COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHN J. PALMER, Complainant

v.

DAYTON PARTS, INC., Respondent

PHRC Case No. 200101410

STIPULATIONS

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COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHN J. PALMER, Complainant

v.

DAYTON PARTS, INC., Respondent

PHRC Case No. 200101410

STIPULATIONS

1. Complainant John J. Palmer ("Palmer") was hired by Respondent Dayton Parts ("Dayton Parts") on April 12, 1999.
2. Dayton Parts terminated Palmer's employment on December 10, 2001.
3. At the time of his termination by Dayton Parts, palmer was paid at an hourly rate of $11.56.
4. At the time of his employment by Dayton parts, Palmer worked a forty-hour week.
5. Palmer worked for Gibraltar Construction from January 30, 2002 through December 20,2002.
6. Palmer was initially paid an hourly rate of $9.50 by Gibraltar.
7. After six months with Gibraltar, Palmer received a wage increase of one dollar per hour.
8. Palmer worked a forty-hour workweek at Gibraltar
9. Overnite Transportation Company hired Palmer as a dockworker on July 22, 2003 at a wage that exceeded the wage that he earned at Dayton Parts.

Joseph T. Bednarik
PHRC Counsel in support of Complaint
Date: July 8, 2005

Vincent Candiello
Counsel for Respondent
Date: 7/8/05

FINDINGS OF FACTS *

1. The Respondent, Dayton Parts, Inc. (hereinafter "Dayton Parts"), is an industrial manufacturer of various sizes of truck springs. (N.T.I 27; R.E. 6).
2. At Dayton Parts, manufacturing materials are often transported using fork trucks. (N.T. I 78).
3. On April 12, 1999, the Complainant, John Palmer (hereinafter "Palmer") was hired by Dayton Parts. (CE-1; S.F. 1).
4. Dayton Parts issues an employee handbook to its employees. (R.E. 2).
5. Dayton Parts' employee handbook details numerous policies including a Personal Safety Policy. (R.E. 2).
6. Under Dayton Parts' Personal Safety Policy:

Associates who endanger the health and safety of co-workers, which includes verbal threats, physical fights, and/or carrying weapons are subject to **immediate discharge.**

AND

Immediate discharge can be based upon: serious improper conduct, blatant and willful violations of company policies and procedures, and for violating the spirit of such policies to provide a cooperative and productive working environment. Examples of serious improper conduct include, but are not limited to:

Disorderly conduct on company premises including horseplay, threatening, insulting or abusing any associate physically or verbally…(N.T.I 58; N.T. II 111; R.E. 2).

*The foregoing "Stipulations" are hereby incorporated herein as if fully set forth. To the extent that the Opinion, which follows, recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized through these Findings of Fact for reference purposes:

N.T.I	July 8, Notes of Testimony
N.T. II	July 18, Notes of Testimony
C.E.	Commission's Exhibit
R.E.	Respondent's Exhibit
S.F.	Stipulations

7. Dayton Parts has a zero tolerance policy for verbal threats and physical touching. (N.T. II 110, 112, 115, 138, 172).
8. Anytime an employee made a verbal threat, that employee was terminated. (N.T. II 110, 113, 130, 140).
9. It was Dayton Parts' policy that, depending on the seriousness of the conduct, horseplay, insults and abusive language normally was subject to progressive discipline. (N.T. II 111, 172).
10. Dayton Parts' upper management staff made all decisions regarding the imposition of discipline. (N.T. I 126).
11. The Senior managers normally involved in questions of appropriate discipline include Paul Anderson, Director of Operations, (hereinafter "Anderson"); Lester Eckert, Plant

Superintendent (hereinafter "Eckert"); and Donna Pantaloni, Human Resources Administrator, (hereinafter "Pantaloni"). (N.T. II 96, 133, 169).

