matter of this case.
2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.
3. Overby is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. Acme is an employer within the meaning of the PHRA.
5. Overby has met his initial burden of establishing a *prima facie* case of race-based discrimination by proving that:
   a. he is a member of a protected class;
   b. that he was qualified to perform the duties of a groundsman;
   c. that, when he was working, he satisfied the normal requirements of the job;
   d. that, following a lay-off, a recall was conducted and, although eligible, Overby was not recalled; and
   e. that either individuals who were recalled were not members of Overby's protected class or that another individual, who is not a member of Overby's protected class, was hired.
6. Acme articulated legitimate nondiscriminatory reasons for not recalling Overby.
7. Overby has shown Acme's reasons to be pretextual and that the reason Overby was not recalled was because of his race.
8. The PHRC has broad discretion in fashioning a remedy.
9. Overby is entitled to lost wages, plus nine percent interest.

O P I N I O N

This case arises on a complaint filed by Richard A. Overby, (hereinafter "Overby") against Acme Tree Service & Landscaping, (Hereinafter "Acme"), or about February 20, 2001, at Docket Number E-98440. Generally, Overby's complaint alleged that Acme failed to recall Overby because of his race, African American. In Overby's original complaint, Overby alludes to a race-based disparity in training, however, the post-hearing brief on behalf of the complaint made no attempt to address this issue.

On or about August 9, 2001, Overby amended his complaint to add allegations that during his employment with Acme, Overby was the first to be laid off and the last employee recalled. Additionally, Overby alleged a hostile work environment. Overby claims that Acme's actions violate 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 Overby's allegations of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on June 27, 2002, in Media, Pennsylvania, before Carl H. Summerson, Permanent

Hearing Examiner. Briefs were submitted by the parties. Both Acme's brief and the brief on behalf of the complaint were received on October 29, 2002.

The post-hearing brief on behalf of the complaint focuses exclusively on the alleged race-based failure to recall. In fact, page 13 of the post-hearing brief on behalf of the complaint articulates the issue as, "Did Acme Tree Service & Landscaping unlawfully discriminate against the Complainant because of his race, African American, when it failed to recall him to his position?". Because the alleged hostile environment claim and the alleged disparity in timing of layoffs claim have been relegated to background information supporting the main claim of failure to recall, this opinion will likewise principally focus its analysis on the alleged failure to recall claim.

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

> "It shall be an unlawful discriminatory practice . . .
> [f]or any employer because of the race . . . of
> any individual . . . to refuse to . . . employ . . .
> such individual . . . or to otherwise discriminate
> against such individual . . . with respect to . . .
> hire, tenure, terms, conditions or privileges
> of employment . . ."

In this disparate treatment case, Overby specifically alleges that Acme treated him less favorably than white employees because of his race, black. To prevail, Overby is required to

prove that Acme had a discriminatory intent or motive in failing to recall him. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532, A.2d 315 (1987).

Since direct evidence is very seldom available, we consistently apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8(1981). Overby must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing, *supra*; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, (1973). The phrase "*prima facie* case" denotes the establishment of a legally mandatory rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the *prima facie* case creates the presumption that the employer unlawfully discriminated against the employee. *Id*. at 254. The *prima facie* case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. *Id*. It raises an inference of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

In McDonnell Douglas, the U.S. Supreme Court held that a plaintiff may prove a *prima facie* case of discrimination in a failure-to-hire case by demonstrating:

(i) that he belongs to a racial minority;
(ii) that he applied and was qualified for a job for which the employer was seeking applicants;
(iii) that, despite his qualifications, he was rejected; and
(iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons with Complainant's qualifications. *id*. at 802.

Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of the *prima facie* case will vary substantially according to the differing factual situations of each case. McDonnell Douglas, 411 U.S. at 802, n.13. They simply represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Shah v. General Electric Co., 816 F.2d 264, 268, 43 FEP 1018 (6th Cir. 1987).

