COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICTORIA SAIDU-KAMARA, Complainant
v.
PARKWAY CORPORATION, Respondent

DOCKET NO. E77300D

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. The Respondent, Parkway Corporation (hereinafter "Parkway"), operates numerous parking facilities in the City of Philadelphia. (NT 57.)

2. On the top of Parkway's management structure is a vice president of operations. (NT 110, 111, 175.)

3. Under the vice president of operations are four district managers. (NT 175.)

4. Under each district manager are between three to six facility managers. (NT 175.)

5. Parkway has approximately 20 facility managers. (NT 179.)

6. Most of Parkway's parking facilities are non-unionized; however, several of Parkway's facilities are unionized. (NT 157, 189.)

7. At the time relevant to this case, five separate unions represented various Parkway employees. (NT 288.)

8. Which union represented an employee was dependent upon at which facility an employee worked. (NT 288; CE 7.)

***** The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

A	Admission
AE	Admission Exhibit
CE	Complainant's Exhibit
NT	Notes of Testimony
RE	Respondent's Exhibit

9. At its facilities, Parkway employed cashiers, attendants, valets, and security personnel. (NT 176.)

10. On August 3, 1994, the Complainant, Victoria Saidu-Kamara (hereinafter "Saidu-Kamara"), applied for a part-time cashier position with Parkway. (NT 51, 53; CE 1.)

11. In August 1994, Saidu-Kamara was hired as a parking attendant/cashier at the rate of $5.25 per hour. (NT 53, 82, 249-250.)

12. Initially, Saidu-Kamara was assigned to Parkway's Franklin Plaza Hotel parking facility and worked Monday through Friday, 2:30 p.m. to 10:30 p.m. (NT 57.)

13. Saidu-Kamara only worked part-time for approximately two weeks, and then she began to temporarily fill a full-time position while another cashier was out on maternity leave. (NT 84, 86.)

14. Saidu-Kamara told management that she wanted to work more hours because she needed the money. (NT 85.)

15. Saidu-Kamara's husband had also been an employee at Parkway and worked under Facility Manager Lawrence Sesay (hereinafter "Sesay"). (NT 83, 377.)

16. In October 1995, Saidu-Kamara's husband returned to Sierra Leone, Africa, leaving Saidu-Kamara without help raising six children, then aged approximately seventeen, thirteen, twelve, nine, eight, and two years. (NT 81-82, 89.)

17. After approximately three months at the Franklin Plaza facility, Saidu-Kamara was reassigned to Parkway's 1728 Sansom Street facility to work the 11 p.m. to 7 a.m. shift. (NT 58, 344.)

18. Sesay, who was also from Sierra Leone, was the facility manager for the 1728 Sansom Street facility. (NT 58, 82, 176, 335.)

19. Saidu-Kamara was never a member of a union as a Parkway employee. (NT 119.)

20. In addition to her shift at 1728 Sansom Street, Saidu-Kamara also worked weekends at Parkway's 1818 Market Street facility. (NT 59.)

21. The district manager over Sesay was Paul DeAngelo (hereinafter "DeAngelo"). (NT 151.)

22. While a Parkway employee, Saidu-Kamara independently began a fifteen-month educational program with a Computer Learning Center. (NT 68, 87-88, 132-133, 137, 146.)

23. Saidu-Kamara attended school daily from 7:30 a.m. to 1:30 p.m. (NT 87-88.)

24. Saidu-Kamara also worked in the lab at her school for approximately three hours daily, from 1:30 p.m. to 4:30 or 5:00 p.m. (NT 136-137; CE 3.)

25. Saidu-Kamara's school ended in May 1996. (NT 132-133, 137, 146.)

26. Parkway maintains an employee manual which summarized many of Parkway's policies and procedures. (CE 2.)

27. In the employee manual, Parkway listed two sets of rules: violation of certain rules could result in immediate discharge without warning, and another set of rules, the violation of which was described as subjecting an employee "to disciplinary action. Repeated violations shall result in discharge." (CE 2.)

28. The list of rules subjecting an employee to discipline and discharge for repeated violations follow:

1. Excessive lateness and/or absenteeism.
2. Careless driving.
3. Rude and/or profane language to fellow employees or customers.
4. Creating fire, health, and/or safety hazards.
5. Flagrant abuse of work time.
6. Poor facility housekeeping.
7. Excessive money shortages or overages.
8. Failure to report equipment breakdowns, unsafe conditions, or unhealthy conditions.
9. Improper use of parking tickets.
10. Intoxication by any substance during working hours.
11. Temporarily leaving or closing of lot without a manager's consent.
12. Failure to wear complete company uniform, or improper dress or appearance.
13. Poor performance and/or inability to perform job duties as assigned.
14. Unauthorized people in booth.
15. Solicitation of any kind on company property or on company time.
16. Physically restraining a customer from removing a car from a lot or garage.

(CE 2.)

28. Sleeping while on duty was considered a violation of rules 5 and 13. (NT 153, 342.)

29. On a rotating basis, Parkway facility managers were assigned to be roving managers. (NT 104, 179.)

30. Unannounced, roving managers toured Parkway facilities in the early morning hours. (NT 98, 180, 347.)

31. After visiting the facilities, roving managers generated a report to Parkway's vice president of operations. (NT 195, 348.)

32. Some roving managers photographed employees found sleeping. (NT 63, 182, 210, 289, 388.)

33. Both male and female employees had been photographed sleeping. (NT 210, 289, 388.)

34. When a roving manager's report included information that an employee was found sleeping, the information was first filtered from the vice president of operations to the applicable district manager. (NT 181, 348.)