12. At all times relevant, Palmer worked for Dayton Parts as a roll cell operator on the second shift. (N.T. I 27, 65).
13. Between 35 to 40 employees worked on the second shift and were supervised by two supervisors: Jerry Miller, the Forge Department manufacturing supervisor (hereinafter "Miller"), and George Orth, the Fitting Room Assembly Department supervisor. (hereinafter "Orth"). (N.T. I 121, 170, 220, 221; N.T. II 53, 54).
14. Palmer's immediate supervisor was Miller. (N.T.I 29; N.T. II 54).
15. In or about early December 2001, Palmer was partnered with a co-worker, Mike Knob (hereinafter "Knob"), to work weekend overtime for the Maintenance Department. (N.T.I 31, 32, 33).
16. Shortly after beginning his shift on Friday December 7, 2001, Palmer left his roll cell machine and walked through the Forge Department on his way to the Maintenance Department. (N.T.I 33, 68).
17. As Palmer walked through the Forge Department he walked past a large piece of equipment commonly referred to as the "Hillie Machine". (N.T. I 66).
18. Palmer was going to the Maintenance Department to speak with Maintenance Technician, Marlin Klinger, (hereinafter "Klinger"), to ask Klinger if he would be his weekend overtime partner instead of Knob. (N.T. I 33).
19. Earlier, Klinger had asked Engineer Manager Tony Beninsky, (hereinafter "Beninsky") to provide Klinger with a memo regarding the top priority of work to be accomplished during the weekend's overtime. (R.E. 8).
20. When Palmer arrived in Klinger's area, Beninsky and Tom Crist, (hereinafter "Crist"), another maintenance employee, were present. (N.T. I 34).
21. As well as an Engineer, Beninsky was also Dayton Parts Safety Coordinator. (N.T. I 223; N.T. II 11, 42, 45, 47).
22. In approximately 1999, Paul Wagner (hereinafter "Wagner"), a manufacturing employee, had been seriously injured. (N.T. I 78, 225; N.T. II 11, 12, 13).
23. A fork truck had backed up striking Wagner and running over his leg. (N.T. II 14, 15).
24. The injury resulted in Wagner losing his leg. (N.T. I 225; N.T. II 12).
25. This accident occurred near the Hillie operation and at the time of the incident, Beninsky responded and had applied a tourniquet to Wagner's mangled leg. (N.T. II 12, 13).
26. After asking Klinger if he would become his overtime partner, Palmer asked Klinger if the Hillie was running. (N.T. I 35, 68).
27. In effect, Crist told Palmer the Hillie was running and, in jest, said to Palmer that Palmer had just walked past the Hillie, didn't Palmer notice it was operating. (N.T. I 36, 71).
28. Palmer responded to Crist by stating, in effect, that he does not even look around, that he has his own work area and that's all he looks at. (N.T. I 37, 72).
29. Hearing Palmer say he doesn't pay attention when walking around the plant concerned Beninsky as he recalled what happened to Wagner's leg. (N.T. II 17, 24).
30. This prompted Beninsky to, in effect, tell Palmer that he should watch where he is going and make sure what's around him so he doesn't get hit by a fork truck. (N.T. I 37; N.T. II 16).
31. This annoyed Palmer because Palmer erroneously perceived Beninsky was just trying to be smart and talk down to him. (N.T. I 37, 38, 69).

