

**COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**DEBRA L. WURST, Complainant**

**v.**

**WEISSER MOBILE HOMES, INC., Respondent**

**PHRC CASE NO. 200300049**

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**FINAL ORDER**

### FINDINGS OF FACT\*

1. The Complainant in this case is Debra L. Wurst, an adult female (hereinafter “Wurst”).
2. The Respondent in this case is Weisser Mobile Homes, Inc. (hereinafter “Weisser Mobile Homes”).
3. Weisser Mobile Homes has two locations – Lancaster, Pennsylvania, and Trevoese, BenSalem, Bucks County. (N.T. 160, 161, 290, 315)
4. William Weisser, the company President, and Geraldine Weisser, the Vice-President, jointly own Weisser Mobile Homes, each owning 50% of the family business. (N.T. 158-159, 162, 313-314)
5. Weisser Mobile Homes sells manufactured housing, parts and accessories and provides various services to homes sold. (N.T. 159-160, 314)
6. The facility in Bucks County, located at 222 Old Lincoln Highway, is situated on approximately 3 acres on which there are 9 sample homes, an office, a parts store, a service department, a showroom, and a warehouse approximately 100 feet from the main office. (N.T. 79, 161, 214-215)
7. Of Weisser Mobile Homes’ 19 employees, 7 work at the Bucks County location. (N.T. 163, 217, 218, 316)
8. Weisser Mobile Homes had no written employment policies of any nature. (N.T. 164, 218)

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

N.T. Notes of Testimony  
C.E. Complainant’s Exhibit  
R.E. Respondent’s Exhibit

9. Yearly, Weisser Mobile Homes experiences two busy seasons: March 1 until the end of June and August through Thanksgiving. (N.T. 160)
10. Prior to August 2002, Wurst and her husband were struggling financially and had contemplated bankruptcy. (N.T. 28)
11. At that time, Wurst had been working full time with Morrisville Sweeping Company earning \$9.25 per hour. (N.T. 117)
12. On August 5, 2002, the Weissers hired Wurst for the position of Bookkeeper/Secretary/Receptionist at Weisser Mobile Homes’ Bucks County facility. (N.T. 24, 27, 74, 164)
13. Wurst’s position was primarily an office position that required no heavy lifting. (N.T. 265)
14. Wurst answered the telephone, used a computer, met and greeted customers, collected and distributed literature for customers, received payments from customers, paid bills, and did filing. (N.T. 27, 77)
15. Essentially, the position was a one person office operation. (N.T. 76)
16. On occasion, Wurst had to retrieve parts from the warehouse and on rare occasion, show a sample home when no one else was around the facility. (N.T. 78, 265, 318-319)
17. Wurst had no problem doing her job. (N.T. 103)
18. William Weisser described Wurst as having a good attitude, articulate, helpful, knowledgeable, kind to customers, eager to learn, and an excellent employee. (N.T. 166, 320, 323)

19. William Weisser further testified that Wurst had a good personality and appearance, improved the office atmosphere and that she was a breath of fresh air. (N.T. 166, 204, 320)
20. Geraldine Weisser, Wurst's immediate supervisor, described Wurst as vivacious and outgoing. (N.T. 261, 263)
21. When she started, Wurst worked 9:00 a.m. to 5:00 p.m., Monday through Friday, 35 hours per week, and was paid \$14.50 per hour. (N.T. 27, 28, 123)
22. The pay she received at Weisser Mobile Homes was the highest wages Wurst had ever made. (N.T. 27)
23. In 1998, Wurst was diagnosed with cervical cancer and underwent surgery in June 1998. (N.T. 26)
24. In 1999, Wurst had additional exploratory surgery for endometriosis. (N.T. 26)
25. When hired by Weisser Mobile Homes, Wurst told Geraldine Weisser that because she had cancer she could not have children. (N.T. 351)
26. On the Thursday of her first week at work, Wurst attended a scheduled Doctor's appointment as part of a periodic follow-up monitoring the earlier cervical cancer. (N.T. 28-29)
27. At that appointment, Wurst learned that she was pregnant. (N.T. 28, 74)
28. The following day, Wurst informed the Weissers that she was pregnant. (N.T. 29)
29. The Weisser's were happy and excited for Wurst. (N.T. 74,167)
30. At some point, Wurst was given a raise which brought her hourly rate to \$15.00 per hour. (N.T. 30, 122, 266)
31. Wurst was never given either verbal or written discipline. (N.T. 30)
32. Wurst's pregnancy did not hinder her job in any way. (N.T. 30)
33. Throughout her pregnancy, Wurst was under no medical restrictions and had a healthy pregnancy. (N.T. 30; C.E. 1)
34. Wurst was told that her due date was February 17, 2003 and she advised the Weissers of this information. (N.T. 39)
35. Wurst also informed the Weissers that she planned on working until she went into labor. (N.T. 39, 113)
36. While pregnant, Wurst had looked into day care options as she fully planned on returning to work. (N.T. 39-40)
37. Megan Druding, Office Aide at Weisser Mobile Homes, testified that she never heard Wurst complain, look uncomfortable, or moan and groan during her pregnancy. (N.T. 237, 239)
38. On January 20, 2003, the Weissers had a meeting with Wurst to discuss Wurst taking a "voluntary" layoff. (N.T. 41,42, 170-171, 234, 267)
39. William Weisser informed Wurst that the Weissers wanted Wurst to take a "voluntary" layoff because they did not want Wurst going into labor in the office. (N.T. 42, 85)
40. William Weisser offered Wurst the opportunity to apply for unemployment compensation benefits and that he would not oppose such an application. (N.T. 42, 178-179)
41. Wurst was also told to call Weisser Mobile Homes when she felt ready to return to work. (N.T. 42, 124-125)
42. At the conclusion of the meeting, Wurst was asked to type a memorandum indicating that she was taking a voluntary layoff. (N.T. 43, 86)
43. Wurst complied and prepared a short note that stated, "I, Debra L. Wurst, am voluntarily taking a layoff at this time – with the agreement of Weisser Homes, Inc." (N.T. 43-44; C.E. 2)
44. On January 21, 2003, Wurst filed for unemployment compensation. (N.T. 44)