35. District managers would then make the facility manager at the location where an employee was reported sleeping aware of the report. (NT 195, 348, 389.)

36. Either verbal or written warnings were issued to employees found sleeping. (NT 155, 244, 245, 295.)

37. In December 1995, when Saidu-Kamara was robbed at gunpoint, Sesay commended Saidu-Kamara. (NT 59.)

38. By letters dated February 7, 1996, DeAngelo commended Saidu-Kamara and other employees who performed extra duties after a blizzard. (NT 59-60, 159, 170; RE 2.)

39. Saidu-Kamara's attendance was perfect and Sesay was satisfied with Saidu-Kamara's performance. (NT 251, 378.)

40. Saidu-Kamara was a flexible employee who filled in when needed. (NT 60.)

41. On the morning of February 2, 1999, a roving manager informed Sesay that Saidu-Kamara was observed sleeping on duty. (NT 61, 355; AE "A".)

42. On February 2, 1996, Sesay issued a written warning to Saidu-Kamara which indicates this was Saidu-Kamara's first warning. (AE "A".)

43. Sesay wrote in the remarks section of the written warning, "Sleeping while on duty (2-2-96)." (AE "A".)

44. Saidu-Kamara challenged the issuance of the warning, protesting that she had not been sleeping. (NT 63, 100, 111, 131, 349, 400.)

45. After speaking with Sesay, Saidu-Kamara gave up her protest and did not pursue the matter with the vice president of operations. (NT 111-112.)

46. During the early morning hours of February 16, 1996, a roving manager photographed Saidu-Kamara sleeping while on duty. (NT 113, 161, 350.)

47. The February 16, 1996 roving manager's report and the photograph of Saidu-Kamara went to the vice president of operations. (NT 115, 181.)

48. Information regarding the report that Saidu-Kamara was sleeping on duty on February 16, 1996, filtered back to DeAngelo and ultimately to Sesay. (NT 113, 114, 161, 181, 184, 350.)

49. After seeing Saidu-Kamara's photograph, DeAngelo lobbied for Saidu-Kamara's termination. (NT 184, 199.)

50. On February 27, 1996, Sesay called Saidu-Kamara at her home to advise her that she was terminated. (NT 64, 112, 114, 351, 404.)

51. Saidu-Kamara again vehemently denied that she had been sleeping on duty. (NT 404.)

52. After being terminated by Sesay, Saidu-Kamara called DeAngelo to ask why she was being terminated so soon after having received a commendation letter. (NT 64, 65, 162, 178.)

53. DeAngelo told Saidu-Kamara that it was not his job to investigate and that she had to speak with Sesay. (NT 65, 145.)

54. After speaking to DeAngelo, Saidu-Kamara neither pursued her discharge with Parkway's human resources department nor with the vice president of operations. (NT 162, 178.)

55. Saidu-Kamara never received a verbal warning for sleeping on duty. (NT 60, 61, 112, 148.)

56. Parkway facility managers operate with a large degree of autonomy. (NT 186, 287.)

57. Facility managers who observe an employee sleeping have the discretion to give either a verbal or a written warning. (NT 186.)

58. Sometimes roving managers report employees found sleeping on the job and sometimes they would simply go personally to the employee's facility manager and verbally report the employee, thereby giving the applicable facility manager flexibility to deal with the infraction. (NT 130, 214, 394-395.)

59. Although Sesay had issued between 15 to 20 verbal warnings for sleeping, he did not give Saidu-Kamara a verbal warning. (NT 355.)

60. Sesay indicated that he had discretion regarding what to do when an employee was found sleeping. (NT 396.)

61. Sesay testified that it was his practice to document verbal warnings by going back to a past written warning and noting that a verbal warning was issued. (NT 355, 419.)

62. Parkway's human resource director testified that typically facility managers came to the human resource department when discipline was contemplated and received advice on how to proceed. (NT 239.)

63. When an employee was to be terminated, the human resource director normally reviewed the employee's file with the facility manager and advised them if the action was appropriate. (NT 240.)

64. Prior to Sesay's first warning to Saidu-Kamara, Sesay did not discuss the matter with the human resource department. (NT 262.)

65. When Sesay terminated Saidu-Kamara, he had not consulted the human resource department; he simply forwarded the warning slip to the human resource department after the termination occurred. (NT 262.)

66. On March 4, 1995, Mohammed Gba-Kamara (hereinafter "Gba-Kamara"), a male, was hired by Parkway as a full-time cashier. (A #11.)

67. Sesay supervised Gba-Kamara. (NT 356.)

68. Gba-Kamara worked at a Parkway facility which made him a member of the Transport Workers Union of America, Local No. 700 (hereinafter "the Union"). NT 263, 313, 318.)

69. There was a collective bargaining agreement between Parkway and the Union (hereinafter "the CBA"). (CE 7.)

70. The CBA does not establish employee conduct rules or regulations. (CE 7.)

71. The CBA states that Parkway "shall have the right to discharge any employee covered by [the CBA] for just cause. . ." (NT 158; CE 7.)

72. The CBA also requires that before an employee is discharged, Parkway shall notify the Union and the matter will be discussed. (NT 248; CE 7.)

73. The Union agrees that Parkway's employee manual is used to determine "just cause," and that sleeping on the job can be just cause for termination. (NT 247.)