32. Palmer responded to Beninsky by suggesting that if anyone hit him with a fork truck he would punch that person in the face. (N.T. I 37; N.T. II, 31).
33. Beninsky then told Palmer if somebody hit him with a fork truck, he wouldn't be able to punch them in the face. (N.T. II 31).
34. Palmer angrily replied that if he had to crawl, he would punch someone in the face and that he was in no mood for this and that he felt like punching someone in the face and that Beninsky should not let him be the first one. (N.T.I 38; N.T. II 17, 18).
35. Beninsky asked Palmer if he was threatening him. (N.T.I 38-39; N.T. II 19, 30, 32, 49, 50, 57, 75).
36. Palmer replied that he was not threatening Beninsky, but he was just letting him know not to be the first one. (N.T. II 32).
37. With that, Beninsky left the area and proceeded to leave the work site to attend a scheduled doctor's appointment. (N.T. I 220; N.T. II 32, 51).
38. While in his car on the way to his doctor's appointment, Beninsky called Orth and generally related what had happened, telling Orth that he and Miller should get involved because there is probably a serious problem that needs investigated. (N.T. II 18, 28, 50, 55, 56, 74).
39. Beninsky informed Orth that he felt threatened by Palmer and that Palmer should be spoken to before something else happened. (N.T. II 56, 75, 94).
40. Beninsky told Orth that Klinger and Crist were there and could verify what happened. (N.T. II 19, 28).
41. After his telephone conversation with Orth, Beninsky made notes about what had occurred. (N.T. II 20, 21).
42. After speaking with Beninsky, Orth related to Miller Beninsky's call, and as happens anytime an incident occurs on the second shift, together, Orth and Miller began to investigate almost immediately. (N.T. I 41, 122, 202, 211).
43. Miller and Orth first interviewed Klinger, then Crist, and then called in Palmer. (N.T. I, 112, 154, 155; R.E. 4).
44. At his interview, Palmer was upset, shaking a little and frustrated but spoke in a normal tone. (N.T. I 155; N.T. II 61).
45. Since there appeared to be no signs of further hostility, Palmer was returned to work instead of being sent home while the matter was further investigated. (N.T. I 43, 155, 199; N.T. II 61).
46. After speaking with Klinger, Crist and Palmer, Miller unsuccessfully attempted to call Beninsky. (N.T. I 156).
47. Generally, Miller and Orth reduced to writing Klinger's, Crist's and Palmer's versions of the incident. (R.E. 4).
48. Copies of Miller and Orth's report was placed in Dayton Parts' in-house mail for Eckert, Anderson and Pantaloni. (N.T. 150; N.T. II, 134).
49. At approximately 6:30 a.m. Monday, December 10, 2001, Eckert first saw Miller and Orth's report. (N.T. II, 98-99).
50. When Anderson and Pantaloni arrived at approximately 8:00 a.m., they met with Eckert to review the report, Dayton Parts' Handbook, and Beninsky's typed memo, describing his version of the incident. (N.T. II 100, 101, 171; R.E. 8).
51. Finding Crist's statement to be less direct than Klinger's, Eckert called Crist to insure they had all Crist's information. (N.T. II 106; R.E. 2).

52. Crist verified what Miller and Orth had documented including Crist having heard Palmer say, "I am in a mood to punch someone in the face." (N.T. II 106; R.E. 9).
53. Concluding Palmer had threatened Beninsky, Eckert, Anderson and Pantaloni each zeroed in on the part of Klinger's statement that reported Palmer told Beninsky, "I'm in the mood to punch somebody don't let it be you first." (N.T. II 105, 106, 137, 174, 175).
54. Neither Beninsky, nor Miller, nor Orth participated in the decision to terminate Palmer. (N.T. I 122; N.T. II 24, 61-62, 64).
55. Together, Eckert, Anderson and Pantaloni made the decision to terminate Palmer. (N.T. I 218; N.T. II 98, 133, 169).
56. Generally, the process used to make a discipline decision involves upper management relying solely on the documentation furnished by the middle managers who directly interview those employees involved in an incident. (N.T. II 177).
57. Normally, upper management decision makers do not re-interview anyone. (N.T. II 177).
58. When Miller and Orth arrived to work Monday afternoon on December 10, 2001, they learned that a decision had been made to terminate Palmer. (N.T. I 167; N.T. II 62-63).
59. When Palmer arrived at work on December 10, 2001, he was called to Miller's office and given a termination letter that had been prepared by Pantaloni. (N.T. I 44, 88, 200; R.E. 1).
60. Palmer was replaced by Darrell Everett, an African American employee who bid on the job vacated by Palmer. (N.T. I 213; N.T. II 162).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to a public hearing.
3. Palmer is an individual within the meaning of the PHRA.
4. Dayton Parts is an employer with the meaning of the PHRA.
5. When a Respondent has done everything that would be required of it if a Complainant had properly made out a *prima facie* case, whether the Complainant really did so is not relevant.
6. When a Respondent articulates its reasons for an action, the case proceeds directly to the question of whether the reasons offered were discriminatory.
7. Dayton Parts offered legitimate non-discriminatory reasons for terminating Palmer.
8. Palmer failed to prove that Dayton Parts' reasons were a pretext for unlawful discrimination.
9. Dayton Parts' termination of Palmer has not been shown to violate the PHRA.

