



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Earl Ray Tomblin  
Governor

**HUMAN RIGHTS COMMISSION**  
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Phyllis H. Carter  
Acting Executive Director  
ROCCO S. FUCINO  
Cabinet Secretary

**Via Certified Mail-  
Return Receipt Requested**

October 3, 2012

Ilona Brown  
PO Box 23  
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Elite Coal Services, LLC  
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Sweeney, PLLC  
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Charleston, WV 25332

Re: Brown v. Elite Coal Services, LLC  
ES-248-09

Dear Parties:

Enclosed please find the Commission's Final Order in the above-referenced matter, which incorporates the Final Decision of the Administrative Law Judge and a Notice of Right to Appeal.

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**ILONA BROWN,**

**Complainant,**

**v.**

**Docket No.: ES-248-09  
EEOC No.: 17J-2009-00095**

**ELITE COAL SERVICES, LLC,**

**Respondent.**

**FINAL ORDER**

On the 2<sup>nd</sup> day of August, 2012, the West Virginia Human Rights Commission at its regularly scheduled meeting reviewed the Final Decision issued by Administrative Law Judge Robert B. Wilson on the 17<sup>th</sup> day of February, 2012, in the above-captioned matter and all appeal briefs thereto.

After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Chief Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision as its own, without modification or amendment.

It is, therefore, the Order of the Commission that the Administrative Law Judge's Final Decision be attached hereto and made a part of this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto as Exhibit A.

It is so **ORDRED**.

Entered for and at the direction of the Commissioners of the West Virginia Human Rights Commission this 3<sup>rd</sup> day of October 2012, in Charleston, Kanawha County, West Virginia.

**WV HUMAN RIGHTS COMMISSION**



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**PHYLLIS H. CARTER**  
**ACTING EXECUTIVE DIRECTOR**  
Rm 108A, 1321 Plaza East  
Charleston, WV 25301-1400  
Ph: 304/558-2616 Fax: 558-0085

## EXHIBIT A

### NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this Order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

**IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY**, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this Order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11 and the West Virginia Rules of Appellate Procedure.

Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review.

Please refer to the attached Notice of Right to Appeal for more information regarding your right to petition a court for review of this Final Order.

Sincerely,



Phyllis H. Carter  
Acting Executive Director

PHC/mst

Attachments

cc: The Honorable Natalie Tennant  
Secretary of State

February 17, 2012

Page 2

discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the Acting Chief Administrative Law Judge, the relief to which the appellant believes she is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the Commission from the Acting Chief Administrative Law Judge shall not operate as a stay of the decision of the Acting Chief Administrative Law Judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the Commission or its Executive Director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the Executive Director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the Commission shall render a Final Order affirming the decision of the Acting Chief Administrative Law Judge, or an Order remanding the matter for further proceedings before an Administrative Law Judge, or a Final Order modifying or setting aside the decision. Absent unusual circumstances duly noted by the Commission, neither the parties nor their counsel may appear before the Commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an Administrative Law Judge, the Commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the Administrative Law Judge on remand.

10.8. In considering a notice of appeal, the Commission shall limit its review to whether the Administrative Law Judge's decision is:

10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the Commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established

February 17, 2012

Page 3

by appropriate rules or regulations of the Commission;

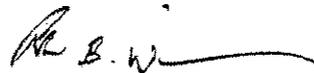
10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an Administrative Law Judge's Final Decision is not filed within thirty (30) days of receipt of the same, the Commission shall issue a Final Order affirming the Judge's Final Decision; provided, that the Commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the Commission. The Final Order of the Commission shall be served in accordance with Rule 9.5.

If you have any questions, you are advised to contact Phyllis H. Carter, Acting Executive Director of the Commission, at the above address.

Yours truly,



**Robert B. Wilson**  
**Acting Chief**  
**Administrative Law Judge**

RBW/jek

Enclosure

cc: Phyllis H. Carter, Acting Executive Director, WVHRC  
Dr. Darrell Cummings, Chairperson of Commission Board

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ILONA BROWN,  
Complainant,

v

Docket No: ES- 248 - 09  
EEOC No.: 17J-2009-00095

ELITE COAL SERVICES, LLC,  
Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on June 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup> and July 1<sup>st</sup>, 2011 in Kanawha County, at the West Virginia Human Rights Commission's Office Hearing Room, at Room 108A, 1321 Plaza East, Charleston, West Virginia, and, reconvened on September 14<sup>th</sup>, and 15<sup>th</sup>, 2011 in the Board Room of the Tamarack Conference Center in Raleigh County, West Virginia, before Robert B. Wilson, Acting Chief Administrative Law Judge.

