

FINDINGS OF FACT *

1. The Complainant, Vikki Mace, filed a complaint of employment discrimination against Respondent Caco Three, Inc., with the Pennsylvania Human Relations Commission on or about January 7, 2002. (S.F. 1; N.T.I. 10.)
2. At the time of the filing of the complaint, Complainant's legal name was Vikki Arentz and was an adult female. (S.F. 2; N.T.I. 10.)
3. At the time the Complainant was rehired, Respondent was doing business as McDermitt Concrete, Inc. (S.F. 3; N.T.I. 11.)
4. The initial complaint was amended to reflect the correct legal names of the Complainant and Respondent. (S.F. 4; N.T.I. 11.)
5. The PHRC served Respondent with a copy of the complaint on or about February 7th, 2002. (S.F. 5; N.T.I. 11.)
6. Respondent filed its Answer on or about April 5, 2002. (S.F. 6; N.T.I. 11.)
7. Respondent is an "employer" within the meaning of Section four of the Pennsylvania Human Relations Act. (S.F. 7; N.T.I. 11.)
8. The PHRC served Respondent with a Finding of Probable Cause on or about December 30, 2002. (S.F. 8; N.T.I. 11.)
9. PHRC scheduled a conciliation conference for January 14, 2003. (S.F. 9; N.T.I. 11.)
10. Conciliation was not successful. (S.F. 10; N.T.I. 11.)
11. Complainant filed a second complaint with the PHRC, Case Number 200209894, alleging retaliation on or about June 6th, 2003. (S.F. 11; N.T.I. 12.)
12. PHRC served Respondent with a copy of the second complaint on June 16, 2003. (S.F. 12; N.T.I. 12.)

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

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

13. Complainant amended her second complaint on or about September 9, 2003. (S.F. 13; N.T.I 12.)
14. PHRC served the amended complaint on September 10, 2003. (S.F. 14; N.T.I 12.)
15. Respondent filed its Answer to the amended complaint on or about September 12, 2003. (S.F. 15; N.T.I 12.)
16. On or about November 21st, 2005, PHRC notified Respondent that probable cause existed to credit the allegations of the second complaint. (S.F. 16; N.T.I 12.)
17. PHRC scheduled a conciliation conference regarding the second complaint for December 5, 2005. (S.F. 17; N.T.I 12.)
18. At Respondent's request, the conciliation conference was rescheduled for January 18, 2006. (S.F. 18; N.T.I 12.)
19. Conciliation was not successful. (S.F. 19; N.T.I 13.)
20. On or about March 1, 2007, PHRC Executive Director Homer C. Floyd notified the parties that both cases were approved for public hearing. (S.F. 20; N.T.I 13.)
21. The procedural prerequisites for public hearing have been satisfied. (S.F. 21; N.T.I 13.)
22. The Complainant is Vikki Mace (hereinafter "Complainant" or "Mace"), formerly Vikki Arentz. (S.F. 2.)
23. The Complainant is an adult female, who at all times relevant to this matter resided in the Commonwealth of Pennsylvania. (S.F. 2; N.T.I 53.)
24. The Respondent is Caco Three, Inc. (hereinafter "Respondent" or "McDermitt"), doing business as McDermitt Concrete, Inc. (S.F. 3.)
25. The Respondent employed more than four individuals within the Commonwealth at all times relevant to this case and is considered an "employer" under the Pennsylvania Human Relations Act. (S.F. 7; R.E. 5.)
26. The Respondent is an asphalt and concrete trucking company with plants in Gettysburg, PA and Hanover, PA. (N.T.I. 261; N.T.II. 82.)
27. McDermitt is managed by Robert Mumma (hereinafter "Mumma"), an adult male who owns approximately a half interest in McDermitt. (N.T.I. 224.)
28. Mumma is not directly involved in the daily operation of McDermitt, does not have an office at either plant and actually spends part of the year in Florida. (N.T.I. 257.)