OPINION

This case arises on a complaint filed on or about December 13, 2001 by John J. Palmer (hereinafter, "Palmer") against Dayton Parts, Inc. (hereinafter, "Dayton Parts"), with the Pennsylvania Human Relations Commission (hereinafter, "PHRC"). Palmer's complaint alleged that he was terminated because of his race, African American. This race-based allegation alleges a violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter, "PHRA").

PHRC staff investigated the allegation and at the investigation's conclusion, informed Dayton Parts that probable cause existed to credit Palmer's allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion, but

such efforts proved unsuccessful. Subsequently, the PHRC notified Dayton Parts that it had approved a Public Hearing.

The Public Hearing was held on July 8 and 18, 2005, in Harrisburg, PA, before a three member panel of commissions consisting of Theotis W. Braddy, Panel Chairperson; Raquel Otero de Yiengst, Panel Member; and Toni M. Gilhooley, Panel Member. PHRC staff attorney Joseph Bednarik presented the case on behalf of the complainant. Vincent Candiello, Esquire, appeared on behalf of Dayton Parts. Following the Public Hearing, the parties were afforded the right to file post-hearing briefs. Dayton Parts' post-hearing brief was received on September 23, 2005, and the PHRC Harrisburg regional office's post-hearing brief was also received on September 23, 2005. Following the receipt of post-hearing briefs, the parties requested an opportunity to file reply briefs. That request was granted and reply briefs were received on October 21, 2005.

> Section 5(a) of the PHRA states in pertinent part:
>
> It shall be an unlawful discriminatory practice…[f]or any employer because of the race…of any individual…to discharge from employment such individual…

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

Dayton Parts' post-hearing brief begins by urging a finding that Palmer failed to establish the requisite *prima facie* case. Dayton Parts generally argues that the evidence presented does not even establish that Palmer is African American and that no circumstances have been proven that give rise to an inference of discrimination. Additionally, Dayton Parts notes that Palmer's replacement was African American.

The case of U.S. Postal Service Board of Governors v. Aikens, 31 FEP 609, 460 U.S. 711 (1983), illustrates that our factual inquiry need not focus on the limited question of whether a *prima facie* case has been shown. In Aikens, the Supreme Court noted that when a case has been fully tried on the merits the job of the fact finder is to decide whether the alleged action was intentionally discriminatory. Did the employer treat some people less favorably than others because of their race, citing Furmco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), quoting International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335 n. 15 (1977).

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

Here, we find that there can be no question that Dayton Parts did articulate their reasons for terminating Palmer. In effect, Dayton Parts submits that after an investigation, three top-level managers concluded that Palmer threatened Beninsky and that Dayton Parts has a zero tolerance for threats of violence. That whenever an employee is found to have threatened another employee, that employee is immediately terminated. (N.T. I 114; N.T. II 110, 130, 140).

The PHRC regional office post-hearing brief first argues that it was unreasonable for Dayton Parts to have interpreted Palmer's statements to Beninsky as a threat. We disagree. Considering the circumstance of the interplay between Beninsky and Palmer, and more importantly, the scope of information available to the decision makers, it was an entirely reasonable conclusion to make that Palmer threatened Beninsky. We also specifically acknowledge that the employer's perception of events is what is pertinent. See Jones v. General Electric Company, 28 FEP 433 (M.D.N.C. 1982), aff'd without op., 705 F.2d 443, 32 FEP 232 (4th Cir. 1983).

All three decision makers reviewed the slightly conflicting versions of what happened and focused on Palmer's reported declaration to Beninsky that he was, "…in the mood to punch someone in the face, don't let it be you first." (N.T. II 105, 106, 120, 123, 126, 129, 137, 138, 174; R.E. 4, R.E. 8). Generally, the essential facts of the incident that precipitated Palmer's discharge involved a manager hearing Palmer say he doesn't look around when walking through the plant. More specifically, Palmer's inattention referenced a location where approximately two years earlier another employee had been struck by a fork truck, causing the loss of that employee's leg. All Beninsky was doing was trying to make Palmer aware of the potential dangers inherent with inattentiveness. In doing so, Beninsky was met with a threat spoken in anger. We conclude that the determination that a threat had been made was reasonable.