45. When Weisser Mobile Homes received notice that Wurst had filed for unemployment compensation, William Weisser completed and returned an “Employer’s Notice of Application – Request for Separation and Wage Information” form to the Unemployment Service. (N.T. 179-180; C.E. 11)
46. In William Weisser’s response, he indicated the reason Wurst left was “voluntary layoff for pregnancy”, and in the remarks section, William Weisser wrote “she was not feeling well and was about 0 month [sic] from birth.” (C.E. 11)
47. On January 30, 2003, Wurst had a baby boy, Ty Scott Wurst. (N.T. 45, 87)
48. A few days after giving birth, Wurst called Weisser Mobile Homes and spoke with Scott Weisser, William and Geraldine Weissers’ son, saying she had a baby and asked Scott Weisser to tell everyone. (N.T. 87-88)
49. Initially, Wurst was awarded unemployment compensation benefits but by Advance Notice dated February 12, 2003, Wurst was informed by the Unemployment Service Center that her unemployment benefits may be terminated because Weisser Mobile Homes had told them Wurst had “voluntarily quit work without good cause”. (N.T. 45, 108; C.E. 3)
50. When Wurst received this notice on February 14, 2003 she was shocked and immediately called Weisser Mobile Homes. (N.T. 45, 50, 243)
51. On February 14, 2003, Wurst spoke with William Weisser and told him about the notice she had received and asked him why he would have told the Unemployment Service Center that she had quit. (N.T. 50, 106, 125)
52. William Weisser told Wurst to appeal and that he would not contest it. (N.T. 51)
53. Wurst then told William Weisser “why don’t we just forget the unemployment and I will come back to work.” (N.T. 126)
54. William Weisser responded by telling Wurst “we don’t need your services. We’re hiring someone else. Stay home with your child.” (N.T. 126)
55. Prior to Wurst’s call on February 14, 2003, William and Geraldine Weisser had decided to replace Wurst. (N.T. 275, 325, 357)
56. Sometime prior to 9:00 p.m., February 13, 2003, the Weissers contacted the Philadelphia Inquirer to place an ad in the Sunday, February 16, 2003 want ad section for a Bookkeeper. (N.T. 188-189; C.E. 12)
57. The February 16, 2003 ad indicated that the Bookkeeper was needed “ASAP”. (C.E. 12)
58. Weisser Mobile Homes hired Sally Carr as a Bookkeeper, and she began working on March 11, 2003. (N.T. 197, 273)
59. On or about October 22, 2003, PHRC Investigator Chungsoo Lee spoke with Geraldine Weisser. (N.T. 138)
60. After speaking with Geraldine Weisser, Investigator Lee notated that Geraldine Weisser had stated that Wurst was laid off because, “she was slow and she was pregnant, and under the condition, my husband and I didn’t think that she could return...She needs to stay home and take care of the child.” (N.T. 138)
61. In or about 2001, a Weisser Mobile Homes male employee, Jim Marcus, broke his back and was off work for approximately 6 months and was allowed to return to work. (N.T. 218-219, 277-278)
62. At around the same time period, another male employee, Daniel Herr, had knee surgery and after being out two to three months, was allowed to return to work on light duty. (N.T. 219, 276-277)
63. Another male employee had broken his leg and was off 4 to 5 days and returned. (N.T. 218-219)

64. Yet another male employee was off work for approximately 6 months after a knee injury and allowed to return to work. (N.T. 277-278)
65. William Weisser testified that he communicated with injured male employees and even visited one employee at his home during his absence. (N.T. 221-222)
66. After being notified that she would not be permitted to return to Weisser Mobile Homes, Wurst began to seek other employment. (N.T. 52)
67. Wurst looked in the newspaper want ads, sent resumes, made telephone calls, and submitted applications for both full-time and part-time work. (N.T. 52, 53)
68. After approximately six job interviews, Wurst was hired by Faulkner Pontiac for a part-time job working 16 to 20 hours per week. (N.T. 54, 56, 82)
69. After only one week with Faulkner Pontiac, Wurst was forced to resign because of financial concerns associated with the cost of day care. (N.T. 56)
70. Wurst continued to seek alternate employment until April 2004, when she was hired by Krum Insurance Services for a part-time position, working 20-24 hours per week. (N.T. 57, 69, 80)
71. At the time of the Public Hearing, Wurst was still employed by Krum Insurance Services. (N.T.70, 84)
72. Because of financial difficulties, Wurst was unable to pay the mortgages on her home. (N.T. 58, 118)
73. After falling behind on mortgage payments, Wurst and her husband were forced to sell their home. (N.T. 118-119)
74. Wurst and her husband also declared bankruptcy. (N.T. 67)
75. Wurst missed 12 to 16 hours of work at Krum Insurance Services in connection with pursuing her PHRC claim. (N.T. 72)
76. Wurst also incurred travel expenses associated with her PHRC claim in that she visited the PHRC's Philadelphia regional office 4 times, twice driving a car to Philadelphia and twice taking a train. (N.T. 73)

