

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**HEATHER PARSONS,
Complainant**

v.

**LEM MOORE TRANSPORTATION,
Respondent**

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**PHRC CASE NO. 201104789
EEOC CHARGE NO. 17F201261218**

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

FINDINGS OF FACT*

1. The Complainant in this case is Heather Parsons, an adult female (hereinafter "Parsons") (J.E. 1)
2. The Respondent in this case is Lem Moore Transportation (hereinafter "LMT"), (J.E. 1)
3. Lem Moore, LMT's Owner and Principal Officer, founded LMT in 2005. (N.T. 389; J.E. 1)
4. LMT is a trucking company located in Douglesville, Berks County, Pennsylvania, that picks up and delivers refrigerated freight to various locations both in Pennsylvania and in surrounding states. (N.T. 156, 404-405)
5. In 2010 and 2011, LMT operated with 13 trucks. (N.T. 395)
6. Drivers for LMT are generally assigned the same truck and drive assigned routes where freight is delivered and picked up. (N.T. 395, 404)
7. Parsons was hired by Lem Moore on November 10, 2006 as a Truck Driver. (N.T. 34; J.E. 1)
8. When hired, Parsons had two children ages 6 and 11. (N.T. 34; J.E. 1)
9. Lem Moore attempted to have a friendly personal relationship with each of his drivers . (N.T. 399)
10. After Parsons was hired, Lem Moore's wife, Joann Moore, developed a personal friendship with Parsons. (N.T. 35, 37, 239)

*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
J.E. Joint Exhibit
R.E. Respondent's Exhibit

11. Parsons and Joann Moore, who also worked for LMT, hung out together, went drinking together, and told each other secrets. (N.T. 254; J.E. 1)
12. Although the relationship began as an employer/employee relationship, Lem Moore also became personal friends with Parsons. (N.T. 35)
13. Parsons visited the Moore's home and the Moores visited Parsons home. (N.T. 35)
14. Parsons children would swim in the Moore's swimming pool. (N.T. 263)
15. Parsons friendship with the Moores resulted in Parsons receiving special treatment in the form of assignments to mainly local driving assignments. (N.T. 34, 254)
16. In June 2010, Parsons suspected that she was pregnant. (N.T. 38, 42, 265)
17. In June 2010, Parsons shared her suspicion with Joann Moore. (N.T. 38, 42, 265)
18. Parsons asked Joann Moore not to tell Lem Moore and, because of their friendship, Joann Moore agreed. (N.T. 38, 266)
19. In an August 6, 2010 Notice to all drivers, Lem Moore advised that "right now freight is weak." (N.T. 410; R.E. 19)
20. Parsons signed the notice. (R.E. 19)
21. Although Parsons testified that she had never been disciplined or warned about a rule violation, Lem Moore testified that on May 16, 2010, he placed a warning notice in Parsons' mail box regarding allowing her children to be in the truck and on the dock of a customer. (N.T. 444)
22. In or about the end of August 2010 or the beginning of September 2010, Parsons began to gain weight due to her pregnancy and thought it was time to tell Lem Moore that she was pregnant. (N.T. 43-44, 181-182, 213)

23. Lem Moore began to inquire of Parsons about her health and ask Parsons if she was ready to call it quits and leave. (N.T. 47, 214, 227, 268, 489, 506)
24. In testifying that he would ask Parsons everyday how she was feeling, Lem stated, "she's my Heather." (N.T. 489)
25. Lem Moore inquired of Parsons about her bouncing around in the truck. (N.T. 214)
26. Joann Moore testified that Lem Moore grew concerned about Parsons moving freight and "hobbling around." (N.T. 271)
27. In September, after Parsons informed Lem Moore that she was pregnant, Lem Moore hired Doug Towers. (N.T. 499)
28. Lem Moore lightened Parsons' route assignments in an effort to make her job easier. (N.T. 499, 514)
30. In the period August, September, October, Parsons husband was in and out of the house causing her financial difficulties. (N.T. 137)
31. Lem Moore testified that when he looked at Parsons, it was apparent to him that Parsons was having physical problems . (N.T. 494-495)
32. Although customers were telling Lem Moore that Parsons' work performance was not a problem, Lem Moore formed the idea that the best way to handle the situation with Parsons was to lay her off. (N.T. 320, 351)
33. Despite being told by customers of LMT that Parsons was able to do her job, on November 15, 2010, Parsons was presented with a layoff notice. (N.T. 54, 324; J.E. 4)
34. Lem Moore told Parsons that he was not comfortable with her in the truck anymore and he was laying her off. (N.T. 54)
35. Lem Moore informed Parsons that she could apply for unemployment compensation and he would not contest it. (N.T. 54, 138)