In the alternative, the PHRC regional office post-hearing brief then argues that Palmer was the only one to be discharged for similar conduct and that Dayton Parts' investigation of Palmer was somehow unequal. We first consider the question of whether Palmer has proven that other similarly situated employees were treated more favorably than he was. In Palmer's complaint, Palmer generally referenced two situations alleging in one that he was treated different than Beninsky and in the other that a white employee was not fired for allegedly spitting on an African American employee.

Palmer's PHRC complaint suggests that Palmer's and Beninsky's conduct on December 7, 2001 was in some way comparable and that only he was fired while Beninsky, who is white, was not. On this point, Palmer testified that he felt that Beninsky was trying to threaten him with a fork truck. (N.T. I 40, 76). At one point, Palmer testified that Beninsky told him, "if he hit him with a fork truck Palmer wouldn't get up". (N.T. I 38). Then twice Palmer clarified that Beninsky actually said, "if you" get hit…(N.T. I, 38).

It was apparent that Palmer was attempting to paint a portrait of himself as being threatened when in fact, he never was. Although Palmer would have us believe Beninsky was "goading" him, the record demonstrates that Beninsky did no such thing. (N.T. I 77).

The exchange on December 7, 2001 was correctly seen by the decision makers on Monday, December 10, 2001, as Palmer threatening Beninsky who was simply interested in Palmer's safety. As such, any attempt by Palmer to compare himself with Beninsky is misplaced. Indeed, little effort in this regard was attempted at the Public Hearing.

As credibility is invariably an issue in a case, a few points can be made that suggest there are several cracks in Palmer's credibility. One issue is the question of when Palmer became aware of the extensive leg injury to Paul Wagner that was on Beninsky's mind when telling Palmer he needed to be more aware of his surroundings.

At first, Palmer denied knowing on December 7, 2001, that there had been a fork truck accident. (N.T. I 78). Palmer then changed his story and suggested that he learned of Wagner's injury between his threat to Beninsky and his termination on December 10, 2001. (N.T. I 80).

Actually, Wagner worked part-time several days a week right beside Palmer. Clearly, Palmer would have known about Wagner's injury and loss of a leg due to being struck with a fork truck. Palmer's testimony that Wagner had returned to work just before he was terminated and Palmer did not learn about Wagner's accident until the point between Palmer threatening Beninsky and his being terminated is not credible.

Another point that addresses Palmer's credibility deals with the other circumstance Palmer's complaint points to. In his complaint, Palmer generally asserted that Scott Hilbish (hereinafter "Hilbish"), a white employee, spit on Felton Hearn, (hereinafter "Hearn"), an African American employee and was not terminated. (R.E. 3).

During the Public Hearing, Orth credibly testified that, long after the fact, Palmer told him he had witnessed Hilbish spitting on Hearn. However, Palmer never offered testimony at the Public Hearing about having witnessed the incident. It would appear that Palmer did not witness the interaction between Hilbish and Hearn.

Clearly, in the summer of 2001, Rick Felton, an African American employee, made Miller aware that several other African American employees were frustrated and angry after forming the opinion that Hilbish had intentionally spit in Hearn's face. (N.T. I 159, 160, 176, 179). Upon learning that an incident had occurred, Miller and Orth began an investigation. (N.T. I 160). Both Hilbish and Hearn were given the opportunity to explain what had happened. In effect, both explained that what happened was an accident. (N.T. I 176, 177, 206, 214; N.T. II 88). The environment in the work area is very hot. Hilbish was at a water fountain getting a drink and was rinsing his mouth out. As he turned to spit water out, Hearn happened to be approaching and some water accidentally landed on Hearn's shoes.

Hearn is reported to have confirmed that the incident was accidental and when Hilbish and Hearn were brought together, they shook hands and acknowledged there was no issue between them. (N.T. I 164, 178). Initially, the incident was not even documented by Miller and Orth. (N.T. I 163). Only later, when Eckert learned of the incident was the matter documented. (N.T. II 117; C.E. 7).

Interestingly, Hearn was not called as a witness to rebut the idea that what had occurred had been strictly an accident. Had Miller and Orth found that Hilbish had intentionally spit on Hearn, Hilbish would have been terminated. (N.T. I 207).

In summary, the Hilbish-Hearn incident is far from similar to Palmer's threat to Beninsky. Dayton Parts' managers reasonably concluded that Hilbish had not engaged in misconduct while reasonably concluding that Palmer had.