The Complainant, Illona Brown, appeared in person and by Counsel for the West Virginia Human Rights Commission, Paul R. Sheridan, Esq., Deputy Attorney General, West Virginia Office of the Attorney General, Civil Rights Division. The Respondent, Elite Coal Services, LLC., appeared in person by its representatives, David Gillespie, former Human Resources Director, and by Mike Gross, President, and by Counsel, Barbara G. Arnold, Esq., with MacCorkle, Lavendar & Sweeney, PLLC. The parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof, and response briefs

through January 28, 2012.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of Counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the Administrative Law Judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited. It was Ordered prior to Public Hearing that the record would be held open if not rendered moot for supplementation on the issue of damages with the right to further discovery prior thereto as necessary after a Final Decision on the merits has been issued on the issue of liability.

## **I.**

### **STATEMENT OF THE CASE**

The Complainant, Ilona Brown, received her 40 hour surface mining card and began applying for jobs at various mine sites in September of 2008. At the time she was employed full time as a security guard working at a coal mine guard shack and was going to college.

Complainant left an application at the Edwight surface mine and was scheduled for an interview with the mine's President, Toby Edwards. Mr. Edwards was impressed with her work ethic and interest in becoming a coal miner. Despite the fact that Ms. Brown had no experience driving trucks or operating any kind of heavy equipment, Mr. Edwards considered her for a position driving a rock truck, a very large piece of equipment at the Edwight Mine. Complaint was contacted by a Massey Energy Human Resources employee and instructed to report to Respondent, Elite Energy Services, LLC, with the understanding that she would be trained to operate a rock truck which was the position available there and the equipment which red hats were initially trained on when hired.

Edwight Mine is a d/b/a of Alex Energy Inc., a member of the Massey Energy family of companies. The practice of those companies was to initially hire workers through a staffing company, Elite Coal Services, to conduct initial training, screen the employees for miner certification, conduct drug testing and background checks, which if satisfactory would result in the employees becoming employees of Elite Coal Services, LLC upon their placement with the client mine. Assuming the employees worked out, eventually they would become full fledged Massey employees, or members as they are referred to at Massey. That screening process takes place over the course of a day at the Elite Coal Services facility, where the prospective employees are given safety demonstrations, view videos on various subjects, etc. At some point during the day they are sent to another facility in the area to be drug tested. Then they return to Elite Coal Services to fill out an application and go over

paperwork and forms covering Elite's company policies. During the course of the paperwork being reviewed and completed instructions are given to call Elite should they have any concerns regarding safety issues or harassment at the mine site where they are placed for employment. Complainant was given this training, signed the forms indicating her awareness of the policies and was given a sheet with Elite Coal Services's contact numbers twenty-four hours, seven days a week.

Complainant was not paid for the one day training session and did not become an employee of Elite Coal Services until she showed up for work at Edwight Mine. Although Complainant and other contract workers are paid by Elite Coal Services, provided benefits by Elite Coal Services and have all taxes and withholding administered by Elite Coal Services, the actual supervision of the contract employees is exclusively within the control of the client, in this case Alex Energy Services, Inc., d/b/a Edwight Mining. Work hours are scheduled by Edwight Mining and reported on a daily basis to Elite Coal Services which bills Edwight based upon the hours its contractors are reported to have worked each day. The contract employee works under the direction of Edwight Mining's employees and agents. Elite Coal Services does not independently supervise its employees in their day to day duties while employed at the mine.

After her Elite Coal Services training, the Complainant was instructed to report to a Massey facility for Massey Initial Training, or MIT. Following that Ms. Brown was scheduled to begin her work at the Edwight mine, which she did, beginning on October 16,

2008. After initial introduction at the mine office and orientation regarding the mine specific safety instruction, Ms. Brown was sent to the warehouse to help with inventory. The next day she was again assigned to work inventory. Complainant then asked regarding why she was not being trained to drive the rock truck which was the position for which she was hired. At the end of the second day, Ms. Brown was instructed to report the next morning to the "hogshed" at the bottom of the mountain where the rock truck drivers assemble each morning before going to their rock trucks. Complainant was assigned a trainer and began her training by observing from the "buddy" seat of the rock truck and being taken around the mine site and shown the various active pits and dump points. Ms. Brown eventually began driving the rock truck under the supervision of the trainer. Ms. Brown apparently was managing operation of the rock truck except for having difficulty backing the rock truck up to the loader, which required the use of the mirrors. After about ten days training, Complainant was summoned to the President's office at the mine and a conversation was conducted regarding her inability to back the rock truck and need for additional training. Although the content of that discussion is disputed, subsequent thereto, Ms. Brown worked two more days assigned first to inventory and then to clean the offices. Upon leaving that day she was asked to turn in her identification at the guard shack. When she called home she had been left a voice message from Elite Coal Services that her services were no longer required.