Here, we only slightly adapt the McDonnell Douglas test because this case involves an alleged race-based refusal to recall. To establish a *prima facie* case Overby must show:

1. that he is a member of a protected class;
2. that he was qualified to perform the duties of a groundsman;
3. that, when he was working, he satisfied the normal requirements of the job;
4. that, following a lay-off, a recall was conducted and, although eligible, Overby was not recalled; and
5. that either individuals who were recalled were not members of Overby's protected class or that another individual, who is not a member of Overby's protected class,

was hired. See SDHR v. Ozone Industries, 38 FEP 393, 395 (S.D.N.Y. 1985); Harrell v. Turner Industries, LTD et. al., 901 F. Supp. 1149, 1153 (MD La. 1995).

If Overby establishes a *prima facie* case, the burden shifts to Acme "to articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802. Acme must rebut the presumption of discrimination by producing evidence of an explanation, Burdine, 450 U.S. at 254, which must be "clear and reasonably specific," I*d*. at 255, and "legally sufficient to justify a judgment" for Acme. *Id*. at 255. However, Acme does not have the burden of "proving the absence of discriminatory motive." Board of Trustees v. Sweeney, 439 U.S. 24, 25, 18 FEP 520 (1982).

If Acme carries this burden of production, Overby must then satisfy a burden of persuasion and show that the legitimate reasons offered by Acme were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804. This burden now merges with the burden of persuading us that he has been the victim of intentional discrimination. Burdine, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that Acme intentionally discriminated against Overby remains at all times with Overby. *Id*. at 253.

In a memorandum of law in support of Acme's post-hearing brief, Acme submits that Overby failed to establish a *prima facie* case. Acme lists the required elements of a *prima facie* case as:

1. that he belongs to a racial minority;
2. that he was qualified for the position in question;
3. that he was subjected to an adverse action by his employer; and
4. that the action was based upon his race.

Acme's first three listed proposed elements of a requisite *prima facie* case are similar to the first four required elements which will be used in this case, however, Acme's proposed fourth element misconstrues the purpose of requiring a *prima facie* showing. Acme's proposed fourth element jumps right to the ultimate question in this case and would require direct evidence of discrimination.

As the U.S. Supreme Court has noted, "[t]here will seldom be "eyewitness' testimony as to the employer's mental processes." United States Postal Serv. Bd. Of Governors v. Aikens, 460 U.S. 711, 716 31 FEP 609 (1983). We must recognize that "[d]iscrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered." Jackson v. University of Pittsburgh, 826 F.2d 23. 236, 44 FEP 977 (3d Cir. 1987), *cert. denied*. 484 U.S. 1020 (1988). Allegations of discrimination are uniquely difficult to prove and often depend upon circumstantial evidence. *See. e.g*.. Aman v. Cort Furniture Rental Corp., 85 F.3d Cir. 1996); Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 48, 50 FEP 216 (3d Cir. 1989; and Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897, 43 FEP 681 (3d Cir.) (en banc) *cert. denied*, 483 U.S. 1052 (1987); "This is true in part because . . . discrimination . . . is often subtle." Chipollini, 814 F.2d at 899. [A]n employer who knowingly discriminates . . . may leave no

written records revealing the forbidden motive and may communicate it orally to no one." *Id*. (quoting LaMontagne v. American Convenience Prods., 750 F.2d 1405, 1410, 36 FEP 913 (7th Cir. 1984)).

The distinct method of proof in employment discrimination cases, relying on presumptions and shifting burdens of articulation and production, arose out of the U.S. Supreme Court's recognition that direct evidence of an employer's motivation will often be unavailable or difficult to acquire. See Price Waterhouse v. Hopkins, 490 U.S. 228, 271, 49 FEP Cases 954 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the McDonnell Douglas *prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 36 FEP 977 (1985) ("The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence." (internal quotation marks omitted)); see also International Bhd. Of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1997) (recognizing that burden-shifting rules "are often created . . . to conform with a party's superior access to the proof"); Chipollini, 814 F.2d at 897.