At the Public Hearing, specifics of several other situations were also presented. Evidence of two pushing incidents shows that Dayton Parts terminated employees who became physical with another employee. Both Timothy D. Flasher and William Miller, two white employees, were terminated for pushing other employees. (N.T. I 191; N.T. II 115-116; R.E. 7, R.E. 10). Indeed, the employee Miller pushed was an African American employee. (N.T. I 218).

Another specific incident was noted, also involving a threat. That situation involved the termination of Ronald Romberger, Jr., a white employee, for having made a verbal threat. Interestingly, while Romberger's termination occurred after Palmer's, his termination occurred prior to Dayton Parts being served with Palmer's PHRC complaint. (R.E. 11).

Often, the weight of a comparison situation is significantly lessened when a Respondent's action is consistent with an alleged action that is the subject of a case the Respondent has been made aware of. Here, Dayton Parts action in terminating Romberger occurred before they knew Palmer had filed a PHRC complaint.

Also, Palmer appears to suggest that he didn't mean anything by his threat to Beninsky and that he should just be given an opportunity to apologize. Well, Romberger said that he had not meant anything by his threat and that he would never do anything to hurt anyone. However, despite his declaration of innocent intent, Romberger was terminated. (R.E. 11).

Finally, Palmer seeks to compare his discipline to the discipline given Tom Paul, (hereinafter "Paul"), a white employee. After progressive discipline failed to correct verbally abusive behavior, Dayton Parts eventually terminated Paul. It appears that Paul had a history of being uncooperative and verbally abusive with those he was assigned to train. On July 29, 1999, and again on February 2, 2000, Paul was given oral warnings for verbally abusing trainees. (C.E. 6). On May 17, 2000, Paul was issued a written warning for the communication problems he continued to have until on March 22, 2001, Paul was terminated. (C.E. 6). Additionally, as part of Paul's final warning, he was sent to Dayton Parts employee assistance program. (N.T. 7, 138). Rather than having threatened another employee Paul's termination was for verbal abuse, cursing, yelling and generally failing to work together. (N.T. I 129; N.T. II 113; 173).

Palmer would have us equate Paul's conduct with his because both threats and verbal abuse are listed in the same portion of Dayton Parts' policy on improper work behavior. (R.E. 2). Under the heading "Personal Safety Policy" the general policy is declared as, "associates who endanger the health and safety of co-workers, which includes verbal threats, physical fights, and/or carrying weapons are subject to **immediate discharge**. The policy goes on to state that, "**immediate discharge** can be based upon serious improper conduct, blatant and willful

violations of company policies and procedures, and for violating the spirit of such policies to provide a cooperative and productive working environment. Examples of serious improper conduct include but are not limited to:" The policy then lists 18 separate examples. (R.E. 2). Focus in this case was principally on the first example listed which states, "Disorderly conduct on company premises including horseplay, threatening, insulting or abusing any associate physically or verbally."

This example breaks "disorderly conduct" into five distinct components: horseplay, threats, insults, physical abuse and verbal abuse.

Dayton Parts argues that there is a qualitative difference in these five components. Dayton Parts submits that two of the components routinely result in automatic termination while the remaining three may result in either termination or progressive discipline depending on the severity of an incident. Dayton Parts states that it has zero tolerance for threats and physical abuse, while discretion is exercised with instances of horseplay, insults, and verbal abuse.

Without question, extreme discretion can be found regarding an uncontroverted instance of verbal abuse committed by Palmer. It would seem that for a time Miller was bothered by periodically hearing the word Hitler and employee laughter when he would enter the locker area. (N.T. I 197). Miller's heritage is German. (N.T. I 198). Eventually, Miller heard Palmer refer to him as Hitler. Interestingly, all Miller did was call Palmer to his office and explain to him that he heard Palmer's comment, that he just wanted it to end, and if it would, the matter could be considered resolved. (N.T. I 198). When Palmer agreed, Palmer was simply sent back to work and the matter dropped. (N.T. I 198). Palmer received no discipline.

Without discretion for verbal abuse, a restrictive reading of Dayton Parts' policy would have otherwise subjected Palmer to termination. Instead, like with Paul, discretion resulted in even less action against Palmer than was taken against Paul for verbal abuse.