29. At all times relevant to this matter, Phil Klocek (hereinafter "Klocek"), an adult male, was employed as the Operations Manager of the Gettysburg Plant, and was the Complainant's direct supervisor. (N.T.I 104, N.T.II 73.)
30. In October 2003, Klocek resigned from McDermitt. (N.T.II 72-73.)
31. Ginger French (hereinafter "French") is an adult female who had been employed as the Respondent's office manager since 1996. (N.T.I 282.)
32. As the Office Manager, French was placed in charge of accounting and personnel, including the maintenance of employee files. (N.T.I 282; N.T.II 17.)
33. The Complainant was first hired by the Respondent in 1993. (N.T.I 54.)
34. The Complainant was employed continuously from 1993 to April 7, 2000, when she voluntarily quit for personal reasons. (N.T.I 53-54, 95.)
35. Approximately six weeks later, the Complainant asked for her job back and was re-hired by Klocek in June 2000. (N.T.I 54, 96-97.)
36. For the duration of both terms of employment the Complainant was a cement truck driver. (N.T.I 53.)
37. There are few women cement truck drivers in general, but the Respondent prides itself on employing women whenever possible. (N.T.I. 245; R.E. 5.)
38. Each driver is assigned to a truck and is responsible for ensuring the truck's maintenance in addition to their primary duties of loading the truck and delivering loads to customers. (N.T.I 36-38.)
39. Occasionally drivers would be assigned to a different truck for the day or the duration of a job. (N.T.I 228.)
40. The Complainant received a copy of the Respondent's Employee Handbook. (N.T. I 97.)
41. From time to time, the Company would amend the Employee Handbook in the form of memoranda, which would be distributed to employees for their notice and insertion into their Handbook. (N.T.I 212.)
42. In relevant part, the Respondent's Employee Handbook contains the following provisions regarding corrective action and employee conduct: (R.E. 2, 7-10.)

§ 3 – EMPLOYEE RULES AND REGULATIONS:

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

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

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

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

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

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

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

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

20. Failure to maintain equipment properly.

21. Contributing to unsanitary conditions or poor housekeeping.

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

43. At McDermitt, corrective actions are typically handled by the direct supervisor of the employee. (N.T.I 214.)
44. The employee handbook is the only direction given to supervisors on how to handle employee complaints and issue corrective actions. (N.T.I 214-16.)
45. As a result, corrective actions are largely based on the employee's past record and the discretion of the issuing supervisor. (N.T.I 216-17.)

46. On November 7, 2001, there was an altercation involving the Complainant and Kim Bucher (hereinafter "Bucher"). (N.T.I 58.)
47. Another McDermitt employee, Deb Leedy (hereinafter "Leedy"), allegedly witnessed this incident. (N.T.II 32, 58.)
48. Bucher's legal name at the time of this hearing is Kim McDermott, but for clarity and consistency, she will be referred to by her name at the time relevant to this matter, "Bucher." (N.T.II 27.)
49. Bucher was an adult female employed by McDermitt as a Quality Control Manager from 2001-02. (N.T.II 28.)
50. Bucher's position at McDermitt required that she create concrete designs and test the product being delivered to customers, ensuring that it was mixed to the correct specifications. (N.T.I 246, 250, 286; N.T.II 28.)
51. Bucher's duties necessarily placed her in a quasi-supervisory position over the drivers. (N.T.I 246, 250; N.T.II 29.)
52. Leedy is an adult female who had previously been employed as a driver, but at the time in question was a lab technician under Bucher's supervision. (N.T.II 9, 28, 55.)
53. Leedy left McDermitt in the spring of 2002. (N.T.II 55.)
54. On November 7, 2001 there was an issue with machinery at the plant, creating a concern that the wrong type of stone, an MD-3, may have been included in the mix. (N.T.II 31-32.)
55. Bucher approached all of the drivers that day, asked them to keep an eye out for any MD-3s and inform dispatch if they found any. (N.T.II 32.)
56. Bucher specifically asked Leedy to accompany her when she went to talk with the Complainant, as she felt uncomfortable around Mace. (N.T.II 32, 37, 59-60.)
57. The Complainant was filling the water tank of her truck when Bucher approached her. (N.T.I 59.)
58. Bucher and Mace remained at opposite ends of the truck throughout the entire exchange. (N.T.II 41, 47.)
59. The engine in the Complainant's truck was running during the exchange, forcing both parties to yell to be heard. (N.T.I. 66-67; N.T.II 47.)
60. Leedy overheard the confrontation from a position behind the Complainant's truck. (R.E. 9.)
61. When Bucher approached the Complainant and asked her to check for MD-3s, Mace became agitated and began to yell at Bucher. (N.T.II 32, 59.)