Accordingly, Acme's proposed fourth element is rejected. Instead we will follow the formula set forth above as we inquire whether Overby is able to meet the non-onerous burden of establishing a *prima facie* case. Clearly, Overby, as an African American, is a member of a protected class. Equally clear is the fact that Overby was qualified to perform the duties of a groundsman. The evidence reveals that Overby's job performance was not in question. Overby's principal direct supervisor, Matt Gormley, testified that he never had any problems with Overby and described Overby's performance as excellent. (N.T. 208-209). Overby's co-workers corroborated Matt Gormley's testimony by offering testimony which collectively indicates Overby's co-workers had no problems with Overby.

Undisputed evidence was offered that customers praised Overby's work and specifically requested the crew on which Overby worked. (N.T. 55, 208). Further, there is no dispute that Overby was selected to train newly hired groundsman. (N.T. 55-56). Until the failure to recall occurred, Overby was not only recalled each year, he had also recently received a pay raise. (N.T. 48, 296, 322). The second element of the requisite *prima facie* showing is clearly met.

If Overby has any difficulty with the requisite *prima facie* showing it is with the third element. Peppered throughout the record is evidence of Overby's attendance problems. The record reveals that, when he was working, Overby met the normal requirements of the job with the exception of his attendance. There is ample evidence that Overby was often late and missed work completely on occasion. Here, we are mindful that the threshold of proof necessary to establish a *prima facie* case is minimal. Young v. Warner-Jenkinson Company, Inc., 152 F.3d 1018 (8th Cir. 1998). We are also mindful that Overby otherwise met all other requirements of the groundsman position.

With respect to the attendance questions as they relate to this element of the *prima facie* showing, we accept the evidence which indicates that all Acme employees were late on occasion and missed work once in a while. (N.T. 74, 229). As this feature was articulated by Acme as a reason not to recall Overby, an in depth review of this question will be reserved for the pretext

showing portion of this analysis. For purposes of the non-onerous *prima facie* showing, we find that, when he was working, Overby satisfied the normal requirements of the job.

Clearly, Overby was not recalled in February 2001. Overby specifically asked to be recalled and Eric Burkholder, in effect, told Overby he would not be recalled. Finally, other groundsman not in Overby's protected class were recalled and an additional groundsman outside of Overby's protected class was subsequently hired by Acme. (N.T. 281-282).

Having determined that Overby established a *prima facie* case*,* we turn to the question of whether Acme articulated a legitimate non-discriminatory reason for not recalling Overby. Said differently, the burden of production now shifts to Acme to articulate a legitimate non-discriminatory reason for its failure to recall Overby from layoff.

In Acme's post-hearing brief Acme submits that since Overby was an employee at will, Eric Burkholder was free not to recall Overby simply because he did not like Overby. Acme asserts that Eric Burkholder's dislike of Overby had nothing to do with Overby's race. Acme's post-hearing brief points to Overby's "refusal and inability" to get a driver's license and suggests this prevented Overby from being a crew chief. Finally, Acme's post-hearing brief notes that Overby's frequent unexplained absences from work and frequent lateness caused Eric Burkholder great scheduling difficulties. Acme observes that prior to becoming Acme's president, Eric Burkholder wanted his father, William Burkholder, to terminate Overby because of his poor attendance record.

We also note that the post-hearing brief on behalf of the complaint acknowledges that Acme articulated legitimate non-discriminatory reasons for the failure to recall Overby.

Mindful that Acme carries only the burden of production and not the burden of persuasion at this stage, we conclude that Acme has succeeded in rebutting the presumption of discrimination that arose when Overby established a *prima facie* case by articulating legitimate non-discriminatory reasons for not recalling Overby. Therefore, the burden of showing pretext is merged with the burden of persuasion and both now rest with Overby to prove by a preponderance of the evidence that Acme's articulated reasons are pretextual. To satisfy his burden on the pretext issue, and ultimately his burden of persuasion, Overby could have presented either direct evidence that "a discriminatory reason more likely motivated [Acme]", or indirect evidence that Acme's proffered explanations are unworthy of belief. Burdine, supra at 256.