### **OPINION AS TO LIABILITY**

This case arises on a complaint filed by Debra L. Wurst (hereinafter "Wurst") against Weisser Mobile Homes, Inc. (hereinafter "Weisser Mobile Homes"), on or about July 3, 2003, at PHRC Case Number 200300049. Generally, Wurst alleged that Weisser Mobile Homes unlawfully discriminated against her because of her pregnancy by discharging her from her position as a Bookkeeper. Wurst claims that Weisser Mobile Homes violated Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit the allegation of discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. These efforts were unsuccessful, and this case was approved for public hearing. The public hearing was held on September 8, 2004, in Fairless Hills, Pennsylvania, before a three-member panel of Commissioners. PHRC Commissioner Raquel Otero de Yiengst served as Panel Chairperson, and PHRC Commissioners Toni M. Gilhooley, and M. Joel Bolstein were the remaining panel members. Panel Advisor, Carl H. Summerson assisted the Panel.

The state's interest in Wurst's allegation was presented by Charles Nier, III, Esquire, and Weisser Mobile Homes was represented by Alan W. Moss, Esquire. The parties submitted post-hearing briefs on December 30, 2004 and reply briefs on February 2, 2005.

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

It shall be an unlawful discriminatory practice...for any employer because of the...sex...of any individual...to discharge from employment such individual...or to otherwise discriminate against such individual...with respect to compensation, hire, tenure, terms, conditions or privileges of employment...if the individual ...is the best able and most competent to perform the services required...(43 P.S. 955(a)).

Fundamentally, in the case of Cerra v. East Stroudsburg Area School District, 299 A.2d 277 (Pa. 1973), the Pennsylvania Supreme Court held that pregnancy-based discrimination constitutes sex discrimination in violation of Section 5(a) of the PHRA. In Cerra, the court observed that pregnant women who are discharged on the basis of a physical condition peculiar to their sex amounts to sex discrimination "pure and simple". Id at 280.

In this case, there are two distinct instances of conduct that we find was unlawful discrimination. First, on January 20, 2003, Wurst was made to take a voluntary layoff. Second, Weisser Mobile Homes did not permit Wurst to return to her position following her pregnancy.

Regarding the January 20, 2003 layoff, there is no dispute that the Weissers called a meeting with Wurst and that a result of the meeting was that Wurst left that same day on a "voluntary layoff". Wurst testified that she wanted to work until she went into labor. (N.T. 39) She indicated that her expected delivery date was February 17, 2003 and that she had informed the Weissers of this. (N.T. 39) Wurst credibly explained that she wanted to work as long as she could because she and her husband had severe financial concerns and she needed all the income she could make. (N.T. 39, 44)

Wurst testified that when she was called to the meeting on January 20, 2003, William Weisser told her he wanted her to take a voluntary layoff because he did not want her to go into labor in the office. (N.T. 42) Wurst offered that she felt she had no meaningful choice but to take the layoff. (N.T. 104-105)

Weisser Mobile Homes suggests that Wurst did not ask what would happen if she did not take the voluntary leave and that when the leave was offered to her she was thankful to be given the opportunity to receive unemployment benefits and be able to go home to get ready for her baby's arrival. (N.T. 108, 205, 259, 354)

Between the two versions, we find Wurst's version more credible. Wurst did not approach the Weissers seeking leave. Instead, the Weissers appear to have taken a paternalistic approach to Wurst's pregnancy. William Weisser offered that Wurst was a nice "kid" and that they needed to help her out. (N.T. 172) Indeed, the Weissers believed they were being kind to Wurst and laying her off out of the "goodness of their hearts." (N.T. 172, 202) In actuality, the Weissers were acting discriminatorily by forcing Wurst to take a layoff before she intended.

Although the Weissers suggested that Wurst appeared uncomfortable and moaned and groaned around the office, both Wurst and the office Aide, Megan Druding, agreed that Wurst was not

having problems, not moaning or groaning, and did not appear uncomfortable. (N.T. 30, 40, 239) Wurst was not under any doctor's restrictions and credibly testified that her pregnancy was healthy and she felt comfortable at work. (N.T. 30, 40; C.E. 1)

The Weissers also suggest that during the meeting on January 20, 2003, they spoke to Wurst about several performance issues. Geraldine Weisser offered that Wurst was making mistakes and was slacking off. (N.T. 352, 354) However, at a prior deposition, when asked about any performance problems, Geraldine Weisser said Wurst had "nothing to really speak about." (N.T. 356).

William Weisser testified about purported accounting problems suggesting that Weisser Mobile Homes' accountant came to him on January 20, 2003 and told him the company's books were really poor and that something had to be done. (N.T. 177, 323-324) He testified that during the meeting with Wurst, he brought up this performance issue. (N.T. 177) On cross-examination, William Weisser was confronted with having previously stated during a deposition that there had been no discussion in the January 20, 2003 meeting about accounting problems. William Weisser responded by suggesting he had not understood the prior question. He then admitted that his decision to place Wurst on a voluntary layoff was in no way influenced by an accounting issue. (N.T. 178)

Considering the evidence as a whole, it is clear that the only motivation for placing Wurst on a layoff was that she was pregnant and the Weissers did not want her working because they felt it would be better if she did not and that they did not want her to go into labor while working. Their motivation quite simply was discriminatory.

Next, we turn to that portion of Wurst's claim that alleges she was not permitted to return to her position following the birth of her son. In effect, Wurst claims that she was terminated on February 14, 2003.