Ms. Brown spoke with David Gillespie, Human Resources Director of Elite Coal Services, and indicated that she wished to be considered for future employment and was told

that she would be considered for future openings. Ms. Brown never received any calls back however. Mr. Gross, Elites' president and owner, indicated that he had been told that Ms. Brown was unable to operate the rock truck and presented a safety concern as a rock truck driver by Jim Perry, a Human Resources individual with the Massey Energy companies, whose office initially informed Elite that Ms. Brown's services were no longer required. This is the standard practice of the companies that did not require and did not provide any further elaboration to the contractors upon termination of their services. When Ms. Brown spoke to Mr. Gillespie at Elite Services he was unable to provide any explanation to Complaint as to why she was no longer employed because Mr. Gross had not told him about his conversation with Mr. Perry. Complainant was subsequently awarded unemployment benefits on the basis of "lack of work" after being laid off "because her services were no longer required." Elite Coal Services did not challenge that basis for Ms. Brown's award of unemployment benefits and did not bring up the allegation of her being unfit to operate the rock truck. Ms. Brown never complained that she thought she was being discriminated against because of her gender to anyone at Elite Coal Services until the complaint was filed with the Human Rights Commission. Ms. Brown was not aware that her services were terminated as a result of not being allowed to continue her training in the rock truck because of these alleged concerns regarding her safety in operating the rock truck.

Other testimony indicated that Mr. Gross would not have required the services of a red hat surface miner, particularly one who could not operate a rock truck because they were

deemed a safety concern, as the vast majority of red hat inexperienced surface miners were hired in for rock truck driver positions. Furthermore, shortly after the termination of the Complainant's services, there was a general down turn in the price of coal due to a lack of demand. This resulted in large scale lay-offs in the industry as well as a drastic reduction of Elite Coal Services' own contractors employed in the industry. Between Elite Coal Services, which provides labor for surface mines and Superior Coal Services, which provides labor to underground mines, the number of contract employees went from between 250-270 down to a low of about 40 such employees. At the time when Ms. Brown was laid off, Massey accounted for about 90 percent of Elite Coal Services' business.

## II.

### **PARTIES' CONTENTIONS**

The Complainant, Ilona Brown, contends that she received her 40 hour surface mining card and began applying for jobs at various mines sites. Complainant was interviewed by Toby Edwards, President of Edwight Mining a dba of Alex Energy Inc. after leaving her resume at the Edwight mine. She was called by Jim Perry, a Human Resources person working for the Massey group of companies, who instructed her to contact Elite Coal Services, LLC, a contractor that processes new hires for coal companies, including Alex Energy, and pays them as the employer while they undergo training and are evaluated for future hire as actual Alex Energy Inc., employees. When hired Complainant was initially sent to do inventory and office work the first two days instead of driving the rock truck for which

she was hired. She thereafter trained in the buddy seat and eventually drove the rock truck over the next seven to eight days. A conversation with Mr. Edwards occurred thereafter in which Complainant stated she needed more training on backing the rock truck up to the loader before she would be able to drive the rock truck on her own. Despite indicating she would receive the training she spent the next two days doing inventory and office work and was laid off. Complainant alleged that the shifting explanations and contradictory stories are evidence of pretext for gender based discrimination as is evidence of disrespectful and harassing comments to Complainant and other women who are in an extreme minority in the workforce. Complainant also contends that the contract employer, Elite Coal Services, LLC made no effort to get Complainant employed with any other clients operating surface mines.

Respondent, Elite Coal Services, LLC, as a temporary staffing agency for the coal industry, contends that Complainant was hired for a position as a rock truck driver, which was the only opening available. Respondent contends that Complainant never made any complaint about discrimination during her training at Edwight and that Complainant was afraid of driving the rock truck, indicated she preferred to work as an office worker, and wasn't able to master driving the rock truck after ten days of training. Complainant was laid off for lack of work and never indicated any claim of discrimination in her unemployment application. Respondent also contends that Complainant failed to adequately mitigate her damages by going to college full-time and failing to apply for coal mining employment aggressively, limiting her search to sites within the mileage of the Edwight mine from her

home. Testimony at Public Hearing further, indicated that there was no demand for inexperienced red hat miners without the ability to operate heavy equipment and without CDL's for on road trucking.

### III.

#### SUMMARY OF DECISION

The Respondent, Elite Coal Services, LLC, is an "employer" and a "person" under the West Virginia Human Rights Act. The Complainant and the Commission claim that the Respondent discriminated against Ms. Brown on the basis of her gender by virtue of permitting their client Alex Energy, Inc., to fail to allow her to complete her training as a rock truck driver, where the basis of that decision was motivated in whole or in part on the basis of her gender. Secondly, the Complainant and the Commission contend that Respondent, Elite Coal Services, LLC, discriminated against Ms. Brown on the basis of her gender when it failed to call her back with referrals to other surface mine operations.