The ultimate resolution of this case rests upon several evidentiary components. First, credibility determinations must be made on numerous points as versions of relevant events differed and sometimes the differences were dramatic. Second, we note that whenever there are subjective determinations made in an employment context, such subjectivity may offer a convenient pretext for giving force and effect to racial prejudice, perhaps without a conscious effort by the decision maker. See Abrams v. Johnson, 534 F.2d 1226, 12 FEP 1293 (6th Cir. 1976). Because discrimination is often subtle, adjudicative bodies must be increasingly vigilant in their analysis to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct. When, as here, a subjective employment decision is made by someone not in

a Complainant's protected class, that decision should be subjected to particularly close scrutiny. See Thornton v. Coffey, 618 F.2d 686, 691 (10th Cir. 1980). Third, when a Respondent destroys documents, a Complainant may be entitled to the benefit of an adverse inference being draw against the Respondent. Lastly, a decision finding pretext is supported when a Respondent's proffered reasons for its action substantially change over time.

Collectively, these evidentiary elements are intertwined throughout the evidence presented in this case. Collectively, they also bear on the issue of whether Acme's articulated reasons are pretextual.

We begin by observing that Acme's proffered reasons for failing to recall Overby have fluctuated from the moment Eric Burkholder spoke with Overby on February 12, 2001, until Eric Burkholder's testimony at the public hearing. In effect, there are four distinct instances where Acme proffered reasons for failing to recall Overby. The distinct instances are:

1. Eric Burkholder's verbal communication to Overby on February 12, 2001;
2. The completion of the Employment Termination Form, (CE 9), for Overby;
3. Acme's Answer to Complaint, (CE 10); and
4. reasons offered at the Public Hearing.

Overby testified that when he went to see Eric Burkholder on February 12, 2001, Eric Burkholder told Overby, "I don't like you, and you don't like me, you always knew that. I bought the company from my dad, I'm not calling you back." (N.T. 65). In effect, Eric Burkholder confirmed the essence of Overby's version of the February 12, 2001 conversation. (N.T. 262). Overby added that on February 12, 2001, Eric Burkholder also told him that he is downsizing the company. (N.T. 65).

There is no evidence that Overby's attendance was discussed on February 12, 2001. Also, it is apparent that Eric Burkholder never mentioned anything about Overby's work performance, a lack of cooperation, customer complaints, disrespect to other employees including Eric Burkholder, or a violation of rules. It is clear that Eric Burkholder simply stated to Overby that he did not like him so he was not calling him back and that Acme was downsizing anyway.

When Eric Burkholder caused an Employee Termination Form to be completed regarding Overby, Eric Burkholder gave instructions that the following reasons for Overby's termination be noted: Unsatisfactory performance; Absenteeism or tardiness; Insubordination; Lack of cooperation; Violation of rules; Reduction in force; and Disruptive influence on workforce. Additionally, under the supervisor's stated reasons for leaving, the following was written: "Bought business this January – had to downsize and have had problems with Richard. He was frequently late without calling, and missed work without calling, does not respect his supervisor. Had to terminate an employee also with over 15 years service."

In Acme's "Answer to Complaint", Acme began by denying it was even Overby's employer. Acme suggested that Keystone Professional Employers, Inc., was Overby's employer. Acme then indicated, "Mr. Overby was not assigned additional work because he failed to

properly report for work which he was previously scheduled, and several complaints were lodged against him for negligence on the job site." Acme's answer denied that Eric Burkholder purchased the Company and that the reason given to Overby was "I don't like you, and you don't like me." The answer further states that, "it was difficult when Mr. Overby was present for work to find a location suitable to his limited skills."

Finally, at the Public Hearing, although Eric Burkholder was never asked point blank why Overby had not been recalled, laced throughout his testimony, he touched on several reasons. Generally, when called on direct and questioned as if on cross-examination, Eric Burkholder testified that he told Overby that he did not like him. (N.T. 262; 283). When Eric Burkholder was asked whether that portion of Acme's answer that stated "Mr. Overby was not assigned additional work because he failed to properly report for work which he was previously scheduled, and several complaints were lodged against him for negligence on the job site" were the reasons Overby was not recalled, Eric Burkholder answered, "those were the reasons for him missing work." Upon clarification, Eric Burkholder then stated, in effect that complaints by co-workers and customers against Overby contributed to his not being recalled. (N.T. 266-267).