74. Parkway takes into account an employee's union status when contemplating discipline. (NT 287.)

75. While it is Parkway's stated policy to terminate a non-union employee after two incidents of sleeping while on duty, a union employee is given three incidents before being terminated. (NT 155, 173, 244-245, 292-293, 304, 309, 343, 397.)

76. On October 19, 1995, Gba-Kamara was found sleeping on duty, and on October 20, 1995, Sesay issued a written notice to Gba-Kamara which indicated that this was his "first warning." (NT 263; AE "E".)

77. On January 31, 1996, Sesay issued Gba-Kamara a second written notice for an incident of sleeping on the job on January 24, 1996. (AE "F".)

78. On February 28, 1996, Sesay issued Gba-Kamara a third written warning for an incident of sleeping on the job on February 16, 1996. (AE “G”.)

79. Sesay’s February 28, 1996 warning was marked “Dismissal.” (AE “G”.)

80. Sesay had also verbally warned Gba-Kamara for sleeping on the job. (NT 336, 360; CE 19.)

81. On February 29, 1996, Sesay prepared a termination report on Gba-Kamara in which he marked Gba-Kamara as excellent in attendance, fair in cooperation, and satisfactory in initiative, job knowledge, and quality of work. (CE 19.)

82. In this termination report Sesay also indicated that “without reservation” he would “rehire” Gba-Kamara. (CE 19.)

83. Gba-Kamara was not terminated after the February 28, 1996 warning notice and February 29, 1996 termination report. (A #21.)

84. On March 15, 1996, DeAngelo found Gba-Kamara leaning back with his hands behind his head and his eyes closed. (NT 164.)

85. To DeAngelo, it appeared Gba-Kamara was sleeping. (NT 164; AE “H”.)

86. DeAngelo wrote a warning notice on Gba-Kamara in which he indicated, “Not Alert while on Duty,” and in effect that this was his last warning. (AE “H”.)

87. On June 3, 1996, Sesay issued another written warning to Gba-Kamara for sleeping on the job on May 24, 1996. (CE 13.)

88. On June 4, 1996, Gba-Kamara was terminated. (A #26.)

89. Sesay prepared a termination report on Gba-Kamara in which Gba-Kamara was given an evaluation of excellent for attendance, satisfactory for initiative, and good for cooperation, job knowledge, and quality of work. (CE 20.)

90. On February 28, 1996, when Sesay prepared a termination report on Saidu-Kamara, he gave her an excellent for attendance, fair for cooperation and initiative, and satisfactory for job knowledge and quality of work. (AE “D”.)

91. Sesay did not recommend Saidu-Kamara for rehire. (AE “D”.)

92. George Boateng (hereinafter “Boateng”) was a non-union Parkway employee under Sesay’s supervision in 1996. (NT 272, 364.)

93. On or about January 13, 1993, while under another facility manager’s supervision, Boateng received a written notice for sleeping on the job. (NT 274.)

94. By a warning notice dated March 17, 1995, Boateng was notified by Sesay that he had been "caught sleeping on the job" and that this was a "Final Warning - Next infraction will result in your termination." (NT 274; CE 14.)

95. On March 18, 1994, Sesay issued Boateng a written warning for careless driving because he had damaged two cars. (CE 15.)

96. On May 4, 1995, Sesay issued Boateng a written warning for "Not Performing Assigned Duties Properly." (CE 16.)

97. On August 30, 1995, Sesay issued Boateng a written warning for being "Habitually Late" and "Not Performing Assigned Duties Properly." (CE 17.)

98. Sesay had verbally warned Boateng for sleeping on the job. (NT 365, 370.)

99. After threatening to beat up a supervisor, Boateng was terminated. (NT 368-369.)

100. Worede Tesfau (hereinafter "Tesfau") was a non-union Parkway employee supervised by Facility Manager Simpson. (NT 205, 210-212.)

101. Simpson verbally warned Tesfau for sleeping on the job. (NT 212, 219, 225.)

102. On March 2, 1996, Simpson issued Tesfau a written warning for sleeping on the job. (NT 211; RE 3.)

103. On April 24, 1996, Simpson issued Tesfau a second written warning and terminated him for sleeping on the job. (NT 212, 219; RE 3.)

104. After Saidu-Kamara was terminated, she continued going to school until her graduation in May 1996. (NT 69, 138.)

105. Saidu-Kamara testified that she decided to concentrate on school, and that it was not practical to look for a night job. (NT 69-70, 138.)

106. In June 1996, Saidu-Kamara applied for work with Norrell Services, Inc., a temporary employment agency, and was provided various work assignments. (NT 70, 136; CE 4.)

107. When assigned to work, Saidu-Kamara's salary at Norrell temp agency exceeded her wages with Parkway. (CE 4; July 6, 1999 letter from Tierce to Nier.)

108. In July 1998, Saidu-Kamara left Norrell. (NT 71, 74, 143.)

109. In August 1998, Saidu-Kamara was hired by Protocall Pa., Inc., another temporary employment agency. (NT 74.)

110. Protocall assigned Saidu-Kamara to Presbyterian Hospital where her rate of pay exceeded what she earned at Parkway. (NT 74-75.)

111. Since her termination from Parkway, Saidu-Kamara neither asked her temp agency employers for an extra night-work assignment nor worked part-time anywhere else. (NT 139, 144.)

112. On nine occasions, Saidu-Kamara visited the Pennsylvania Human Relations Commission (hereinafter "PHRC") in connection with her complaint against Parkway. (NT 77-78.)