The Commission contends that Respondent, Elite Coal Services, LLC, is liable under the West Virginia Human Rights Act for the termination of Ms. Brown's services at Alex Energy, Inc.'s Edwight Mine because any gender discrimination by Alex Energy is imputable to Elite as an alter ego of sorts for Massey Energy and its subsidiaries, or because it is involved in some type of joint venture as a co-employer of Ms. Brown at Edwight mine. The Commission seeks to impose what amounts to strict liability upon what is essentially an employment agency for the acts of its client, when its client allegedly engages in illegal

gender discrimination at the work site where its employee is placed.

The Respondent, Elite Coal Services, LLC, counters by denying that its client engaged in illegal gender discrimination, arguing that Ms. Brown was not competent to drive a rock truck, presenting a safety danger to herself and others. They argue that Ms. Brown asked to perform other duties for which no other positions existed. Additionally, they claim that Ms. Brown never complained to anyone at Edwight Mine or at Elite that she was being treated unfairly or discriminated against during her rock truck driver training, despite being informed of her right and duty to do so under Elite's policies. Elite claims that by accepting unemployment benefits from Elite Coal Services, LLC for lack of work without raising discrimination as the basis of her termination, Ms. Brown should somehow be estopped from claiming discrimination at this point.

Elite's argument that Ms. Brown's failure to raise gender discrimination complaints acts to bar the instant case fails, for the simple reason that neither Elite Coal Services, LLC nor its client Alex Energy, Inc, ever informed Ms. Brown that she had essentially failed her rock truck training, that there were any safety concerns with her operating the rock truck or that her progress was deemed unsatisfactory. Thus, there was nothing for Ms. Brown to complain about in regards to her training that would allow her to suspect that gender discrimination might be subverting her training process. Even after her services were terminated all she was told was that, "her services were no longer needed." The Commission views this failure of Respondent, Elite Coal Services, LLC, to share the concerns with her

ability to drive the rock truck with her, to be a tacit complicity in Alex Energy, Inc's alleged discrimination in failing to allow her a reasonable period of training, which other male red hats received, to allow her to learn the position for which she was recruited at Edwight Mine.

Despite any inherent unfairness to Ms. Brown under this set of facts, there does not appear to be any legal duty under the West Virginia Human Rights Act, which Elite Coal Services, LLC has violated. Elite Coal Services, LLC is a distinct legal entity with no ownership relationship to Alex Energy, Inc., or any of its related Massey Energy affiliated companies. The de facto terms of its business relationship with Alex Energy, Inc., were such that whether Elite's contractors remained on site with Alex Energy was strictly a matter of Alex Energy's needs. Alex Energy, Inc., through the Massey Human Resources office at Progress Coal, would simply inform Elite that the contractor's services were no longer needed at which point the contractor would be so informed by Elite and the contractor would be laid off from Elite. There is no co-employment or agency relationship created between the two entities in this relationship. Therefore, Elite is only liable for gender discrimination in regards to Alex Energy's failure to allow Ms. Brown to complete her training as a rock truck driver, to the extent that Elite's own employees and agents discriminated against Ms. Brown on the basis of her gender, or, otherwise failed to take reasonable steps to prevent such discrimination upon learning of that discrimination.

In the instant case, Elite Coal Services, LLC was informed that Ms. Brown's services were no longer required. That is all that Elite's Human Resources Director, Mr. Gillespie told

Ms. Brown. Mr. Gross was later told that the reason Ms. Brown's services were no longer required was because she "couldn't back the rock truck onto a ball field". Through no fault of Ms. Brown she could not ascertain that this was the "reason" for her termination which might have alerted her to the possibility of gender discrimination being behind the ending of her training on the rock truck. On the other hand, there was nothing to alert Mr. Gross, the President or anyone else at Elite Coal Services, LLC that gender discrimination was an issue. Ms. Brown had been referred to Elite by Massey in the first place, with full knowledge of her gender. No complaint of gender discrimination was raised to anyone at Elite Coal Services, LLC, or at Edwight for that matter, by Ms. Brown until after she was terminated (and after she collected her unemployment benefits from Elite).

Neither have the Complainant or the Commission demonstrated that gender discrimination played any role in the failure of Elite Coal Services, LLC to refer Ms. Brown for employment to other surface mines after her employment at Edwight. The evidence establishes that as far as Elite Coal Services was aware, Ms. Brown was not capable of operating a rock truck. As that was the case as far as Elite Coal Services was aware, and because all the positions opening for red hat surface miners were for rock truck operators, there was simply no demand for Ms. Brown's services given her lack of CDL or experience operating heavy equipment. That lack of potential referral of Ms. Brown by Elite Coal Services was exasperated by the severe downturn the following year in the number of contractor employees to less than a quarter of what it had been when Ms. Brown was laid off.