62. The Complainant's tirade contained inappropriate and abusive language, and was only ended by Bucher's leaving. (N.T.II 32, 61.)
63. Bucher subsequently reported the incident to French, and both Bucher and Leedy met with both Klocek and French on the afternoon of November 7, 2001. (N.T.I 286, 290.)
64. That day, Bucher and Leedy each wrote a statement recounting the incident. (N.T.I 288-91; N.T.II 33, 61; R.E. 8; R.E. 9.)
65. The Complainant was later called into Klocek's office, where Klocek and French delivered a corrective action. (N.T.I 60; C.E. 8.)
66. French and Klocek reached the conclusion that the Complainant had spoken to Bucher in a threatening manner and decided that a three-day suspension was warranted. (N.T.I 293; N.T.II 78.)
67. Dated November 7, 2001 the Complainant received a three-day suspension for "use of abusive, offensive or obscene language or gestures" and "threatened physical violence or profane abusive language toward another employee..." in violation of the employee handbook. (C.E. 8.)
68. The written notice of suspension noted that the decision to suspend was based on "information gained through parties involved & witnesses who heard or seen (sic) what happened unless other evidence can be obtained." (C.E. 8.)
69. This conclusion was supported by the facts that Bucher was merely doing her job, Mace had admitted to yelling and Leedy had verified Bucher's story. (N.T.I 294.)
70. The Complainant served the three-day suspension. (N.T.I 104, 296; N.I, II 16.)
71. During the three-day suspension, the Complainant visited the PHRC and began the process of filing a claim. (N.T.I 113.)
72. In her written statement dated November 8, 2001, the Complainant wrote a rebuttal to the charge wherein she gave her version of the incident. (C.E. 9.)
73. In her statement, the Complainant states "I call that discrimination! Against me! And so does the labor board!" (C.E. 9.)
74. In testimony, the Complainant explained that by "labor board" she actually meant the PHRC. (N.T.I 111-13.)
75. On or about November 15, 2001, the Complainant also gave McDermitt a written letter in which she alleged that Leedy's statement was false. (N.T.I 107; C.E. 10.)
76. The Complainant identified and spoke with several individuals that she believed had witnessed the confrontation. (N.T.I 109.)

77. After showing the letter to each person, the Complainant asked them to sign if they agreed with the statement. (N.T.I 110.)
78. The November 15, 2001 letter was signed at the bottom by six people, who included five employees of McDermitt and an independent contractor. (N.T.I 107-10; C.E. 10.)
79. On December 18 and 20, 2001, Klocek conducted interviews with each of the signatories to investigate the claims made in the letter. (N.T.II 80; C.E. 18.)
80. Bernie M., Dan B. and Randy B. stated that they had not actually witnessed the incident, but signed the paper when the Complainant asked. (N.T.I 298; C.E. 18.)
81. Joe S. stated that Leedy was not in the area, but he did not actually see or hear any of the confrontation. (N.T.I 298; C.E. 18.)
82. Dan S. was not available for questioning. (N.T.I 298; C.E. 18.)
83. The sixth signatory, Paul Smith, was an independent contractor, who did not wish to get involved in employee disputes. (N.T.I 298; C.E. 18.)
84. Since the investigation did not substantiate the claims made in the November 15, 2001 letter, the suspension was not revoked. (N.T.I 299.)
85. On October 19, 2001, two weeks before the incident involving Mace and Bucher, Klocek issued a written warning to another employee for the use of abusive language. (C.E. 5.)
86. This warning was given to Raymond Unger (hereinafter "Unger"), an adult male employee. (N.T.I 28; C.E. 5.)
87. Unger had worked as a driver for McDermitt for approximately 15 years and had no previous disciplinary record. (N.T.I 28, 33.)
88. Klocek was the supervisor involved in the incident and also the one who wrote and delivered the warning notice. (N.T.II 81.)
89. The written warning documented the incident and included a notation that should the incident occur again, Unger would be given a three-day suspension without pay. (N.T.I 301; C.E. 5.)
90. Unger and Klocek had a disagreement in the dispatch office and Klocek told Unger to go down and get in his truck. (N.T.I 24.)
91. Upon leaving the office, Unger slammed the door, prompting Klocek to follow Unger out and tell him that there was no reason to be slamming doors. (N.T.I 25.)
92. Unger then turned around and yelled "f*** you" to Klocek. (N.T.I 25; N.T.II 82.)