Eric Burkholder also generally testified that Overby had been disrespectful to him. (N.T. 274). He also testified that he had problems with Overby's work performance. (N.T. 274-275).

Eric Burkholder's examination by his attorney on cross-examination once again failed to directly ask him the reasons why Overby had not been recalled. Instead, reasons must be extracted from the totality of his testimony. For instance, Eric Burkholder testified that nobody was either late as often as Overby, (N.T. 285), or did not show up at all as often as Overby. (N.T. 286). Further, Eric Burkholder testified that Overby rarely called to say he would either be late or not be coming to work. (N.T. 286-287). In effect, Eric Burkholder testified that when Overby came late, this caused him problems scheduling jobs. (N.T. 287; 312).

Having reviewed the four distinct instances where Acme proffered reasons for failing to recall Overby, one can readily see that Acme has at different times, articulated to various audiences different explanations for failing to recall Overby.

As a whole, Acme's varied reasons can be described as inconsistent and contradictory. In fact, at times, Acme's reasons differed substantially and were even untrue. Acme's inability to settle on an explanation contributes to an inference that Acme's articulated reasons are pretextual. See Thruman v. Yellow Freight Systems, Inc., 90 F 3d 1160, 1167 (6th Cir. 1996). Further, when such reasons substantially change, as here, there is greater support for a finding of pretext. Hossaini v. Western Mo. Medical Center., 72 FEP 171, 175 (8th Cir. 1996), citing Kobrin v. University of Minn., 34 F 3d 698, 703, 65 FEP 1624 (8th Cir. 1994).

Besides changing substantially, there are glaring examples that false reasons have been articulated by Acme. First, when Eric Burkholder told Overby he was not recalling him, he told Overby he was downsizing Acme. Eric Burkholder repeated this falsehood again in Overby's Employment Termination Form. Clearly, Acme was not downsizing.

Acme's "Answer to Complaint" is replete with additional falsehoods. To suggest Overby was not an employee of Acme but instead an employee of Keystone Professional Employers, Inc., is beyond merely incorrect. The answer also denies that Eric Burkholder purchased Acme when, in fact, the evidence clearly shows that Eric Burkholder had indeed executed a purchase agreement making Eric Burkholder the new owner of Acme. The Answer contends that Overby had limited skills making it difficult to assign Overby work. By all accounts, Overby was an excellent groundsman who was training to become a climber. As for assignments, Overby was routinely assigned as Matt Gormley's groundsman and together they made up a regular crew. Finally, the answer denies that Eric Burkholder told Overby " I don't like you, and you don't like me." The evidence presented reveals that Eric Burkholder did indeed say this to Overby.

Collectively, such falsehoods weigh heavily against Acme. However, we are mindful that the inquiry does not end here. In the case of Sims v. Cleland, 43 FEP 362 (6th Cir. 1987), the court observed that where two or more alternative and independent reasons are articulated by an employer, the falsity of one reason does not automatically impeach the credibility of the remaining reasons. Accordingly, the issue of pretext requires an analysis of all the reasons articulated.

We next turn to the question of Overby's absences and instances of being late. Clearly, too often, Overby either came to work late or missed work entirely. Acme argues that Overby was by far the worst offender in both areas of attendance. However, the best evidence that could have presented a more precise picture of the frequency of Overby's attendance infractions as compared with the attendance records of other Acme employees was destroyed by Eric Burkholder. Employee time cards for Acme's employees existed but were discarded by Eric Burkholder.

In the case of EEOC v. Protek of Albuquerque, 49 FEP 1110 (DC. N.M 1988), an employer maintained incomplete documentation regarding the jurisdictional question of the number of persons employed. Through no apparent fault of the employer, the documentation that was kept was destroyed by fire. The court found that those bringing the action against the employer are entitled to the benefit of a presumption that the destroyed documents would have shown that the employer employed the requisite number of employees to bring the employer under Title VII's definition of an employer.