Fundamentally, employers may not treat a female employee attempting to return to work after a pregnancy any different from a male employee attempting to return to work from any other temporary disability. Freeport Area School District v. PHRC, 335 A.2d 873, 877 (Commonwealth Ct. 1975); Anderson v. Upper Bucks County Area Vocational Technical School, 373 A.2d 126, 132 (Commonwealth Ct. 1977); Leechburg Area School District v. PHRC, 339 A.2d 850, 853 (Commonwealth Ct. 1975), citing Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973). See also In re Southwestern Bell Tel. Co. Maternity Benefits Litig., 602 F.2d 845, 848-849 (8<sup>th</sup> Cir. 1979), and Communications Workers v. South Central Bell Telephone, 515 F.Supp. 240, 245 (E.D. La. 1981). In addressing a school policy that required the forced resignation of female teachers at the end of their fifth month of pregnancy, the Pa. Supreme Court in Cerra articulated a principle that controls in this case. The Cerra court wrote:

...Mrs. Cerra's contract was terminated absolutely, solely because of pregnancy... There was no evidence that the quality of her services as a teacher was or would be affected as a result of her pregnancy. Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short, Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of

a physical condition peculiar to their sex. This is sex discrimination pure and simple. 450 Pa. at 213, 299 A.2d 280.

Initially, Weisser Mobile Homes argues that the reason Wurst was not brought back to work is that she failed to timely communicate with Weisser Mobile Homes that she was ready to return to work. Weisser Mobile Homes suggests that if only Wurst had come back or called, she would have been returned to work. Weisser Mobile Homes further submits that it was Wurst's obligation to advise them when she was ready to return. Weisser Mobile Homes contends that Wurst not only never told them her intentions while she was working, but that after leaving on January 20, 2003, Wurst's only call was to express concern about a developing problem regarding her collecting unemployment compensation.

Weisser Mobile Homes argues that there would have been no reason not to want Wurst to return. Weisser Mobile Homes submits that it had invested 5 to 6 months of training in Wurst, there were no major complaints regarding Wurst's work performance, Wurst was friendly and likeable and seen as a breath of fresh air around the office, and Weisser Mobile Homes needed a bookkeeper. Weisser Mobile Homes also argues that it is a good employer in that most staff members are long-term employees. Finally, Weisser Mobile Homes points to the circumstance of another female employee who was permitted to remain employed after a pregnancy.

Wurst testified that practically the moment she received a notice from the unemployment office that, in effect, told her that her benefits were in jeopardy, she called Weisser Mobile Homes. (N.T. 50) Wurst testified that she placed this call on February 14, 2003 and spoke directly with William Weisser. (N.T. 106, 125) Wurst further indicated that after expressing concern that William Weisser had told the unemployment office that she had quit, she specifically suggested to William Weisser that they should simply forget the unemployment compensation issue and that she would just come back to work. (N.T. 125) Wurst testified that, in response to her suggestion, William Weisser informed her that she was terminated, that Weisser Mobile Homes was looking to hire someone else for her position and that Wurst should stay home with her child. (N.T. 52, 126)

Clearly, there is fundamental conflict between the testimony of Wurst and William Weisser regarding who said what during Wurst's only telephone call to Weisser Mobile Homes after she had her baby. Because this fundamental disparity is so critical, an assessment of credibility must be made.

Considered as a whole, we find Wurst's straightforward testimony to be credible, while William Weisser's testimony was found to be evasive at times, not always logical, and both contradicted and inconsistent, thus lacking credibility. There was no dispute that Wurst did make one phone call, the conflict here is when this call was made and what was said by whom.

William Weisser initially attempted to counter Wurst's testimony that she called on February 14, 2003 by saying that he was in Lancaster on that day. (N.T., 184) William Weisser later testified that he was in Bensalem, (N.T. 212) and eventually, on cross-examination, he admitted that he was in the office in Trevoise. (N.T. 213-214). In this instance, William Weisser contradicted himself.

Geraldine Weisser actually specifically contradicted William Weisser on two instances. First, William Weisser testified that he decided to hire someone else approximately the first week of



March 2003. (N.T. 187) Geraldine Weisser credibly testified that the decision to replace Wurst had been made by February 13, 2003. (N.T. 357) Second, William Weisser testified that he placed the February 16, 2003 ad for a bookkeeper to “test the water” for a possible future position. (N.T. 190-192) Geraldine Weisser was clear that the ad was placed to seek a replacement for Wurst. (N.T. 360) Additionally, William Wurst also later contradicted himself on this point by offering that the February 16, 2003 ad for a bookkeeper could have been to replace Wurst. (N.T. 230)

William Weisser also testified that he had to hire a bookkeeper because he had already gotten rid of Weisser Mobile Homes’ part-time bookkeeper, Megan Druding. (N.T. 343) However, the evidence reveals that at the time of the decision to replace Wurst, Megan Druding had not told anyone that she was leaving. (N.T. 357)

William Weisser also suggested that the decision to replace Wurst had been made because Weisser Mobile Homes started to get busy. The decision to replace Wurst was made on or before February 13, 2003, and one of Weisser Mobile Homes’ two separate busy seasons did not begin until March. (N.T. 160)

William Weisser testified that it was not possible that the decision to replace Wurst was made before she called him. (N.T. 196) The evidence reveals that, indeed, the decision to replace Wurst had been made just before she called.