36. Parsons was also permitted to continue under LMT's insurance policy as long as she paid the premiums. (N.T. 255)
37. Although others had left for medical reasons, no other LMT employee had ever been permitted to continue on LMT's insurance and apply for unemployment without such an application being contested by LMT. (N.T. 256)
38. The Moores asked Parsons to keep in touch and to call when she was ready to return. (N.T. 54, 79, 263; J.E. 11)
39. The day following her layoff, Parsons applied for unemployment compensation. (N.T. 81, 140)
40. On the Friday following her layoff, Parsons went to LMT's offices for her pay check. (N.T. 55)
41. At some point in December 2010, Parsons went into LMT's office to pay an insurance premium. (N.T. 56, 168, 261)
42. At that time, Parsons also picked up her personal items that had been removed from the truck she had used and placed in a bag for her. (N.T. 60-61, 166)
43. Parsons delivered a child on February 13, 2011. (N.T. 57, 59)
44. In January, 2011, Parsons removed Joann Moore as a friend on the internet social site, Facebook. (N.T. 251, 260)
45. Parsons removal of Joann as friends on Facebook embarrassed and hurt Joann Moore. (N.T. 260, 264)
46. In February 2011, the unemployment office contacted Parsons to ask why she was not working. (N.T. 81)
47. Just before she had her baby, Parsons informed the unemployment office that she was not eligible for benefits and she was cut off. (N.T. 82, 142)

48. In January 2011, the unemployment office sent Lem Moore an employer questionnaire about Parsons' eligibility for benefits. (N.T. 335, 481; J.E. 5)

49. In responding to the question why Parsons separated, Lem Moore stated, "seven mo. Pregnant. No longer able to endure driving truck or unloading freight." (N.T. 335; J.E. 5)

50. In responding why Parsons was not working, Lem Moore stated, "pregnant, could no longer perform the job." (N.T. 344; J.E. 5)

51. In a section entitled "Additional Information", Lem Moore stated, "I was unclear on how to handle, so I said I will lay her off. She had no time frame when she would return to work! Baby was due in late Jan. We have not heard from Heather yet since left." (N.T. 336; J.E. 5)

52. On March 30, 2011, Parsons was released by her Doctor to return to work. (N.T. 62-63; J.E. 1)

53. On March 31, 2011, Parsons called Lem Moore seeking to return to work. (N.T. 63)

54. Lem Moore was shocked that Parsons called as he thought she would have been in touch with the Moores. (N.T. 473)

55. Lem Moore testified that Parsons asked him to fire Doug Towers and that he became uncomfortable with the conversation so he told Parsons he would call her back over the weekend. (N.T. 64, 474, 477)

56. Lem Moore did not call Parsons back. (N.T. 66, 477)

57. After Lem Moore did not call her back, on April 6, 2011, Parsons placed a call to Lem Moore. (N.T. 66, 331, 449)

58. Lem Moore testified that when Parsons called, he was on the dock loading freight and that before he could get to the telephone, the answering machine picked up.