In the 3rd Circuit Case of Mensch v. BIC Corporation, et. al, 1992 U.S. Dist LEXIS 14318, the court noted that "under Pennsylvania law a party cannot benefit from its own withholding or spoiliation of evidence, and further, that spoiliation of evidence gives rise to a presumption unfavorable to the responsible party."

Here, conflicting testimony about the frequency of tardiness and absences must be resolved against Acme since any hope of a proper comparison was lost with the destruction of employee time sheets. Testimony favorable to Overby begins with a coworker indicating that when Overby was late, it was only by a matter of minutes. (N.T. 348). Of course, when an employee is late by only a little, they are still late. Next, even Eric Burkholder in a deposition admitted that all employees are late sometimes. (N.T. 279). This agrees with both Overby's, (N.T. 74), and Matt Gormley's testimony. (N.T. 229).

On the question of tardiness strict scrutiny reveals an instance of disparity between how Overby was treated and the treatment given to Jeremy Olsen, a white employee hired shortly after Eric Burkholder returned to Acme. Shortly after Olsen began, Olsen became habitually late necessitating "several informal warnings" from Eric Burkholder. (N.T. 319, 355-356). Despite these warnings, Olsen continued to be late. In response, Eric Burkholder pulled Olsen aside and counseled Olsen that he will be fired if he keeps coming in late. (N.T. 318). The record reveals that Olsen's instances of tardiness improved but he continued to be late. (N.T. 229; 278).

Eric Burkholder's reaction to Overby stands in stark contrast. Upon Eric Burkholder's return, when Overby was late, Eric Burkholder's reaction to Overby's tardiness was to recommend that Overby not be recalled. (N.T. 288). Had William Burkholder, the then president, not declined his son's recommendation, Eric Burkholder would have failed to recall Overby years earlier. (N.T. 288).

As for absences, Matt Gormley testified that all Acme employees, including himself, missed work at times. (N.T. 229). Once again, because Eric Burkholder destroyed employee time cards, a determination on Overby's absence rate compared with others can not be made.

A connected issue with respect to attendance is Eric Burkholder's testimony that Overby called in only once in three years to say he would be late. (N.T. 286). Overby testified that possibly once or twice he failed to notify Acme that he would not be in, (N.T. 72-73), and that when he would be late he called either Eric Burkholder, William Burkholder, or Matt Gormley. (N.T. 143). On this point, Overby's testimony was found to be more credible than Eric Burkholder's. Matt Gormley corroborated Overby's testimony by indicating that when Overby was unable to come in, he called him or Eric Burkholder or left a note at Acme. (N.T. 212). Overby lived next door to Acme (N.T. 72), presenting him with a convenient method of notifying Acme of both intended and unexpected absences.

Turning to Eric Burkholder's testimony that Overby was disrespectful to him and to co-workers, once again, close scrutiny of the record reveals that this reason too is pretextual. With regard to whether Overby was disrespectful to Eric Burkholder, Overby acknowledged that his nickname for Eric Burkholder was "Dick." However, the evidence shows that when Eric Burkholder asked Overby not to call him that, Overby complied.

Contrasted to Overby's nickname for Eric Burkholder was another employee's use of the terms, "Dick Boy, Jennifer, Pussy Boy" when referring to Eric Burkholder. (N.T. 77, 217-218). The same employee, who is white, was also described as expressing expletive-laced anger and outright refusal when Eric Burkholder would order him to climb a tree he felt was too high. (N.T. 77-78).

It was undisputed that everyone at Acme had names for each other. (N.T. 75). Even Eric Burkholder acknowledged that a white employee called him "Jennifer", (N.T. 314), and would refuse to climb high trees. (N.T. 272). However, when such things were done by the white employee, Eric Burkholder did not find them either insubordinate or disrespectful. (N.T. 272).

As for Eric Burkholder's assertion that Overby was disrespectful to other employees, there was absolutely no evidence that this occurred. To the contrary, those who testified suggested Overby was not disrespectful to his co-workers.