When William Weisser was asked why, if Wurst had not called, he did not call Wurst, he offered that he did not want to pressure Wurst. (N.T. 195, 216, 223, 232) Clearly, William Weisser never did call Wurst. (N.T. 327, 344) We find that William Weisser’s testimony about pressuring Wurst is not logical. Clearly William Weisser was aware that Wurst was desperate for money. During his testimony, he twice acknowledged this fact. (N.T. 179, 324) Wurst testified that she told everyone her due date was February 17, 2003, and because she needed money, she planned on working until she went into labor. (N.T. 38, 113) Also, only a few days after giving birth on January 30, 2003, (N.T. 87), Wurst called Weisser Mobile Homes and told Scott Weisser to tell everyone there that she had a baby. (N.T. 87-88) Megan Druding testified that people at Weisser Mobile Homes knew that Wurst had her baby. (N.T. 246, 258)

William Weisser’s suggestion that he did not want to pressure Wurst by inquiring if and when she would be returning stands in stark contrast to his knowledge that Wurst needed money. He certainly had to know that by Wurst not working, her family would experience considerable financial hardship. It is simply not believable that the reason William Weisser did not contact Wurst was because he did not want to pressure her to return to work. To the contrary, the reason he did not make any effort to contact her was because he had decided not to rehire her after the pregnancy.

Consider the result in the case of Haynes v. Rhone Poulenc, Inc., 531 S.E.2d 331 (W.Va. 1999), where an employer had terminated an employee after six months of maternity leave had passed. The employer argued that it was unreasonable to be required to hold a job open when the employer had no idea when, or even whether, the employee was going to return. In the Haynes case, the employer was found liable for an impermissible failure to reasonably accommodate an employee’s temporary disability. The employee was replaced without being informed. This was found to be an unsympathetic act and hostile to the employee. Additionally, the action was found to be intolerant and disdainful to the employee’s condition.

In this case, William Weisser's testimony subverts Weisser Mobile Homes' defense that Wurst did not call to tell Weisser Mobile Homes when she could return. After a review of the reasons listed, we find that William Weisser lacks credibility. We find that Wurst called William Weisser on February 14, 2003, and told him that she would return to work rather than pursue an unemployment compensation claim. In response, William Weisser informed Wurst that she was terminated. Since this defense of Wurst failing to call is rejected, we turn to the larger question, whether Wurst was treated the same as males who had other forms of disabilities.

The evidence on this question reveals that Wurst was treated significantly different than several male employees who had temporary disabilities. The evidence in this case reveals that at least four male employees were treated better than Wurst in that they were allowed to return to their positions following extended absences. One male had broken his back and was out for approximately six months and allowed to return. (N.T. 218-219, 277-278) Another male employee was out between two and three months following knee surgery and came back to work on light duty. (N.T. 219, 220, 276-277) Still another male employee who had blown out his knee and was out for six months was allowed to return. (N.T. 277-278) Finally, a male with a broken leg took four or five days off and came back to work. (N.T. 218-219) In none of those instances was William Weisser afraid to speak with the male employees about returning to work for fear of upsetting them. In fact, William Weisser even visited one of those male employees at his home during his period of recuperation.

One can see that a seed of bias against Wurst was planted on January 20, 2003 when Wurst was made to take a "voluntary" layoff. Wurst initiated contact with Weisser Mobile Homes approximately two weeks after she had a baby. Before she called, William Weisser had already decided to replace her and took measures to place an ad for a new bookkeeper. When Wurst called, and offered to come back, he callously told her she was terminated.

Weisser Mobile Homes points to the treatment of another female, Jill Hassinger. Approximately eight years before Wurst was terminated, Weisser Mobile Homes allowed Hassinger, the then bookkeeper at the Lancaster location, to return to work after having a baby. Further, Hassinger testified that she was permitted to work until the day before she delivered.

Here, we have a record of at least four male employees treated better than Wurst. The better treatment received by the male employees occurred closer in time than the ostensible similar treatment Hassinger received in that Hassinger's circumstance occurred approximately eight years before Wurst's circumstance. This time discrepancy lessens the impact of the comparison with Hassinger. Further, as the court in Freeport Area School District v. PHRC, supra at 878, noted, "one incident of treatment accorded...does not, without more, provide substantial evidence..."

We find that the disparity between the treatment afforded to Wurst when compared to the treatment afforded male employees more than sufficiently establishes Wurst's claim that her termination was sex-based.

Accordingly, the full Hearing Panel makes the following recommendation regarding liability. Since panel members differ regarding appropriate damages, separate recommendations on the issue of damages will follow.

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DEBRA L. WURST, Complainant

v.

WEISSER MOBILE HOMES, INC., Respondent

PHRC CASE NO. 200300049

RECOMMENDATION OF THE HEARING PANEL AS TO LIABILITY

Upon consideration of the entire record in the above-captioned matter, the full Hearing Panel finds that Wurst has proven discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the full Hearing Panel's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion as to Liability be approved and adopted by the full Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

4-18-05  
Date

By: Raquel Otero de Yiengst  
Raquel Otero de Yiengst  
Hearing Panel Chairperson

4/18/05  
Date

By: M. Joel Bolstein  
M. Joel Bolstein  
Panel Member

April 18, 2005  
Date

By: Toni M. Gilhooley  
Toni M. Gilhooley  
Panel Member

## MAJORITY OPINION AS TO DAMAGES

The PHRC has broad equitable power to fashion relief. Section 9 of the Pennsylvania Human Relations Act (hereinafter, “PHRC”) states in pertinent part:

(f)(1) 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 to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, reimbursement of certifiable travel expenses in matters involving the complaint, compensation for loss of work in matters involving the complaint, hiring, reinstatement or upgrading of employees; with or without back pay, . . . and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice, . . . as, in the judgment of the Commission, will effectuate the purposes of this act, . . .