113. Saidu-Kamara had to take unpaid leave from work to visit the PHRC on those occasions. (NT 76, 80-81.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of this case.

2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.

3. Parkway is an "employer" within the meaning of the Pennsylvania Human Relations Act ("PHRA").

4. Saidu-Kamara is an "individual" within the meaning of the PHRA.

5. Saidu-Kamara has met her burden of establishing a *prima facie* case by proving that:

a. she is a member of a protected class;
b. Parkway had a policy or practice concerning sleeping on duty;
c. male employees either were given the benefit of lenient company practice, or not held to strict compliance with the company policy; and
d. she either was not given the benefit of a lenient policy or was held to compliance with the strict policy.

6. Parkway has articulated legitimate reasons for terminating Saidu-Kamara.

7. Saidu-Kamara has established by a preponderance of the evidence that the reasons offered by Parkway for its actions were pretextual.

8. When discrimination has been found, the PHRC has broad discretion in fashioning a remedy.

OPINION

This case arises on a complaint filed on or abut March 21, 1996, by Victoria Saidu-Kamara (hereinafter "Saidu-Kamara") against Parkway Corporation (hereinafter "Parkway") with the Pennsylvania Human Relations Commission (hereinafter "PHRC").

Saidu-Kamara's complaint alleged sexual harassment, retaliation for having complained about the alleged sexual harassment, and a sex-based termination. At the pre-hearing conference, the PHRC attorney on behalf of the state's interest in the complaint indicated that since probable cause

had been found only on the sex-based termination, the sexual harassment and retaliation allegations would not be pursued at the public hearing. The remaining sex-based termination claim 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 that allegation, and at the investigation's conclusion informed Parkway that probable cause existed to credit Saidu-Kamara's sex-based termination allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that it had approved a public hearing.

The public hearing was held on June 23, 1999, in Philadelphia, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The PHRC's interest in the complaint was overseen by PHRC staff attorney Charles L. Nier, III. Michael G. Tierce, Esquire, appeared on behalf of Parkway. The parties were afforded an opportunity to submit briefs. Both Attorney Nier's post-hearing brief and Parkway's brief were received in September 1999.

In this disparate treatment case, Saidu-Kamara generally alleges that Parkway treated her less favorably than others because of her sex, female. To prevail, Saidu-Kamara is required to prove that Parkway had a discriminatory intent or motive. *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). Saidu-Kamara 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 a *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 presumed 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. 467, 577 (1978).

In *McDonnell-Douglas*, the United States 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 of 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 adapt the *McDonnell-Douglas* test because this case involves an alleged sex-based termination for violations of work rules. Usually, as a part of a *prima facie* showing, a complainant attempts to show that after being terminated she was replaced by a person outside the complainant's protected class. Here, Saidu-Kamara attempts to show that similarly situated, non-protected persons were treated better. Accordingly, to establish a *prima facie* case, Saidu-Kamara must show:

1. that she is a member of a protected class;
2. that there was a company policy or practice concerning the activity for which she was discharged;
3. that male employees either were given the benefit of lenient company practice, or were not held to compliance with a strict company policy; and
4. that she was not given the benefit of a lenient policy or was held to compliance with the strict policy.

Butler v. Westinghouse Electric Corp., 47 FEP 667, at 669 (D.C. Md. 1987); *citing EEOC v. Brown & Root*, 688 F.2d 338, 340-341 (5th Cir. 1982); *see also EEOC v. Brown Printing Co.*, 54 FEP 1785, 1787 (E.D. Pa. 1990), *citing EEOC v. Charles Schaefer Sons, Inc.*, 49 FEP 475 (D. N.J. 1988), and *Brown v. A.J. Gerrard Mfg. Co.*, 25 FEP 1089 (5th Cir. 1981).

If Saidu-Kamara can establish a *prima facie* case, the burden would shift to Parkway to "articulate some legitimate, nondiscriminatory reason" for its actions. *McDonnell-Douglas*, 411 U.S. at 802. Parkway would be required to rebut the presumption of discrimination by producing evidence of an explanation, *Burdine*, 450 U.S. at 254, which must be "clear and reasonably specific," *Id.* at 285, and "legally sufficient to justify a judgment" for Parkway. *Id.* at 255. However, Parkway would 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 Parkway carries this burden of production, Saidu-Kamara must then satisfy a burden of persuasion and show that the legitimate reasons offered by Parkway were not its true reasons, but were a pretext for discrimination. *McDonnell-Douglas*, 411 at 804. This burden now merges with Saidu-Kamara's burden of persuading us that she has been the victim of intentional discrimination. *Burdine*, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that Parkway intentionally discriminated against Saidu-Kamara remains at all times with Saidu-Kamara. *Id.* at 253.

Before reviewing whether Saidu-Kamara can establish the *prima facie* case outlined above, we note that in her testimony she asserted that she had not violated the work rule against sleeping while on duty on either February 2, 1996 or February 16, 1996. For the purpose of an analysis of Saidu-Kamara's charge, under the circumstances present in this case, it is of no consequence that she disputes the two instances of being charged with sleeping on duty. The law is clear that, even if a complainant did not in fact commit the violation with which they are accused, an employer successfully counters the claim by showing that it honestly believed the employee committed the work rule

violations. *See, Chaney v. Southern Railway Co.*, 847 F.2d 718, 47 FEP 124 (11th Cir. 1988); and *Jones v. Los Angeles Community College District*, 31 FEP 719 (9th Cir. 1983). Even an employer that wrongfully believes that an employee violated a work rule, and acted on that belief, will not be found liable on that basis.