There is no legal theory under which Elite Coal Services, LLC can be held liable for discrimination against Ms. Brown under the facts in this case. The preponderance of the evidence is that gender discrimination played no role in the decisions of Elite Coal Services, LLC or in its actions or inactions in regard to Ms. Brown in the instant case.

#### IV.

#### FINDINGS OF FACT

1. Complainant, Ilona P. Brown, is a female, who was age 39 at the time she was employed by Respondent. Exhibit Nos. 23 and 117.
2. Respondent, Elite Coal Services, LLC, is a company owned by Michael Gross, that provides contract labor for surface mine operations. Tr. Vol. 4, Pages 155-156.
3. Ms. Brown obtained her Surface Apprentice Card from the West Virginia Office of Miners' Health, Safety and Training with a date of issue of August 19, 2008. Exhibit No. 23.
4. Ms. Brown began working for [C]ramer Security as a security guard at the IC[G] mine guard shack at Eccles in June 2008. She was working 60 hours per week, taking three college classes beginning in August 2008 and taking the miner training class every day for three hours for two weeks that summer to obtain her 40 hour red hat certification. Tr. Vol. 1, Pages 43-44.
5. When the bosses at IC[G] mine site where she worked for [C]ramer Security indicated

that they were not hiring for any surface positions, Ms. Brown decided to apply at several mines down Route 3, most of which were owned by Alex Energy/Massey including Montcoal, Progress, Blue Pennant, Twilight and Edwight. She filled out applications that were to be had at the guard shacks down by the road and would leave them at the guard shacks. Tr. Vol. 1, Pages 45-47.

6. Ms. Brown left her application with the guard at Edwight around September 8, 2008. She received a phone call within about a week, from Jim Perry the Human Resources Manager for Massey who told her that Mr. Edwards was interested in interviewing her and that she needed to get a date and time for the interview. Tr. Vol. 1, Pages 45-49.
7. Ms. Brown interviewed with Mr. Edwards for fifteen to twenty minutes at the Edwight strip mine. They talked about why she got her 40 hour card, that her father had been a coal miner, and also discussed that she had begun college and that she would be able to leave early one of the days when the class would require her to leave one hour early. She made it clear to Mr. Edwards that she had no experience driving a rock truck. Mr. Edwards told her it was not a problem, not to worry she would have sixty days to learn. He explained that it takes some people longer than others to learn. He explained the use of the radio and the buddy seat used to observe the trainer while she learned. Tr. Vol. 1, Pages 50-56, Exhibit No. 123.
8. That same day Ms. Brown received a call from Jim Perry at Massey telling her that she needed to contact Elite for training and paper work. The date was arranged and

she reported to Elite's facility in Summersville at 8:00 and was there until 2:00. Both surface and underground miners were there for the training. There was hazard training, paperwork was filled out, safety equipment distributed (safety glasses, suspenders, reflective gear, asked about hard toed boots), and they watched videos. The drug testing was at another location and took approximately 1 1/2 to 2 hours. Tr. Vol. 1, Pages 57-62.

9. Ms. Brown was instructed to report to another mine site for Massey Initial Training at 6:00a.m. and given directions while at Elite. Ms. Brown underwent the MIT training, watched some videos and then met with Brian Hicks or Jim Perry in his office to go over what medications she was taking and discuss when she could start. She indicated she wanted to give two weeks' notice to her current employer and a start date of October 16, was agreed upon. Tr. Vol. 1, Pages 79-83.
10. Ms. Brown reported for work at the Edwight mine on October 16, 2008 at 8:00a.m., met with Ron Charles at the office and was asked to help with inventory the first day. Ms. Brown worked inventory again on the second day. She did ask a number of times when she was going to begin driving the rock truck as she was told when interviewed for the position. Tr. Vol. 1, Pages 90-95, 210, 213-214.
11. At the end of the second day working inventory, Ms. Brown was instructed to report the next day to the "hog shed" where the rock drivers assemble. She met with Foreman Robert Brooks and was assigned to a trainer, Frank Martinez. Tr. Vol. 1,

Pages 99-100.