43 P.S. § 959(f)(1).

In Murphy v. Cmwlth., PA Human Relations Commission, 506 Pa. 549, 486 A.2d 388 (1985) the Pennsylvania Supreme Court commented on the extent of the Commission’s power by stating: “We have consistently held that the Commissioners, when fashioning an award, have broad discretion and their actions are entitled to deference by a reviewing court.” Murphy, at 486 A.2d 393. The expertise of the Commission in fashioning a remedy is not to be lightly regarded. The only limitation upon the Commission’s authority is that its award may not seek to achieve ends other than the stated purposes of the Act. Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 136 Pa. Commonwealth Ct. 147,152, A.2d 702 708 (1990).

The purpose of the remedy awarded under the PHRA is twofold. First, the remedy must insure that the Commonwealth’s interest in eradicating the unlawful discriminatory practice found to exist is vindicated. Vindication of this interest is non-discretionary. It necessitates entry of an order, injunctive in nature, which requires the Respondent to cease and desist from engaging in unlawful discriminatory practices.

The second purpose of any remedy focuses on entitlement to individual relief. Its purpose is not only to restore the injured party to his pre-injury status and make him whole, but also to discourage future discrimination. Williamsburg Community School District v. Pennsylvania Human Relations Commission, 99 Pa. Commonwealth Ct. 206, 512 A.2d 1339 (1986).

With respect to entitlement to individual relief, several other matters must be addressed. First is the fact that where a complainant demonstrates that economic loss has occurred, back pay should be awarded absent special circumstances. See: Walker v. Ford Motor Co., Inc., 684 F.2d 1355 (11<sup>th</sup> Cir. 1982). In fact, once liability is established, the burden shifts to the employer to demonstrate that monetary relief is not proper. U.S. v. International Brotherhood of Teamsters, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed.2d 396 (1977); Franks v. Bowman Transportation Co., 424 U.S. 474, 96 S. Ct. 1251, 47 L. Ed.2d 444 (1976). It is axiomatic that the calculation of the back pay award need not be exact. It is only necessary that the method used be reasonable. Uncertainties, in general, should be resolved against a discriminating employer. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5<sup>th</sup> Cir. 1974). The question of mitigation of damages is a matter that lies within the sound discretion of the Commission. Consolidated Rail Corporation, cited *infra*, 582 A2d at 708. Moreover, the burden is on the employer to demonstrate any alleged failure to mitigate. Cardin v. Westinghouse Electric Corp., 850 F.2d 996, 1005 (3<sup>rd</sup> Cir. 1988). See generally, State Public School

Building Authority v. M.M. Anderson Co., 410 A 2d 1329 (Pa. Cmwlth. 1980) (Party who has caused the loss has the burden of showing that the losses could have been avoided through the reasonable efforts of the damaged party).

The PHRC regional office post-hearing brief suggests that any back pay award should begin on March 3, 2003, offering that this is the date that Wurst reasonably would have been able to return to work. By Wurst's testimony, she was prepared to return to work on February 14, 2003. Accordingly, any calculation of lost back pay shall begin on February 14, 2003.

In Weisser Mobile Homes' post-hearing brief, it argues that Wurst's recovery of unemployment compensation benefits mitigate any loss and that, in effect, any back pay award should be reduced because Wurst did not present credible evidence that she sought full-time employment and instead, she was satisfied to work part-time.

On the question of whether to deduct unemployment benefits, this question has been firmly settled by long standing precedent. In Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3<sup>rd</sup> Cir. 1983), the circuit court articulated a well reasoned rationale for not deducting unemployment compensation. In order not to dilute the PHRA's purpose of ending discrimination in the workplace and because unemployment compensation most closely resembles a collateral benefit which is ordinarily not deducted from a Complainant's recovery, we decline to deduct the unemployment compensation Wurst received. We adopt the stated rationale in Craig as persuasive. See also, Maxfield v. Sinclair Int'l, 766 F.2d 998, 36 FEP 159 (3<sup>rd</sup> Cir. 1984).

Next we turn to Weisser Mobile Homes' argument that Wurst did not sufficiently mitigate her damages because she did not seek full-time employment. Wurst credibly testified that after her termination from Weisser Mobile Homes, she applied for both full-time and part-time positions. (N.T. 80, 84) In Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743 (7<sup>th</sup> Cir. 1983), cert. denied, 464 U.S. 992 (1983), a Complainant, who in a two-year period secured a part-time job and applied for another full-time job, was found to have sufficiently fulfilled the duty to mitigate damages. Here, Wurst did more than the Complainant in Orzel. Accordingly, Weisser Mobile Homes has failed to establish that Wurst failed to mitigate her damages.