Here, it was clear that Parkway believed Saidu-Kamara was sleeping on duty on both February 2, 1996 and February 16, 1996. There was even a photograph taken of Saidu-Kamara on the morning of February 16, 1996, which, at the very least, gave the impression that Saidu-Kamara was sleeping. Accordingly, the analysis here will be confined to a comparison of Parkway's enforcement of its work rules against those employees it believed engaged in misconduct.

Clearly, Saidu-Kamara, as a female, meets the first prong of the requisite *prima facie* showing. Also, she has shown that Parkway had both an asserted policy with respect to work rules and a practice which afforded facility managers extensive flexibility and discretion regarding discipline imposed on those who violated the work rules. As to Parkway's policy, Parkway's employee manual lists an array of infractions which subject an employee to disciplinary action and "repeated violations shall result in discharge." (CE 2.) District Manager DeAngelo indicated that "repeated" meant "more than once." (NT 154.) Parkway's then human resource director further clarified her understanding of the policy to be that a non-union employee would be terminated after two violations, and union employees were not fired until their third infraction. (NT 292-293, 309.)

The evidence also shows that although a stated policy existed, in practice facility managers based their discipline on what they felt was right under varying circumstances. (NT 207.) At times, roving managers did not make a written report about an infraction they observed but, instead, they would go directly to the employee's supervisor and make a verbal report. (NT 214, 394-395.) This provided flexibility in what discipline was imposed. The record clearly shows that some employees received verbal warnings for infractions instead of receiving formalized written warnings. (NT 186, 336, 360; CE 19.)

Regarding the third element of a *prima facie* showing, Saidu-Kamara presented evidence that, in practice, male employees benefited from a discretionary practice which resulted in leniency, and even when discipline was imposed males were not strictly held to compliance with the policy. Again, facility managers had the discretion to give either verbal or written warnings to employees found sleeping. Sesay testified that he had issued between 15 to 20 verbal warnings to employees. Both Gba-Kamara and Boateng benefited from the flexible disciplinary procedure practices by facility managers. Sesay's determination of who received a verbal warning and who was written up as applied to sleeping on duty was subjective and done at his discretion, without the benefit of any objective criteria to insure a uniform implementation of the policy. Furthermore, Saidu-Kamara has shown that Boateng, a male non-union employee, was not terminated after a second infraction of sleeping on duty, and that Gba-Kamara, a male union employee, was not terminated after a third infraction. Accordingly, Saidu-Kamara successfully established the third element of a *prima facie* showing.

This brings us to the fourth element, which has also been proven. Saidu-Kamara has established that she was held to strict compliance with the policy of termination after two infractions. A significant issue of credibility arises at this point.

Sesay testified that in addition to being written up twice, Saidu-Kamara was also verbally warned for sleeping while on duty. Saidu-Kamara testified that she had not been verbally warned. A careful review of the record reveals that Sesay's testimony on this issue, as well as other topics, was less than credible. In contrast, Saidu-Kamara's testimony on the issue of whether she had been verbally warned was quite credible.

Sesay testified that Saidu-Kamara was given a verbal warning for sleeping at a point between the February 2, 1996 incident and the February 16, 1996 incident. (NT 353, 355.) Sesay also testified that when a roving manager reported an employee for sleeping, that report first went to the vice president of operations, who filtered the information to a district manager, who in turn filtered the information to the facility manager over the employee found sleeping. Sesay indicated that this process caused a delay between the infraction and the eventual write-up. For instance, Saidu-Kamara was found sleeping on February 16, 1996, but the written warning which resulted in her termination was not prepared until ten days later, on February 26, 1996. (AE "C".)

The February 2, 1996 incident was written up as a first warning on the same day. This strongly suggests that the roving manager who reportedly found Saidu-Kamara sleeping did not put this in the report to the vice president of operations. Instead, this scenario suggests that the roving manager went directly to Sesay to tell him verbally that Saidu-Kamara was sleeping.

Although Sesay contends that a roving manager did come to him to verbally report on Saidu-Kamara sleeping, Sesay submits that this happened after February 2, 1996. Given the timing of Sesay's February 2, 1996 written warning, it is more credible that it was on February 2, 1996 that a roving manager came to Sesay with a verbal report about Saidu-Kamara, and that rather than exercise his discretion and be lenient, as he so often was, Sesay instead chose to formalize the incident.

An additional factor suggests Sesay's version is inaccurate. Sesay specifically indicated that it was his practice to document verbal warnings by going back to a prior write-up and make a written record of the verbal warning. (NT 355, 419.) A review of Saidu-Kamara's February 2, 1996 written warning reveals that Sesay did not make a notation that a verbal warning was subsequently given. In summary, the record shows that Saidu-Kamara was not given a verbal warning which would have afforded her the benefit of the same lenient policy which had been extended to males. Instead, Saidu-Kamara was strictly held to the policy to terminate after a second incident. The evidence shows that the lack of objective standards and the delegation of subjective discretion in facility managers led to an informal policy where males received additional warnings, while Saidu-Kamara received more severe discipline for fewer work-rule violations.