Two other examples of serious improper conduct listed in Dayton Parts' policy apply to something Palmer did for which he was not terminated. Listed as serious improper conduct are:

- Unauthorized use of any company property, equipment, or material while on or off the job without prior permission.
- Performing work other than your assigned work or generally related type of company work without the instruction of your supervisor.

Once again, in Palmer's file is found an entry that indicates Palmer attempted to gain access to an electrical cabinet to make a repair. (N.T. I 148). Palmer was not authorized to attempt that repair.

Again, discretion was exercised and Palmer was not disciplined. Thus, Palmer's own record reflects the application of discretion to conduct listed in Dayton Parts policy as conduct for which "immediate discharge" can result.

In addition to the specific examples of employees' disciplinary records, the record in this case contains numerous general references about how Dayton Parts distinguishes behaviors. Generally, several witnesses confirmed that 100% of those who have threatened another employee have been terminated. (N.T. I 113; N.T. II 110, 130, 140). Similarly, testimony generally confirms that employees who verbally abuse other employees are not immediately terminated. (N.T. I 173).

Reviewing the record as a whole, we find that it is reasonable to treat threats in the workplace more severely than verbal abuse. Accordingly, we are not prepared to accept Palmer's argument that Dayton Parts must mete out a sanction for verbal abuse equal to its sanction for a threat. Certainly an employer has the discretion to consider all the facts and determine whether discharge is an appropriate action or whether a milder punishment would be more appropriate. See Kendrick v. Comm'n. Of Zoological Subdist., 565 F.2d 524, 527, 16 FEP 656, 658 (8th Cir. 1977). In this case, there is no basis for a conclusion that Dayton Parts would not discharge any employee, regardless of race, who threatened a fellow employee.

Additionally, we recognize that there may be those who would consider the finality of termination harsh. However, our task is not to decide whether, on reflection, a different penalty conclusion seems more reasonable. The issue in this case is whether race-based discrimination occurred. Absent discrimination, the choice of discipline is a matter left to Dayton Parts business judgment in light of all consideration. See Williams v. Sunoco Products Co., 33 FEP 1200 (D.C.S.C. 1982).

The law is clear. An employer's reason for its action may be a good reason, a bad reason, a mistaken reason, or no reason at all so long as the decision was not based on race-based unlawful discriminatory criteria. See Furnco Construction Corp. v. Walters, 438 U.S. 567 (1978); Sanchez v. Texas Commission on Alcoholism, 660 F. 2d 658, 27 FEP 1001 (5th Cir. 1981).

In this case, Palmer has simply failed to come up with credible evidence to establish that his discharge was a pretext for discrimination, and thus he has not shouldered his burden of proof. The record, considered as a whole, substantiates that Palmer's termination was not based on a racial consideration.

An Order dismissing this matter follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHN J. PALMER, Complainant

v.

DAYTON PARTS, INC., Respondent

PHRC Case No. 200101410

RECOMMENDATION OF HEARING PANEL

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

11/16/05.
Date

By: _____
Theotis W. Braddy
Hearing Panel Chairperson

11/21/05
Date

_____
Raquel Otero de Yiengst
Panel Member

11/21/05
Date

_____
Toni M. Gilhooley
Panel Member

COMMONWEALTH OF PENNSYLVANIA
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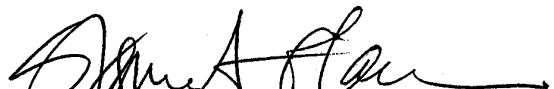
PHRC Case No. 200101410

FINAL ORDER

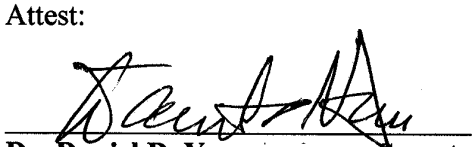
AND NOW, this 20th day of December, 2005, after a review of the entire record in this matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations, Findings of Facts, Conclusions of Law, and Opinion of the Hearing Panel. Further, the full Commission adopts said Stipulations, Findings of Facts, Conclusions of Law, and Opinion as its own finding in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

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

By: 
Stephen A. Glassman, Chairperson

Attest:


Dr. Daniel D. Yun, Secretary