Accordingly we first turn to the amount of Wurst's back pay loss. At the time of her termination, Wurst was earning \$15.00 per hour and was working, on average, 35 hours per week. The general rule is that the back pay period ends on the date of the order authorizing back pay and determining other appropriate relief. See Ekandem v. District of Columbia, 58 FEP 1065 ( D.D.C. 1992); Johnson v. United States Elevator Corp., 57 FEP 1103 (E.D. Mo. 1991); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5<sup>th</sup> Cir. 1974) cert denied, 439 U.S. 1115 (1979); and Nord v. United States Steel Corp., 758 F.2d 1462 (11<sup>th</sup> Cir. 1985). Had Wurst been permitted to return to Weisser Mobile Homes on February 15, 2003 and worked there to the date of this order, she would have earned the following:

\$15.00 per hour x 35 hours per week = \$525.00 per week  
\$525.00 per week x 113 weeks = \$59,325.00 total lost wages

Fundamentally, amounts Wurst earned from substitute employment are deductible. Wurst's interim earnings from her part-time jobs were as follows:

2003.....\$70.00  
(Wurst worked for less than a week with Faulkner Pontiac  
but a schedule conflict and inability to afford day care

caused Wurst to reasonably quit this part-time job. (N.T. 54, 82)

2004.....	\$6,952.25
Wurst’s approximate wages at Michael Krum Insurance (C.E. 8)	
2005.....	\$2,880.00
Total interim wages.....	\$9,902.25
Total lost wages minus interim earnings.....	\$49,422.75

Of course, 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, an award of interest at the rate of 6% per year is appropriate.

The PHRC regional office post-hearing brief also seeks front pay suggesting that reinstatement is not appropriate because there is animosity between the parties and the position that Wurst had held is not available. At the Public Hearing, Wurst testified that she does not want to be reinstated. (N.T. 73) Wurst also stated, “What they did to me was wrong and I don’t want to work for people who’d do that to me.” (N.T. 73). In the case of Bledsoe v. Wilker Bros., 33 FEP 127 (W.D. Tenn. 1980), a complainant testified that she would not return to the employer that terminated her “even if they made me president.” The complainant in the Bledsoe case expressed her disgust with her past employer with a degree of hostility much higher than that expressed by Wurst in this case. In Bledsoe, reinstatement was not ordered. Instead, the court merely ordered back pay equal to what she would have earned absent her termination less her actual earnings since her discharge until the date of trial.

Here, we acknowledge that there would naturally be some hard feelings on the part of Wurst, however, there has not been a showing that the Weissers have exhibited such extreme hostility towards Wurst as to render a good working relationship impossible. See EEOC v. General Lines, 51 FEP 971 (10<sup>th</sup> Cir. 1989). We find that the magnitude of hostility that exists in this matter is relatively light and it is more than probable that an effective employment relationship could be reestablished after this matter has concluded. See EEOC v. Pacific Press Pub. Assn., 20 FEP 848 (N.D. Cal. 1979), and Fitzgerald v. Sirloin Stockade, 22 FEP 262 (10<sup>th</sup> Cir. 1980).

Under all of the circumstances present in this case, we find that the back pay award will deter future unlawful employment action by Weisser Mobile Homes and adequately compensate Wurst for her injury. While reinstatement is usually the preferred remedy, it is not always required. See McKnight v. General Motors Corp., 64 FEP 1071 (7<sup>th</sup> Cir. 1992). In our discretion, we find that Wurst’s declaration that she does not want reinstatement precludes an order of reinstatement. Further, there is insufficient evidence of the likelihood of future friction and animosity to justify a front pay award.

Finally, Wurst is entitled to verifiable, reasonable out-of-pocket expenses caused by the unlawful discrimination. In this regard, the PHRC regional office post-hearing brief submits that Weisser Mobile Homes’ unlawful termination of Wurst was the cause of Wurst’s family having to sell their home and file bankruptcy. The PHRC regional office post-hearing brief also points to expenses incurred by Wurst in connection with the filing of her PHRC claim.

On the issue of the sale of her home and the filing of bankruptcy, we find that prior to being hired by Weisser Mobile Homes, the Wurst family was deep in debt. In May, 2003, just months after Wurst's termination, the Wurst family credit card debt exceeded \$34,000. Cellular telephone bills were \$1,466.62. In total, unsecured creditors were owed almost \$40,000. Given this situation, it is apparent that the reason for the sale of the Wurst's home and the need for the filing of bankruptcy had more to do with a spending pattern that far exceeded the Wurst's means than Weisser Mobile Homes' termination of Wurst. For this fundamental reason, Wurst should not be awarded either the loss she suffered from the sale of her home or the costs associated with the bankruptcy filing.

With regard to expenses Wurst incurred in connection with the filing of her PHRC claim, we find that Wurst should be reimbursed for both the hours she missed work to attend to matters associated with her PHRC complaint and travel expenses. In the PHRC regional office post-hearing brief, Appendix C, the calculations of \$144.00 for lost work and \$48.80 for travel expenses are reasonable and accepted.

An appropriate recommendation and order follows.

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DEBRA L. WURST, Complainant

v.

WEISSER MOBILE HOMES, INC., Respondent

PHRC CASE NO. 200300049

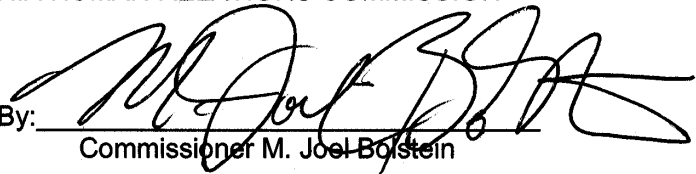
MAJORITY RECOMMENDATION ON DAMAGES

Upon consideration of the entire record in the above-captioned matter, it is the Recommendation of the Majority of the Hearing Panel that the attached Majority Opinion as to Damages be approved and adopted by the full Pennsylvania Human Relations Commission.