(N.T. 479)

59. Lem Moore testified that he was astonished at Parsons' message because she was ranting with vile offensive language. (N.T. 331, 342, 478)

60. Although Lem Parsons needed drivers at the time and it was difficult to find drivers, Parsons' abandoning of the Moores' friendship, her failure to keep in touch with the Moores, and the "nasty" telephone message she left on April 6, 2011, were the reasons Lem Moore did not return Parsons to work. (N.T. 342, 449)

61. On April 7, 2011, Parsons contacted the unemployment office to reinstate unemployment benefits (N.T. 81)

62. On April 7 or 8, 2011, Parsons contacted the PHRC about filing a complaint. (N.T. 86)

63. By April 14, 2011, Parsons had submitted a Questionnaire to the PHRC about her allegations. (N.T. 86)

CONCLUSIONS OF LAW

1. Parsons is an individual within the meaning of the Pennsylvania Human Relations Act, (hereinafter the "PHRA").
2. LMT is an employer within the meaning of the PHRA.
3. The Pennsylvania Human Relations Commission, (hereinafter the "PHRC"), has jurisdiction over the subject matter of the complaint and over the parties.
4. All procedural prerequisites to a Public Hearing have been met.
5. Parsons has established by direct evidence that LMT laid her off because of her pregnancy.
6. When a case is fully tried on the merits, the fact finder's job is to decide whether the alleged action was discriminatory.
7. The PHRC, by virtue of Section 9 of the PHRA, has broad discretion in fashioning a remedy, once a finding of discrimination is made.
8. The PHRC is permitted to award interest in back-pay awards at the rate of six percent per annum.

OPINION

This case arises on a complaint filed by Heather Parsons (hereinafter "Parsons") against Lem Moore Transportation (hereinafter "LMT"), on or about April 18, 2011, at PHRC Case Number 201104789. Generally, Parsons alleged that LMT unlawfully discriminated against her because of her pregnancy by laying her off from her position as a Truck Driver and subsequently failing to rehire her. Parsons claims that LMT 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").

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 15 and 16, 2014, in Reading, Pennsylvania, before a three-member panel of Commissioners. PHRC Commissioner Gerald S. Robinson served as Panel Chairperson, and PHRC Commissioners Dr. Raquel O. Yiengst, and Varsovia Fernandez were the remaining panel members. Panel Advisor, Carl H. Summerson assisted the Panel.

The state's interest in Parsons' allegations was presented by Sharon Lopez, Esquire, and LMT was represented by Paul A. Prince, Esquire. The parties submitted post-hearing briefs on November 3, 2014.

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 are alleged to be unlawful discrimination. First, on November 15, 2010, Parsons was laid off. Second, LMT did not permit Parsons to return to her position following her pregnancy.

Without question, there are two distinct versions of events surrounding both of the allegations. After a careful review of the evidence presented, we find for Parsons on the first allegation and for LMT on the second allegation.

Regarding the November 15, 2010 layoff, there is no dispute that Parsons was laid off. Parsons testified that she wanted to keep working. (N.T. 211) Parsons informed LMT's owner, Lem Moore that her expected delivery date was the end of January 2011. (N.T. 46) Parsons 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. 45, 137-138)

Parsons testified that she was off on Monday November 15, 2010, and when off, drivers are required to call in to be informed about what runs they were to make the following day. (N.T. 54). Parsons indicates that when she called in on the morning of November 15, 2010, Lem Moore asked her to come into the office. (N.T. 54) When she did, Lem Moore handed her a layoff notice saying, he did not feel comfortable with

Parsons in the truck anymore and he was laying her off. (N.T. 54) Parsons testified that she responded she was not ready to be laid off and she needed to continue to work. (N.T. 54) At this point, Lem Moore told Parsons that he would not contest her filing for unemployment benefits. (N.T. 54)

LMT's version of the layoff is startlingly different. Lem and Joann Moore both testified that there had been a meeting on Friday, November 12, 2010, where Parsons had come to Lem Moore crying saying, in effect, she could not do the job anymore and was ready to be laid off. (N.T. 258, 259, 492, 493, 494-495) Lem Moore testified that Parsons was not asked to leave and that if she had wanted to continue working he would have further lightened her work load. (N.T. 260, 493)