Another reason offered by Acme for not recalling Overby was that several customer complaints had been lodged against Overby for negligence on the job site. (CE 10). Under examination, Eric Burkholder could recall only one incident he described as a customer complaint. The details of the purported complaint were not revealed. What was revealed was that the incident in question had occurred a year and a half prior to the decision not to recall Overby. Interestingly, no hint of any specifics regarding job negligence was offered.

Co-workers of Overby offered that they had never heard of any customer complaints about Overby. (N.T. 345, 353, 360-361). Additionally, the evidence reveals that, generally, Acme received complaints about the work performance of everyone. (N.T. 71, 187, 191, 270).

Next we turn our attention to Eric Burkholder's admitted telling Overby a joke containing the "N" word while also referencing the KKK and the lynching of African Americans. (N.T. 78, 282, 285). While this "joke" was told several years before the refusal to recall Overby, there is disputed testimony regarding whether Eric Burkholder frequently told other racial jokes in Overby's presence.

Eric Burkholder specifically denies having told other racial jokes, (N.T. 285), while both Overby and Matt Gormley testified that Eric Burkholder told other racial jokes. (N.T. 145, 219). After weighing the relative credibility of the witnesses, Overby and Matt Gormley are found to be more credible on this issue.

The "N" word as a term is universally recognized opprobrium that fundamentally stigmatizes African Americans because of their race. Eric Burkholder's use of the racial epithet was neither a joke nor innocent. Instead, Eric Burkholder's lack of reticence to cavalierly use a racial epithet in the presence of a black employee evidences that racism surely infected Eric Burkholder's motivation to not recall Overby.

The record considered as whole indicates that when Eric Burkholder told Overby he did not like him, the underlying reason for the dislike was principally Overby's race. All of Eric Burkholder's observations were infested with an under current of dislike of Overby's race. Accordingly, we find that not only has Overby shown that Acme's reasons for not recalling him were pretextual; indeed, the motivation for not recalling Overby was his race.

Thus, we turn to consideration of an appropriate remedy. Section 9(f)(1) of the PHRA generally outlines the remedies the PHRC is authorized to order. This section provides in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and

> desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to. . . hiring. . . with or without back pay . . . as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

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

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

In this case Overby submits that he should be completely reimbursed for lost wages based upon established wage rates through October 25, 2002, adjusted by subtracting his interim earnings.

Overby asserts that he made reasonable attempts at mitigation. Courts consistently hold that it is a respondent's burden to produce evidence of a lack of diligence in pursuing other employment in mitigation. See Jackson v. Wakulla Springs & Lodge, 33 FEP 1301, 1314 (N.D. Fla. 1983); Sellers V. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988); Syvock v. Milw. Boiler Mfg. Co., 27 FEP 610, 619 (7th Cir. 1981); Maine Human Rights Comm. V. City of Auburn, 31 FEP 1014, 1020 (Maine Supreme Judicial Ct. 1981); and Michigan Dept. of Civil Rights v. Horizon Tub Fabricating, Inc., 42 EDP ¶36,968 (Michigan Court of Appeals 1986). Diligence in mitigating damages within the employment discrimination context does not require every effort, but only a reasonable effort. It is a respondent, not a complainant, who has the burden of establishing that the complainant failed to make an honest, good faith effort to secure employment. Id. at 46,704.

Regarding whether Overby mitigated his damages, the evidence shows that once he was notified that Acme would not recall him, Overby applied for employment at Target, BJ's, Foreman Mills, Best Buy, Country Buffet, and Toys R' Us. (N.T. 83, 107). Additionally, Overby sought work with another tree service company, Green Tree Design, but his efforts were all unsuccessful. Overby even attempted to enlist in the military, however, high blood pressure disqualified him.

Throughout the period following the denial to recall Overby, Overby testified, without contradiction, that he continued to seek full-time employment. He reviewed newspaper want ads and applied for work at various places.