If so approved, the Majority of the Hearing Panel recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

7/18/05  
Date

By:   
Commissioner M. Joel Bolstein

April 18, 2005  
Date

By:   
Commissioner Toni M. Gilhooley



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
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DEBRA L. WURST, Complainant

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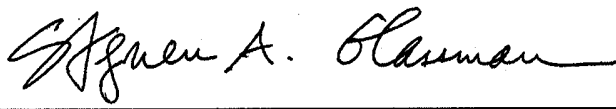
**FINAL ORDER**

AND NOW, this 19<sup>th</sup> day of April, 2005, 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 Findings of Fact, Conclusions of Law, Opinion as to Liability, Recommendation of Hearing Panel as to Liability, and the Majority Opinion as to Damages. Further, the Commission adopts said Findings of Fact, Conclusions of Law, Opinion as to Liability, Recommendation of Hearing Panel as to Liability, and the Majority Opinion as to Damages as its own findings in this matter and incorporates the Findings of Fact, Conclusions of Law, Opinion as to Liability, Recommendation of Hearing Panel as to Liability, and the Majority Opinion as to Damages into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

**ORDERS**

1. That Weisser Mobile Homes shall cease and desist from sex-based discrimination with regard employees that become pregnant.
2. That Weisser Mobile Homes shall pay to Wurst, within 30 days of the effective date of this Order, the lump sum of \$49,422.75, which amount represents back pay lost for the period between February 15, 2004 and the date of this Order.
3. That Weisser Mobile Homes shall pay additional interest at the rate of six percent per annum on the back pay award, calculated from February 15, 2004, until payment is made.
4. That Weisser Mobile Homes shall, within 30 days from the effective date of this Order, reimburse Wurst \$192.80, which represents the certifiable travel expenses and hours missed from work to attend to matters associated with Wurst's PHRC complaint.
5. That Weisser Mobile Homes shall report the means by which it will comply with this Order, in writing to Charles L. Nier, III, Esquire, Assistant Chief Counsel, within 30 days of the date of this Order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

By:   
\_\_\_\_\_  
**Stephen Glassman, Chairperson**

ATTEST:   
By: \_\_\_\_\_  
**Daniel D. Yun, Secretary**

## MINORITY OPINION AS TO DAMAGES

I fully concur with my colleagues' recommendation as to damages with one exception. I agree that Wurst should be awarded back pay in the amount of \$49,422.75, which amount represents the difference between what Wurst would have earned had she not been terminated from Weisser Mobile Homes and what she did earn in substitute employment. Wurst should also be awarded interest on this back pay award. I further agree that Wurst should not be awarded either reinstatement or front pay but that Wurst should be awarded \$144.00 in lost wages while attending to her PHRC complaint and \$48.80 in travel expenses. Where I disagree with my colleagues is on the issue of whether to award certain verifiable out-of-pocket expenses.

In my opinion, Weisser Mobile Homes' termination of Wurst significantly contributed to financial hardships on Wurst's family. The Wurst's had both a first and second mortgage on their home. Once terminated, Wurst fell behind on their home mortgages and were forced to sell their home and an adjacent piece of property they owned.

Wurst testified that, combined, her home and adjacent property were appraised for \$219,000.00. When forced to sell, the home sold for \$163,000.00 and the adjacent property for \$30,000.00. The loss suffered is calculated as \$26,000.00. I would award this sum to Wurst as an out-of-pocket expense incurred as a result of her having been terminated. Further, Wurst incurred \$9,780.00 as a real estate agent commission on the sale of her home and an additional \$300.00 on the sale of the adjacent property. I would also award these expenses.

A further out-of-pocket expense I would award is the \$500.00 cost of filing for bankruptcy. An appropriate Final Order follows.

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DEBRA L. WURST, Complainant

v.

WEISSER MOBILE HOMES, INC., Respondent

PHRC CASE NO. 200300049

MINORITY RECOMMENDATION ON DAMAGES

Upon consideration of the entire record in the above-captioned matter, it is my Recommendation as the Hearing Panel Chairperson that the attached Minority Opinion as to Damages be approved and adopted by the full Pennsylvania Human Relations Commission.

If so approved, I recommend issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

4-18-05  
Date

By: Raquel Otero de Yienqst  
Panel Chairperson Raquel Otero de Yienqst

**COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**DEBRA L. WURST, Complainant**

v.

**WEISSER MOBILE HOMES, INC., Respondent**

**PHRC CASE NO. 200300049**

**FINAL ORDER**

**AND NOW**, this 19th day of April, 2005, 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 Findings of Fact, Conclusions of Law, Opinion as to Liability, Recommendation of Hearing Panel as to Liability, and the Minority Opinion as to Damages. Further, the Commission adopts said Findings of Fact, Conclusions of Law, Opinion as to Liability, Recommendation of Hearing Panel as to Liability, and the Minority Opinion as to Damages as its own findings in this matter and incorporates the Findings of Fact, Conclusions of Law, Opinion as to Liability, Recommendation of Hearing Panel as to Liability, and the Minority Opinion as to Damages into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

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4. That Weisser Mobile Homes shall, within 30 days from the effective date of this Order, reimburse Wurst \$192.80, which represents the certifiable travel expenses and hours missed from work to attend to matters associated with Wurst's PHRC complaint.
5. That Weisser Mobile Homes shall, within 30 days from the effective date of this Order, pay Wurst the lump sum of \$36,080.00, which represents verifiable out-of-pocket expenses incurred in the sale of the Wurst's home and adjacent property and the filing of a bankruptcy petition.
6. That Weisser Mobile Homes shall report the means by which it will comply with this Order, in writing to Charles L. Nier, III, Esquire, Assistant Chief Counsel, within 30 days of the date of this Order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**By:** \_\_\_\_\_  
**Stephen Glassman, Chairperson**

**ATTEST:**

**By:** \_\_\_\_\_  
**Daniel D. Yun, Secretary**