Since Saidu-Kamara has successfully established a *prima facie* case, we turn to the question of whether Parkway articulated a legitimate, nondiscriminatory reason for its actions. In its brief, Parkway principally focuses on Gba-Kamara and argues that because he was a union employee, he was not similarly situated to Saidu-Kamara. Parkway's brief also touches on the other two males with whom Saidu-Kamara attempts to compare herself: Boateng and Tesfau. Parkway submits that although Boateng received two warnings for sleeping on duty, there was a significant lapse of time between the incidents. Further, other warnings received by Boateng were for dissimilar infractions. As for Tesfau, Parkway contends that Tesfau's treatment was exactly the same as the treatment given to Saidu-Kamara.

In effect, Parkway submits that Saidu-Kamara was terminated in accordance with its policy regarding violation of rules and regulations found in its employee manual. Accordingly, Parkway has satisfied its production burden and has sufficiently rebutted the presumption created by the *prima facie* showing. At this point, Saidu-Kamara has the burden to prove by a preponderance of the evidence that the reasons articulated by Parkway are pretextual. Saidu-Kamara may prove pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Stated another way, Saidu-Kamara can prove that Parkway's reasons were not the sole cause of her termination but, rather, that discrimination made a difference in the decision. *Conner v. Fort Gordon Bus Co.*, 37 FEP 1574 (11th Cir. 1985).

This case illustrates both that a terminated employee can be a victim of discrimination even though there is good cause to terminate, and how discrimination can be manifested in very subtle ways. However, careful scrutiny of the evidence presented in this case ultimately reveals that pretext has been sufficiently shown.

Saidu-Kamara's evidence singled out three male individuals for comparison. She suggests that these males were each treated less severely for violating Parkway's work rules.

As we approach an analysis of the disciplinary records of Gba-Kamara, Boateng, and Tesfau, we recognize a fundamental reality. That is, comparisons will never involve precisely the same set of work-related offenses occurring over the same time period and under the same set of circumstances. Here, Saidu-Kamara attempts to show pretext by proving that similarly situated males were treated more leniently. *See McAlister v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir. 1988). Thus, our initial task is to determine whether Saidu-Kamara is in fact comparably situated with any of the three males with whom she attempts to compare herself.

First, we consider Gba-Kamara. Parkway concedes that Gba-Kamara received more warnings for sleeping on duty than Saidu-Kamara but argues that Gba-Kamara was not similarly situated to Saidu-Kamara because Gba-Kamara was a union member. To a point, we agree with Parkway. The situation presented here is rather unique in that some of Parkway's cashiers are union members and some are not. Courts have generally held that bargaining unit employees are not similarly situated with non-bargaining unit employees. *See McKie v. Miller Brewing Co.*, 58 FEP 817 (M.D. Ga. 1992); *citing Marshall v. Western Grain Co., Inc.*, 46 FEP 177 (11th Cir. 1988), *cert. denied*, 488 U.S. 852. The reason for the distinction was clarified in these cases. That is, it is recognized that employers must often go through a complex process in order to discipline a union employee. By contrast, the discipline of non-union employees may be done for any reason so long as the reason is not unlawful. Further, these courts were also careful to note that civil rights laws do not take away an employer's right to interpret its rules as it chooses and to make determinations as it sees fit under its rules. *Nix v. WLCY Radio/Rahall Communications*, 35 FEP 1104 (11th Cir. 1984).

Here, Parkway was free to establish different levels of consequences for work rule violations between union and non-union employees. In fact, Parkway's stated policy was that a union employee was allowed three infractions of the work rule against sleeping on the job before being terminated, while a non-union employee was allowed only two infractions.

If this would have been what occurred, Saidu-Kamara would have no argument regarding such disparate treatment. However, when Sesay's overall actions towards Gba-Kamara are contrasted with his actions towards Saidu-Kamara a difference can be detected which exceeds the general stated policy difference. As noted earlier, Gba-Kamara received at least one verbal warning in addition to having been written up three times before his termination was attempted. Saidu-Kamara did not have the benefit of a verbal warning.

Additionally, when Gba-Kamara's termination reports (CE 19, 20) are closely reviewed, another distinction becomes apparent. On Saidu-Kamara's termination report (AE "D") Sesay indicated that, without reservation, he would not recommend her rehire. Although Saidu-Kamara had only recently received commendations from both Sesay and DeAngelo for her efforts, Sesay marked Saidu-Kamara as "fair" in both cooperation and initiative. The record shows that Saidu-Kamara, if anything, was cooperative. On Gba-Kamara's February 29, 1996 termination report, Sesay recommended Gba-Kamara's rehire, without reservation. This recommendation came after three written warnings and at least one verbal warning for sleeping on duty. On his June 4, 1996 termination report, Gba-Kamara's evaluation marks significantly improved despite the fact that he had several additional work rule violations.

Clearly, Gba-Kamara was not terminated after three written warnings and at least one verbal warning for sleeping on duty. Parkway submits this was because the union became involved. Accepting this scenario as an acceptable difference, we turn to Parkway's explanation of why Gba-Kamara was not terminated after he was "found not alert while on duty" on March 15, 1996. Parkway contends that "found not alert while on duty" is a different infraction from sleeping while on duty. This is simply not credible for several reasons.

First, on March 15, 1996, DeAngelo found Gba-Kamara in a condition described as "looked as though he was sleeping." (AE "H".) It is difficult to imagine how Parkway asserts there is a distinction between such an instance and any other instance where an employee is found with their eyes closed. Looking back to Sesay's final termination report on Gba-Kamara, Sesay indicates that the report was prompted by a fourth incident of sleeping while on duty. Clearly, Sesay understood the March 15, 1996 write-up by DeAngelo as a sleeping while on duty violation.