93. Klocek testified that he did not issue a suspension because he had not felt threatened by Unger, who was just frustrated, and that Unger then went on to do exactly what had been asked of him. (N.T.II 81-82.)
94. On January 7, 2002, the Complainant filed an official complaint of disparate treatment with the PHRC at Case No. 200101823. (S.F. 1.)
95. The Respondent filed an answer on or about April 5, 2002. (S.F. 6.)
96. Leedy left McDermitt in April 2002, and shortly thereafter received a letter from Mace. (N.T.II 63; R.E. 3.)
97. In the letter, Mace demands that Leedy write a new letter to McDermitt, telling the "TRUTH" about the incident. (R.E. 3.)
98. The letter then states that the PHRC investigator attached to the disparate treatment case, Mr. Kaiser, told Mace to write this letter. (R.E. 3.)
99. The letter also states that Mr. Kaiser had all of Leedy's personal information and would make sure that Leedy never held a job in Pennsylvania again. (R.E. 3.)
100. When questioned, the Complainant admitted that she wrote the letter on her own, without Mr. Kaiser's knowledge or consent, and made up these threats in order to make Leedy change her story. (N.T.I 123-26.)
101. Drivers are routinely transferred from one facility to another, depending on the needs of the company. (N.T.I 127, 225.)
102. Shortly before October 10, 2002, the Complainant was transferred from Gettysburg to the Hanover facility. (N.T.I 72.)
103. The Complainant made several complaints about her transfer over the company radio, where she used inappropriate language. (N.T.I 233-34.)
104. On October 10, 2002, Mumma sent the Complainant a letter, warning her that inappropriate conduct would not be tolerated, and that any further violations of company policy would result in termination. (N.T.I 237.)
105. On October 31, 2002, Mumma visited the Hanover facility and saw that Mace's truck was unwashed and parked in the wrong spot. (N.T. 264.)
106. That day, several of the trucks did not meet Mumma's standards for cleanliness, and 11 other drivers were issued warnings. (N.T.I 267, 269.)
107. As stated in the October 10 letter, Mumma decided to terminate the Complainant. (N.T.I. 266.)

108. The Complainant received a letter informing her of her termination on October 31, 2002. (N.T.I. 73.)
109. The Complainant allegedly called Mumma to ask why she had been terminated (N.T.I. 144.), but never protested her termination to anybody at McDermitt. (N.T.I. 73, 145.)
110. A Finding of Probable Cause in the disparate treatment case was served upon the Respondent on or about December 24, 2002, over one month after the Complainant had been terminated. (S.F. 8.)
111. The 180 day filing period with the PHRC for any claims arising out of this termination ended on May 19, 2003. (C.E. 1.)
112. The Complainant's March 1, 2003 letter was received by the PHRC on March 3, 2003; 123 days after the Complainant's termination. (C.E. 14.)
113. The March 1, 2003, letter was apparently the first contact between the Complainant and the PHRC which indicated that she had been terminated. (N.T. I 145.)
114. This letter expresses the Complainant's dissatisfaction with a proposed settlement agreement for the disparate treatment claim, primarily the fact that it does not require the removal of the written disciplinary action from the Complainant's employee file. (C.E. 14.)
115. The Complainant wrote that her disparate treatment case was "because of the letter. It always was about the letter in my file. The money was not the issue..." (C.E. 14.)
116. In conclusion, the Complainant made a vague reference to her termination on October 31, 2002, claiming that she was terminated "for no reason" and alleging that it was "because of this." (C.E. 14.)
117. The final sentence of the letter reads: "[s]o why can't we go with the original agreement?" (C.E. 14.)
118. In testimony concerning the March 1, 2003, letter, the Complainant stated that she couldn't "remember why [she] wrote it." (N.T.I 149, 208-09.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission") has jurisdiction over the parties under the Pennsylvania Human Relations Act of 1955, P.L. 744, No. 222, as amended, 43 PS §§ 951, *et seq.* (hereinafter "PHRA").
2. The Commission has jurisdiction over the subject matter of the complaints under the PHRA.
3. The parties and the Commission have fully complied with the procedural prerequisites for a public hearing in this matter.
4. The Complainant is a "person" within the meaning of Section 4(a) of the PHRA.
5. The Respondent is an "employer" within the meaning of Section 4(b) of the PHRA.
6. The complaint of disparate imposition of discipline, filed at Case No. 200101823, satisfies the filing requirements set forth in Section 9(a) of the PHRA.
7. The Complainant established a *prima facie* case of disparate treatment by proving that:
 - 1) the Complainant is a member of a protected class; and
 - 2) the Complainant suffered an adverse employment action; and
 - 3) a similarly situated employee, who is not a member of the Complainant's protected class, was treated differently in a comparable situation.
8. The Respondent has offered a legitimate and non-discriminatory reason for issuing the Complainant a suspension.
9. The Complainant has not succeeded in showing that the Respondent's reason is actually pretext to mask an act of intentional discrimination.
10. A Complainant can successfully establish a *prima facie* case of retaliation by proving that:
 - 1) the Complainant engaged in a protected activity; and
 - 2) the Respondent knew of the Complainant's protected activity; and
 - 3) the Complainant suffered an adverse employment action; and
 - 4) there is a causal connection between the protected activity and the adverse employment action.
11. The Complainant has not succeeded in showing a *prima facie* case of retaliation.