Overby did some part-time work after Acme failed to recall him. Overby testified that he helped a friend who had neighborhood fish fry's; he performed security services for his sister; and designed and sold t-shirts. Additionally, Overby did some work for Tom Gormley, the owner of Allwood Tree Service, earning approximately $600.00 in 2001, and approximately $1,800.00 in 2002.

Acme's post-hearing brief argument that Overby made no serious effort to find full-time employment is rejected. The record reveals sufficient efforts were made by Overby to mitigate his damages. Acme's post-hearing brief also argues that there is no evidence of record from which to determine damages. Acme submits that the record is devoid of evidence from which to calculate the hours Overby might have worked or the rate he might have been paid had Acme recalled him.

A review of the record reveals that absent inclement weather, Acme employees are sent out to jobs. Clearly, Overby's hours fluctuated. However, Acme's general work hours are 8:00 a.m. to 4:30 p.m. Overby did testify that he was sent home many times when his crew supervisor was absent and that he himself was frequently absent. Given this general information, it is reasonable to conclude that had Overby been recalled he would not have averaged a full 40 hours work week.

The post-hearing brief on behalf of the complaint uses the figure of 35 hours per week to calculate lost wages. This appears to be a reasonable approach to an average number of hours Overby would have worked had he not been refused a recall.

As far as the hourly wages lost, at the time of the failure to recall Overby, he was earning $10.00 per hour. Lost wages shall be calculated using this figure.

Finally, since Acme was a seasonal employer, it is clear that had Overby been recalled in February 2001, he would have been laid off approximately November 1, 2001 and not recalled again until approximately March 2002. Further by October 25, 2002 Overby would have once again been laid off for the winter.

Based on this information, the following back pay calculations are made.
Lost wages:

February 12, 2001 – November 1, 2001
35 hours
per week x $10.00 x 38 weeks = $13,300.

March 1, 2002 – October 25, 2002
35 hours
per week x $10.00 per hour x 34 weeks = $11,900.

Total wages lost	$25,200.
Less interim earnings:	
Security for sister, Security at Fish Fries; and Sale of T-Shirts...........	$ 500.
2001 – Allwood Tree Service	$ 600.
2002 – Allwood Tree Service	$ 1,800.
Total interim wages	$ 2,900.
Net wages lost	$22,300.

The proposed Final Order found in the PHRC regional office post-hearing brief suggests that reinstatement is also an appropriate order and that front pay should be awarded until such time as Acme extends an offer of employment to Overby. We agree.

Finally, the PHRC is authorized to award interest on the back pay award. Goetz v. Norristown Area School District, 16 Pa. Cmwlth Ct. 389, 328 A.2d 579 (1975).

Accordingly, relief is ordered as described with specificity in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD A. OVERBY, Complainant
v.
ACME TREE SERVICE & LANDSCAPING, Respondent

DOCKET No. E-98440

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Overby has proven discrimination in violation of Section 5(a) of the PHRA. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By: Carl H. Summerson, Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD A. OVERBY, Complainant
v.
ACME TREE SERVICE & LANDSCAPING, Respondent

DOCKET No. E-98440

FINAL ORDER

AND NOW, this 2nd day of December, 2002, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

ORDERS

1. That Acme shall cease and desist from race-based discrimination.
2. That Acme shall pay to Overby within 30 days of the effective date of this Order the lump sum of $22,300.00, which amount represents back pay lost for the period between February 12, 2001, and October 25, 2002.
3. That Acme shall pay additional interest of nine percent per annum on the back pay award, calculated from February 11, 1992 until payment is made.
4. That Acme shall offer Overby instatement into the next available position of either Groundsman or an equivalent position.
5. That if Acme fails to offer Overby a position by March 1, 2003, beginning March 1, 2003, Acme shall pay Overby front pay in the amount of $350 per week until such time as either Acme offers Overby a position or Overby rejects an offer of employment by Acme.
6. That within 30 days of the effective date of this Order, Acme shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Charles L. Nier, III, Esquire, in the Commission's Philadelphia regional office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Carl E. Denson, Chairperson
ATTEST: Sylvia A. Waters, Secretary