12. Ms. Brown went with Mr. Martinez and was shown how to do the pre-op list and inspection, shown the instrumentation of the truck, etc. Instruction continued as to operation of the truck, including how to dump coal, different types of coal, where the dump points were, how to operate the CB radio to call out check points on the mountain where trucks would pass each other. Once it got light she was taken around and shown the different areas of the mine operation at Edwight. Tr. Vol. 1, Pages 101-105.
13. Ms. Brown did not drive the rock truck on the first day or the second day but merely observed the trainer. On the third day in the truck, Ms. Brown drove it about 30 minutes and built up to driving one hour than two. The longest period she drove the truck was five hours. Ms. Brown was assigned to work in the rock truck for the whole days of October 20th-24th and 26-29th. She drove seven or eight of those days and her calendar indicated she spent a total of 994 hours in the truck either observing or driving. Tr. Vol. 1, Pages 105-106, and 216-220.
14. Ms. Brown did a good job driving the rock truck and was comfortable doing so but needed additional training on backing up to the loader. She had difficulty getting close enough because she was not used to using her mirrors to back up and the truck did not permit her to view behind the truck without using the mirrors. Ms. Brown never had an accident while driving the truck and never damaged any equipment. Mr. Martinez

complimented her about being very good at stopping the truck the first time it slid while she was driving. She got over her initial fear and the only thing stopping her from driving on her own was getting additional training she asked for backing the rock truck up to the loader. Tr. Vol. 1, Pages 106-108, and 117-120.

15. On October 29, 2008, either Mr. Charles the Mine Superintendent or Robert Brooks the Foreman radioed Mr. Martinez near the end of the shift and told him Mr. Edwards wanted to see Ms. Brown at the end of the shift. Ms. Brown met with Mr. Edwards at 3:45 at the end of the shift. According to Ms. Brown, they discussed her strengths and weaknesses driving the truck. Ms. Brown indicated that she was confident about her driving, the only issue was backing up to the loader. She indicated that she needed practice backing up to the loader, and claims that Mr. Edwards promised her that she could stay over after the shift on the coming Saturday and practice with him or a foreman. Mr. Edwards asked her if she would work inventory the next two days because they really needed it to get done. Ms. Brown agreed to work October 30<sup>th</sup> and 31<sup>st</sup> in inventory and then they'd do additional training backing up to the loader on November 1<sup>st</sup>. Tr. Vol 1, Pages 124-128, and 131-132.
16. Ms. Brown worked inventory October 30<sup>th</sup> and part of the 31<sup>st</sup> and then was asked to spend the rest of the 31<sup>st</sup> cleaning the office. Mr. Charles then told her to report to the hog shed the following morning. Tr. Vol. 1, Pages 135-136.
17. When Ms. Brown left work that day, the security guard at the bottom of the mountain



asked to see her ID Badge and told her that Jason from Safety called down here and said today would be your last day. On the way home when she got cell service she had a message from her mother saying Dave Gillespie, the Human Resources Director at Elite Coal Services, had left a voice message on the answering machine at her house that was her last day and her services were no longer needed. Tr. Vol. 1, Pages 136-138.

18. Ms. Brown then called Mr. Gillespie who told her that Jim Perry had got in touch and said Ms. Brown's services were no longer needed. She asked him if any reason was given but was only told she was laid off without giving any reason. He indicated that they do that all the time. Ms. Brown attempted to call Mr. Edwards or Mr. Charles but was told they were in meetings and she did not get to talk to them. Ms. Brown called Mr. Gillespie sometime thereafter, and asked about whether any red hat positions were available, he told her that none were available. She asked Mr. Gillespie if she had done anything wrong and he said no reason was given. Mr. Gillespie told her he would keep her name on a list, that she was in good standing. Ms. Brown never received a call from Elite Coal Services thereafter. Mr. Gillespie testified that Ms. Brown called on October 31, 2008 and that he talked to her telling her that her services were no longer needed and that she would be laid off. Mr. Gillespie confirmed that Ms. Brown asked about other opportunities at that time. He told her if other things came up that she was eligible for he would refer her. They do not keep

a list. They keep the file folder in the corner for sixty days, just to remind them, should they find a job, they make money on them and get a return on their investment in the cost of training and processing the individual. Mr. Gillespie further testified that Ms. Brown made no complaint about the training she had received for rock truck, nor did she complain about having been assigned to work inventory at that time. Tr. Vol. 1, Pages 138-141, Vol. 2, pages 150-160, 272.