These two versions could not be farther apart. However, close scrutiny of the record as a whole leads to the conclusion that Parsons' version of her layoff is more credible. At critical moments, Lem Moore's testimony uncovers what can only be described as his "paternalistic" attitude towards Parsons' pregnancy. For instance, Lem Moore was described by the PHRC investigator as having acknowledged that customers told him that Parsons was able to do her job without assistance, (N.T. 351) and that doing her job without assistance was not a problem. (N.T. 351) Lem Moore also told the PHRC investigator that Parsons was a good worker and this was not the problem. (N.T. 351) Also, the record reveals that it was Lem Moore who was forming the impression that Parsons was experiencing physical problems and discomfort. (N.T. 492, 494-495) In effect, Lem Moore testified that he formed the opinion that Parsons was experiencing difficulty by seeing a "wallowing pregnant person" and observing the discomfort in her face and her emotions. (N.T. 495) Joann Moore testified that Lem Moore was concerned about Parsons "hobbling around." (N.T. 271) Indeed, in responding to a question from a PHRC investigator, Lem Moore stated that he had

suggested Parsons could be laid off to help her. (N.T. 319; J.E. 9) Lem Moore described the discussion he had with Parsons about the layoff as, "[t]he discussion was okay, you know, that she is having a hard time, and it was getting more difficult to do the job. She did not oppose or object to the suggestion. I was merely suggesting based on her feelings on what was going on with her job. What she could handle. It was getting to her emotionally, physically, you could see it. I wouldn't want my wife to be under those conditions or anybody else's wife for that matter...mainly because from the time she explained her problems and the tests that needed to be done and her age and everything in consideration that somehow, somewhere, somebody has to be the bigger person here." (N.T. 492)

It is relatively clear from Lem Moore's statement, it was his idea that Parsons should be laid off because he did not like to see a pregnant woman performing the work Parsons was doing. By being the "bigger person," Lem Moore was substituting his opinion for Parsons' opinion on how long she should continue to work.

This conclusion is strengthened further by observing what Lem Moore told the unemployment office when questioned in February 2011. Lem Moore gave the unemployment office the reason Parsons separated as "seven months pregnant, no longer able to endure driving or unloading freight. (J.E. 5) This statement flies in the face of the knowledge he was given from customers that Parsons was doing her job without difficulty. Further, Lem Moore told the unemployment office that the reason Parsons was not working was because "pregnant, could no longer perform the job." Again, the record is clear that she could perform the job, it was just that Lem Moore did not want Parsons to continue working. Here Lem Moore revealed he was "unclear on how to handle the situation." Paternalistically, he simply wanted to protect the woman who held a special place in his heart, (N.T. 440) and who he described as "she's my

Heather" (N.T. 489) by removing what he considered too much of a workload for her to handle because she was pregnant.

Proof that the layoff was sex-based discrimination can be established by either direct or circumstantial evidence. See *Doe v. C.A.R.S. Prof. Plus*, 527 F.3d 358, 364 (3rd Cir. 2008). Here, we find that there is sufficient direct evidence that Lem Moore's decision to layoff Parsons was wholly attributed to Parsons' pregnancy and Lem Moore's paternalistic action designed to help Parsons by alleviating her work load. Lem Moore's motivation quite simply was discriminatory and deprived Parsons of her right to decide when she should stop working during her pregnancy.

Next we turn to that portion of Parsons' allegations that alleges she was not permitted to return to her position following the birth of her daughter.

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 (8th 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.

In effect, the post-hearing brief on behalf of the state's interest in the complaint suggests that the evidence presented on the question of the failure to recall should be viewed through the lens of the oft repeated *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), three part allocation of the proof formula. Under this allocation, initially, a Complainant must establish a *prima facie* case. Once the *prima facie* case is sufficiently shown, the burden of production shifts to a Respondent to attempt to articulate a legitimate non-discriminatory reason for its actions. Finally, a burden of persuasion shifts back to a Complainant to prove by a preponderance of the evidence that the reasons offered are a pretext and that discriminatory reasons motivated the Respondent.