Another aspect of Gba-Kamara's disciplinary history tends to shed light on why Saidu-Kamara's situation differs from Gba-Kamara's. Although there were approximately 20 facility managers who rotated as roving managers, it was DeAngelo who found Gba-Kamara "sleeping" on March 15, 1996. Also, DeAngelo wrote the warning notice, not Sesay. Basically, DeAngelo indicated he knew there was a problem with Gba-Kamara, so he personally went out to check on him and found him "sleeping." Such a circumstance creates the appearance that DeAngelo knew that Sesay was being lenient with Gba-Kamara. Clearly, Sesay was treating Gba-Kamara far better than Parkway's stated policy. Saidu-Kamara did not have the benefit of such leniency.

Next we turn to whether Boateng was shown to be similarly situated to Saidu-Kamara. Considering the entire record, Saidu-Kamara has shown that he was.

Parkway acknowledges that Boateng received two written warnings for sleeping on the job, but submits that the first warning came on January 13, 1993, and the second on March 17, 1995, over two years later. Parkway suggests that such a lengthy lapse of time severely reduces the impact

of the first warning. Further, Parkway observes that the two warnings were given by two separate facility managers. Sesay even testified that when he gave Boateng the March 17, 1995 written warning for sleeping on the job, he was unaware of the earlier incident.

Parkway also acknowledges that Boateng received three additional warnings but argues that those warnings were for various dissimilar infractions. In effect, Parkway argues that Boateng was not similarly situated to Saidu-Kamara.

With regard to Boateng's sleeping on duty infractions, several points can be made. First, although Sesay said he was unaware Boateng had received an earlier warning, Sesay's March 17, 1995 warning suggests otherwise. Rather than note that this was Boateng's first warning, Sesay indicated instead that this was his "final warning - next infraction will result in your termination." When Sesay gave Saidu-Kamara her first warning on February 2, 1996, he indicated it was her first warning. Sesay did the same thing on Gba-Kamara's first written warning for sleeping on the job (AE "E"). This factor alone strongly indicates that Sesay was fully aware of and gave consideration to Boateng's earlier warning.

Next, Sesay clearly treated Boateng more leniently because Sesay had given Boateng at least one verbal warning for sleeping. (NT 365, 370.) Sesay did not give Saidu-Kamara a verbal warning. This factor standing alone portrays a circumstance which sufficiently shows that Saidu-Kamara's work rule infractions were not the sole cause of her termination, but rather because she is female she was treated differently.

A complainant can prevail on the issue of pretext by proof of a difference in treatment between a complainant and one other similarly situated comparison. *See Lynn v. Deaconess Medical Center*, 78 FEP 595 (8th Cir. 1998). Here, the comparison with Boateng, on its own, sufficiently shows pretext.

The remaining question regarding Boateng's disciplinary history is whether Boateng's other three violations of work rules were comparably serious. Complainants attempting to establish another employee is similarly situated need only establish that they were treated differently than other employees whose violations were of comparable seriousness. *See Ricks v. Riverwood Int'l. Corp.*, 66 FEP 257 (8th Cir. 1994); and *McAlister v. United Air Lines, Inc.*, 47 FEP 512 (10th Cir. 1988). We should look beyond the labels attached to an employee's misconduct when deciding whether an employee is similarly situated.

Here, we have already concluded that Boateng violated the work rule against sleeping on duty on at least three occasions. In addition, Boateng's careless driving resulted in the damage of two vehicles, and on two occasions he received written warnings for not performing his assigned duties: May 4, 1995 (CE 16), and August 30, 1995 (CE 17). The August 30, 1995 warning also noted that Boateng was "habitually late." During the public hearing we never learned exactly what Boateng had done to be written up twice for "not performing assigned duties properly." What we do know is that the stated policy was to discharge an employee who twice violated a work rule. Boateng violated not one but two work rules twice and was not terminated.

Without concluding Boateng's three separate infractions were comparably serious, it is nevertheless clear that Boateng was treated more leniently than Saidu-Kamara.

Finally, we briefly review Tesfau's discipline history. Fundamentally, we note that Tesfau was not supervised by Sesay. Since Tesfau was supervised by another facility manager, we are able to say that he generally was not similarly situated to Saidu-Kamara. *See Jones v. Gerwens*, 50 FEP 163 (11th Cir. 1989); and *Tate v. Weyerhaeuser Co.*, 33 FEP 666 (8th Cir. 1983).

The benefit of Tesfau's experience is limited to the fact that he too had been verbally warned for sleeping while on duty. (NT 212, 219, 225.) The informality of the discipline policy as applied by facility managers lacked specific and objective criteria in deciding who received informal verbal warnings and who was formally written up. This rendered the application of disciplinary measures particularly susceptible to arbitrary discrimination on the part of Parkway's facility managers. Such a circumstance, which depends largely upon the subjective discretion of the facility managers, was a ready mechanism for discrimination which can be covertly concealed.

Here, Saidu-Kamara has proven that Sesay failed to afford her the benefit of a verbal warning and that such failure was, at least in part, because of Saidu-Kamara's sex.

Accordingly, consideration of an appropriate remedy is in order.

First, the PHRC's power to fashion a remedy is virtually plenary and exclusive. *Murphy v. PHRC*, 465 A.2d 740, 748 (Pa. Commonwealth Ct. 1983). Second, a remedy should both vindicate the state's interest in ending unlawful discrimination and consider an appropriate entitlement to individual relief.