19. Elite Coal Services is a company providing surface mine contract labor to various companies. If they find that someone needs a certain type of labor, Elite runs them through training, drug test, criminal background check, check for valid drivers licence and a valid miners card for the type of work. If the company finds the employee they will send the employee to Elite to do screening and the training process. David Gillespie was their HR/Safety Director in 2008. Tr. Vol. 2, Pages 85, 87, 92 and 94, Vol. 4, Page 156.
20. Elite Coal Services' employees are not employees when they go through training at Elite. They do not become Elite employees until the they show up at the job. Elite Coal Services pays Social Security taxes for Elite's contract employees, as well as, unemployment taxes and worker's compensation premiums. Tr. Vol. 2, Pages 117-118, Tr. Vol. 4, Pages 175-176, 204.
21. The clients set the pay, however, and once the Elite employee reports to the mine site, no Elite supervisors are there. They do not supervise or control the work of their

employees in any way. Elite doesn't provide the trucks or heavy equipment being used by the contract employee at the mine. The people telling Elite's employees how to operate the equipment, showing them where to go and what to do on the job are Elite's clients, in this instance Massey's Edwight mine, employees and agents. The client directs the workforce, controlling the details of the work to be performed; and has the right to change work assignments subject to guidelines of Elite, MSHA and State officials. The client can assign duties as they see fit as long as they are not unsafe and they don't reduce the rate of pay. Elite will investigate if one of their employees complains they are not satisfied with pay or not doing what they're supposed to be doing. Tr. Vol. 2, Pages 120-123, 128-130.

22. Ms. Brown was referred to Elite from Massey. Sixty to seventy percent of Elites' Massey contract employees are referred from Massey to Elite. Ms. Brown was an employee of Elite but Edwight keeps the time for Elite employees. Although Elite suggests that their employees keep their time and turn it in once a week, the time sheets listing its employees with hours worked each day, which Mr. Gross receives via fax or email from Edwight are the basis upon which Elite pays its employees. Tr. Vol. 4, Pages 199-203.
23. Mike Gross picked up the phone when Jim Perry, from Massey's Human Resources Department, called to tell him that Ms. Brown's services were no longer required. Mr. Perry told Mr. Gross there were some safety concerns, that Ms. Brown basically

- couldn't back up a rock truck in a football field. Tr. Vol. 4, Pages 171-172.
24. Mr. Gross did not tell Mr. Gillespie why Edwight told him Ms. Brown's services were no longer needed. So Mr. Gillespie could not tell Ms. Brown why she was let go and Mr. Gross had no follow-up conversations himself with Ms. Brown. Tr. Vol. 4, Pages 194-195.
  25. Mr. Gross testified that he would not have placed Ms. Brown as a rock truck driver anyplace else because Mr. Perry had told him that Ms. Brown couldn't operate the rock truck and he was concerned about her safety and the safety of others. This would be an impediment to employing Ms. Brown elsewhere because most apprentice positions are for rock truck. Tr. Vol. 4, Pages 190-192.
  26. Mr. Gross didn't make any effort to place Ms. Brown in another position and was not aware if Ms. Brown had asked about other employment because he did not make the call to Ms. Brown. Despite considering that Ms. Brown had proven she couldn't operate a rock truck, because Massey (which made up 90% of his business at the time) said so, Elite did not bring up that issue with unemployment which was listed as being due to lack of work. Tr. Vol. 4, Pages 189-192.
  27. Beginning in November and December 2008 and at its worst in the winter and spring of 2009, there was a severe decline in market conditions. Mr. Gross's businesses went from employing between 250-270 contract workers in 2008 including both surface and underground, down to a low of approximately 40, for both surface (Elite) and

underground (Superior). Underground workers typically make up 30-40% of those numbers; but at one point Superior was employing no contract workers underground. The yearly average contract employees for 2009 was 60. Mr. Gillespie testified that Elite had 100-150 lay-offs of both red hats and black hats overall, some of which were from the Edwight mine. Tr. Vol. 2, Page 268, Tr. Vol. 4, Pages 182-184, 186-188.

28. Another female employee of Elite, Ms. Jennifer Keener, worked at Edwight mine. When she filed for unemployment, the form indicated she claimed that she was working in unsafe conditions. Mr. Gillespie testified that he had no reason to believe Ms. Keener had any safety concerns and did nothing to investigate Ms. Keener's concerns even though he did receive the copy of the unemployment document indicating her concern. As far as Mr. Gillespie is concerned, Ms. Keener made herself unavailable for work and did not contact Elite. He did not know there was a complaint until after she was gone. Mr. Gillespie testified that he cannot investigate every complaint put in by a disgruntled ex-worker, if she had called him with the complaint Elite would have addressed it immediately. Tr. Vol. 2, Pages 294-296, 319-320, Exhibit No. 137.

29. Another female employee of Elite, Sherry Cochran, worked at another Massey mine. Ms. Cochran called Mr. Gross about unfair treatment because she complained of sexual harassment and ended up getting fired. Mr. Gross personally called Mr. Hicks to discuss the matter. Mr. Hicks informed him that both the harasser and Ms. Cochran

had been fired when during the course of Massey's investigation, Ms. Cochran admitted to inappropriate things going on at the property. Elite laid her off thereafter. Mr. Gross felt that no further action needed to be taken. Tr. Vol. 4, Pages 227-230.