The PHRC post-hearing brief on behalf of the state's interest in the compliant urges a finding that Parsons established the requisite *prima facie* case. However, in the case of *U.S. Postal Service Board of Governors v. Aikens*, 31 FEP Cases 609, 460 U.S. 711 (1983), the U.S. Supreme Court noted that when a case has been fully tried on the merits, the job of the fact finder is to decide whether the alleged action was intentionally discriminatory. The *Aikens* court stated, "[w]here the defendant has done everything that would be required of him if the Plaintiff had properly made out a *prima facie* case, whether the Plaintiff really did so in no longer relevant." 31 FEP Cases 611. When a Respondent articulates their reasons for an action, a case should proceed directly to the

specific question of whether the Respondent's actions were discriminatory. What is ultimately relevant in this case is the basic question of which party's explanation of an individual's motivation the fact finder believes.

Here, there is no question that LMT did articulate reasons for not recalling Parsons. There is also no question that the versions surrounding the circumstances of LMT not recalling Parsons are vastly different. In Parsons' version, she delivered a child on February 13, 2011, (N.T. 57, 59) and, on March 30, 2011, her doctor released her to return to work. (N.T. 62-63) Parsons testified that the following day, she called Lem Moore regarding returning to work. (N.T. 63) Parsons testified that Lem Moore asked her how she was and if everything went well to which she replied yes, everything's good. (N.T. 64) Parsons then submits that she informed Lem Moore that he doctor had just released her to return to work. (N.T. 64) Parsons testified that she then told Lem Moore that she would like to come down and speak with him about returning and he said OK. (N.T. 64) Parsons contends that Lem Moore then changed the subject but then ended the conversation by saying, he would call her over the weekend and she could come down when no one else was around and they could talk. (N.T. 64; J.E. 11)

Parsons' version then finds her calling Lem Moore on April 6, 2011, after Lem Moore failed to call her back. (N.T. 66) In Parsons' version, Lem Moore answered the telephone and asked what she wanted to talk about to which Parsons responded, the job. (N.T. 66) Parsons then offered that Lem Moore stated, in effect, "well, I don't know. I think a baby's going to interfere with the job. I don't know how you're going to drive a truck with a baby. (N.T. 66, 88, 89, 109) Parsons testified that Lem Moore told her that he did not believe she belongs in a truck, she belongs home raising her children and how can she work with a baby at home and he doesn't think it is right, period. (N.T.

89; J.E. 11) Parsons testified that Lem Moore also said, "children don't belong being raised by babysitters, older siblings or grandparents." (N.T. 66) In Parsons' version, the call ended when Parsons told Lem Moore that what he was saying is none of his concern and Parsons asking, "what are you saying, I no longer have a job" and Lem Moore responding, "I guess that's what I'm saying." (N.T. 66)

Lem Moore's version of the telephone calls is glaringly different. Lem Moore testified that he was shocked when Parsons called on March 31, 2011. (N.T. 473) Lem Moore stated that he thought that Parsons would have been in touch with him and his wife after Parsons left in November 2010. (N.T. 473) Additionally, Lem Moore testified that Joann Moore was upset that the friendship between Joann and Parsons had been ended by Parsons when, in January 2011, Parsons defriended Joann Moore on Facebook. (N.T. 473) Lem Moore testified that during the March 31st telephone call, Parsons asked him to fire Doug Towers, an individual who Lem Moore had hired back in September 2010. (N.T. 474) At that point, Lem Moore offered that he became uncomfortable with the call and told Parsons that he would call her back. (N.T. 477) It is clear from the evidence, Lem Moore did not call Parsons back. (N.T. 477)