Here, the state's interest simply requires a cease and desist order. Under the circumstances presented, the question of appropriate individual relief is more complex.

Because Saidu-Kamara has not expressed an interest in returning to Parkway we need not address the issue of reinstatement. Instead, the individual remedial emphasis here will be on backpay liability issues.

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 Albemarle Paper Co. v. Moody*, 422 U.S. 405, 10 FEP 1181 (1975); and *PHRC v. Alto-Reste Park Cemetery Assoc.*, 306 A.2d 881 (Pa. S.Ct. 1973).

The overall issue we must consider is what relief would make Saidu-Kamara whole. Also, when complainants prove an economic loss, back pay should be awarded, absent special circumstances. *See Walker v. Ford Motor Co. Inc.*, 684 F.2d 1355, 29 FEP 1259 (11th Cir. 1982).

As a general rule, backpay awards must be reduced by interim earnings or an amount a complainant could have earned had that complainant exercised reasonable diligence. An improperly discharged employee may not remain idle and recover lost wages from the date of their discharge. *See O'Neal v. Gresham*, 519 F.2d 803, 805 (4th Cir. 1975).

Once an unlawfully discharged employee produces evidence of the extent of financial loss suffered, an employer has the burden of showing that the employee did not exert reasonable efforts to mitigate the damages. *See Taylor v. Philips Industries, Inc.*, 593 F.2d 783 (7th Cir. 1979); and *Sprogis v. United Air Lines, Inc.*, 10 FEP 1249 (7th Cir. 1975).

Here, Saidu-Kamara carried her initial burden to demonstrate the economic loss she suffered because of the sex-based termination. However, Parkway has likewise carried its burden of proving that initially Saidu-Kamara failed to mitigate her damages.

While a complainant is not required to make every effort to find employment, there is a requirement to make a reasonable and diligent effort to pursue alternative employment.

Here, Parkway has shown that the course of conduct Saidu-Kamara initially followed was so deficient as to constitute an unreasonable failure to seek employment. When Saidu-Kamara was terminated, she was a student. Saidu-Kamara testified that, to her, it was not practical to look for a night job. (NT 69-70.) Instead, Saidu-Kamara simply chose to concentrate solely on school.

Contrary to the PHRC brief on behalf of the complaint, Saidu-Kamara did not look for alternative employment until after she graduated in May 1996. In fact, it was not until June 1996 that Saidu-Kamara even began to look for a job.

Saidu-Kamara did find employment with Norrell Services, Inc., a temporary employment agency where she worked until July 1998. In August 1998, Saidu-Kamara was hired by Protocall Pa., Inc., another temporary employment agency.

While working with Norrell Services, Inc., Saidu-Kamara was assigned to various temporary assignments and during several interim periods between assignments, Saidu-Kamara worked with both the trustees of the University of Pennsylvania and Presbyterian Hospital of the University of Pennsylvania.

Saidu-Kamara's pay records indicate that once she began to work with Norrell Services, Inc., Saidu-Kamara earned more wages than she would have earned from Parkway had she not been terminated. Further, since working for Protocall Pa., Inc., Saidu-Kamara continues to earn considerably more than she would have earned had she still been with Parkway.

While the PHRC brief on behalf of the complaint makes reference to weekend work with Parkway, the record clearly shows that Saidu-Kamara never asked for either extra night work or weekend assignments. In reality, Saidu-Kamara simply indicated that she chose not to work part-time anywhere else because she was waiting for her PHRC complaint to be resolved. (NT 144.)

Under the circumstances presented, Parkway has established that Saidu-Kamara is not entitled to a back-pay award from the date of her termination until June 1996. According to the evidence, Saidu-Kamara did not attempt to seek alternative employment during that period.

Further, once Saidu-Kamara did find employment, she consistently earned more than she would have earned had she remained a Parkway employee. Since backpay awards are always reduced by a complainant's interim earnings, Saidu-Kamara is entitled to no backpay award.

However, evidence was received by stipulation which reflects that Saidu-Kamara made eight visits to the PHRC Philadelphia Regional Office in connection with her case. (NT 77-78.) Further, on each visit Saidu-Kamara took approximately two hours unpaid time off from work. Further, Saidu-Kamara attended a full day of public hearing for which she again took unpaid leave from her work.

Appendix “D” of the PHRC’s post-hearing brief on behalf of the complaint calculates Saidu-Kamara’s verifiable out-of-pocket expenses as $276. This figure is accepted as a reasonable estimate of Saidu-Kamara’s verifiable out-of-pocket expenses.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICTORIA SAIDU-KAMARA, Complainant
v.
PARKWAY CORPORATION, Respondent

DOCKET NO. E77300D

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Parkway terminated Saidu-Kamara because of her sex. Accordingly, the Complainant has proven discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, 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.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICTORIA SAIDU-KAMARA, Complainant
v.
PARKWAY CORPORATION, Respondent

DOCKET NO. E77300D

FINAL ORDER

AND NOW, this 27th day of January, 2000, 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 finding 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

O R D E R S

1. That Parkway cease and desist from discriminating on the basis of sex.

2. That Parkway shall pay to Saidu-Kamara, within thirty days of the effective date of this order, $276.00, which sum represents Saidu-Kamara's verifiable out-of-pocket expenses.

3. That, within thirty days of the effective date of this order, Parkway 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, 711 State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130.

PENNSYLVANIA HUMAN RELATIONS COMMISSION