Lem Moore's version of the April 6, 2011 telephone call is that when the call came in, he was on the dock loading trucks and before he could get to the telephone to answer it, the answering machine picked up. (N.T. 479) Lem Moore testified that Parsons left a message which he described as "nasty", (N.T. 331), and ranting with vile offensive language. (N.T. 478) Lem Moore testified that he was astonished when he played the message. (N.T. 479)

Lem Moore's articulated reasons for not recalling Parsons boil down to the fact that, after giving Parsons special treatment during her employment, (N.T. 254) treating her more as a personal friend than an employee, (N.T. 35, 399) and as he termed it,

holding a special place in his heart for Parsons, (N.T. 440), after November 15, 2010, Parsons, in effect, abandoned the Moores. Lem Moore and Joann Moore specifically asked her to keep in touch with them, but, to their dismay, she did not. Parsons went so far as to remove Joann Moore as a friend from her Facebook account in January 2011 which made Joann Moore embarrassed and hurt. (N.T. 251, 260, 264) In addition, Lem Moore testified that Parsons' offensive telephone message on April 6, 2011 also contributed to his decision not to recall Parsons.

Again, we observe that much of the evidence presented in this case is in conflict. Because of this, it is necessary to examine and evaluate the credibility of the witnesses in this case.

Indeed, judgment of credibility is the responsibility entrusted to the trier of fact. *Carr v. Com. State Board of Pharmacy*, 49 Pa. Commonwealth. Ct. 330, 409 A.2d 941 (1980); *Boughter v. Com. Dept. of Public Welfare*, 55 Commonwealth. Ct. 521, 423 A.2d 806 (1980); and *PHRC v. Hempfield Township*, 23 Pa. Commonwealth. Ct. 351, 352 A.2d 218 (1976). In our assessment of credibility, consideration was given to each witness' motive and state of mind, strength of memory and demeanor while on the witness stand. Consideration was also given to whether a witness' testimony was contradicted, and the bias, prejudice and interest, if any, of each witness. Recognition was also given to the premise that where resolution of a matter rests with a weighing and balancing of conflicting evidence, absolute certainty is rarely achieved.

With these principles in mind, we give more credibility to Lem Moore's version of why Parsons was not recalled. Although his credibility was in question more than once, Parsons' credibility was eroded in several significant respects. First, although Parsons testified that she never heard that LMT's business was falling off, she signed a document in the late summer of 2010 that specifically mentioned there was less

business and Lem Moore was considering dropping a few schedules. (N.T. 147; R.E. 19) Clearly, Parsons had heard that business was falling off. Next, Parsons testified that she was never disciplined or warned not to have her children in the truck with her. Interestingly, Parsons went so far as to claim that she had Lem Moore's permission and the children being in the truck were at his "urging." (N.T. 103) Clearly, there is evidence that customers complained when Parsons' children were found on the loading docks of LMT customers. Without question, we believe that Lem Moore warned Parsons not to continue to take her children with her in the truck. Next, Parsons testified that after she informed Lem Moore that she was pregnant, her hours were cut. (N.T. 46) Not only was there no evidence that Parsons wages were reduced after she informed Lem Moore about her pregnancy, the PHRC investigator indicated that this claim could not be substantiated during the investigation. (N.T. 352)

Another area that reveals Parsons has less credibility is her initial testimony that, after telling him she was pregnant, they never discussed health issues. (N.T. 49) Specifically, Parsons indicated that she did not discuss bouncing in the truck with Lem Moore. During cross examination, Parsons noted that after Lem Moore asked her about bouncing around in the truck, she consulted two doctors and then shared the information with Lem Moore. (N.T. 214-215, 489) This testimony was clearly contradictory. Collectively, these observations undermine Parsons' version of the March 31 and April 6, 2011 telephone calls.

In summary, we find that Parsons failed to establish by a preponderance of the evidence that the reason LMT did not recall her was because she had been pregnant. Instead, we credit Lem Moore's version that declares the end of a friendship and a nasty message on a telephone were the reasons Parsons was not recalled. Simply stated, these reasons are not discriminatory.

Accordingly, we turn to the question of an appropriate remedy for the discriminatory layoff. 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 (11th 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 (5th Cir. 1974).

Although the question was not raised by the post-hearing briefs, 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 (3rd 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 Parsons received. We adopt the stated rationale in *Craig* as persuasive. See also, *Maxfield v. Sinclair Int'l*, 766 F.2d 998, 36 FEP 159 (3rd Cir. 1984).

At the time of her layoff, Parsons was earning \$19.00 per hour and was working, on

average, 40 hours per week.

Had Parsons not been laid off on November 15, 2010, and worked until approximately February 1, 2011, she would have earned the following:

$\$19.00 \text{ per hour} \times 40 \text{ hours per week} = \760.00 per week

$\$760.00 \text{ per week} \times 11 \text{ weeks} = \$8,360.00 \text{ total lost wages}$

Of course, the PHRC is authorized to award interest on the back pay award. *Goetz v. Norristown Area School District*, 16 Pa. Commonwealth Ct. 389, 328 A.2d 579 (1975). Accordingly, an award of interest at the rate of 6% per year is appropriate.

In the PHRC post-hearing brief on behalf of the state's interest in the complaint, a notation is made that, in the event of a liability finding, the Complainant will submit additional receipts for expenses including, affidavits, mailings, transportation, and parking not likely to exceed \$200.00. Rather than hold this record open for receipt of such information, an award of \$100.00 will be made. The time to have submitted information on additional expenses was at the Public Hearing, not after.

An appropriate recommendation and order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

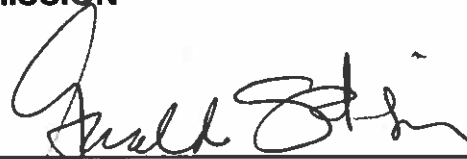
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RECOMMENDATION OF THE HEARING PANEL


Upon consideration of the entire record in the above-captioned matter, the Hearing Panel finds that Parsons has proven she was discriminatorily laid off in violation of Section 5(a) of the Pennsylvania Human Relations Act. Additionally, the Hearing Panel also finds that Parsons was not recalled for reasons other than discriminatory reasons. It is, therefore, the full Hearing Panel's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

12/22/2014
Date

By: 
Gerald S. Robinson
Hearing Panel Chairperson

12-22-14
Date

By: 
Dr. Raquel O. Yienst
Panel Member

12/22/14
Date

By: 
Varsovia Fernandez
Panel Member

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

HEATHER PARSONS,
Complainant

v.

LEM MOORE TRANSPORATTION
Respondent

:
:
:
: PHRC CASE NO. 201104789
: EEOC CHARGE NO. 17F201261218
:
:

FINAL ORDER

AND NOW, this 23rd day of February, 2015, 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, and Recommendation of Hearing Panel. Further, the Commission adopts said Findings of Fact, Conclusions of Law, Opinion, and Recommendation of Hearing Panel as its own findings in this matter and incorporates the Findings of Fact, Conclusions of Law, Opinion, and Recommendation of Hearing Panel into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

ORDERS

1. That LMT shall cease and desist from sex-based discrimination with regard to employees that become pregnant.

2. That LMT shall pay to Parsons, within 30 days of the effective date of this Order, the lump sum of \$8,360.00, which amount represents back pay lost for the period between November 15, 2010 and February 1, 2011.

3. That LMT shall pay additional interest at the rate of six percent per annum on the back pay award, calculated from February 1, 2011, until payment is made.

4. That LMT shall, within 30 days from the effective date of this Order, reimburse Parsons \$100.00, which represents both out-of-pocket expenses and certifiable travel expenses associated with Parsons' PHRC complaint.

5. That LMT shall report the means by which it will comply with this Order, in writing to Sharon Lopez, Esquire, Special Assistant to the PHRC's Chief Counsel, within 30 days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Gerald s. Robinson Chairperson

ATTEST:

By: 
Rev. Dr. James Garmon, Sr.