30. Elite Coal Services, LLC offered shifting and contradictory explanations for why Ms. Brown was laid off from Edwight and subsequently not offered employment at other sites by Elite during the course of the investigation of the complaint and up to the time of the Public Hearing in this case according to the Commission. In its Answer to the Amended Complaint, it was represented that Ms. Brown made no request whatsoever to be placed in another job after the client observed her incompetence in driving the rock truck. Mr. Gillespie admits that Ms. Brown did in fact request to be placed in another position when he talked to her. Nobody told Mr. Gillespie that Ms. Brown was grossly incompetent driving the rock truck. Exhibit No. 5, Tr. Vol. 2, Pages 160-163, 171-172.

31. Elite Coal Services provided responses to interrogatories which stated at one point on page 2, "She was unable to back the truck and she damaged equipment at the her work site." Mr. Gillespie had no knowledge as to how the allegation of damage to equipment came to be made. Mr. Gross does not know where the allegation of damage to equipment came from either, and admitted that Mr. Perry never told him that Ms. Brown damaged equipment. In answers to questions submitted to Elite during the investigation in November, 2011, Elite was asked to provide a list of every

female that worked at Elite since January 1, 2007. Mr. Gillespie provided a list of 11 women. The list omitted Kim Campbell-Johnson and Sherry Cochran, both of whom have filed lawsuits against Elite for discrimination. Elite was also asked to provide a list of every employer to which Complainant's resume was sent, the date on which it was sent, and the job title of the opening for which it was sent. Mr. Gillespie responded by stating: "She never provided us with a resume. In her application, she lists no jobs that she can perform related to mining." Yet Elite Coal Services provided a copy of Ms. Brown's resume to the Commission in response to interrogatories and request for production of documents at some point, and Mr. Gross eventually conceded that she was qualified as a red hat trainee and could shovel belt. Exhibit Nos. 3 and 6, Tr. Vol. 2 Pages 173-182, 184, 200, Tr. Vol. 4, Pages 230-233, 235.

32. Edwight had referred a number of females to Elite which Elite employed over the time Mr. Edwards was President at Edwight and Mr. Hicks was in charge of HR for Massey, including Donna Armstrong, Shelly Bailes, Jennifer Keener, Lind[sey] Dillon, Heather Schraeder, Virginia Mayola and Andrea Cunningham. Tr. Vol. 2, Pages 269-272.

## V.

### DISCUSSION

The West Virginia Human Rights at W. Va. Code §5-11-9 makes it an unlawful

discriminatory act:

(1) For any employer to discriminate against any individual with respect to . . . hire, . . . terms, conditions or privileges of employment if the individual is able and competent to perform the services required . . .

(4) For an employer, . . . employment agency . . . to:

(B) Discriminate against an individual with respect to his or her right to be admitted to or participate in a guidance program, an apprenticeship program, on-the-job training program or other occupational training or retraining program;

(C) Discriminate against any individual in his or her pursuit of such programs or to discriminate against such person in the terms, conditions or privileges of such programs;

(7) For any person, employer, employment agency . . . to:

(A) . . . engage in, or hire, or conspire with others to commit any acts or activities of any nature, the purpose of which is to . . . cause . . . economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section; . . .

W. Va. Code §5-11-1 provides the following definitions:

(a) The term "person" means one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons;

(d) The term "employer" means . . . any person employing twelve or more

persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year . . .

(g) The term "employment agency" includes any person undertaking, with or without compensation, to procure, recruit, refer, or place employees.

(h) The term "discriminate" or "discrimination" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of . . .sex . . .

In order to prove a *prima facie* case of discrimination under the Act, the Commission must show:

- (1) That the plaintiff is a member of a protected class.
- (2) That the employer made an adverse decision concerning the plaintiff.
- (3) But for the plaintiff's protected status, the adverse decision would not have been made.

Syllabus Point 3, Conaway v. Eastern Associated Coal Corp., 178 W.Va. 164, 358 S.E.2d 423 (1986). Mayflower Vehicle Systems, Inc. v. Cheeks, 218 W.Va. 703, 713-714, 629 S.E.2d 762, 772 - 773 (2006).

A discrimination case may be proven under a disparate treatment theory which requires that the Complainant prove a discriminatory intent on the part of the Respondent. The Complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Dept. v. West Virginia

Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). Under this formula, the Complainant must first establish a prima facie case of discrimination; the Respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the Complainant must show that the reason proffered by the Respondent was not the true reason for the decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance or pretense. West Virginia Institute of Tech. v. West Virginia Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corp., *supra*. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and where pretext is shown, discrimination may be inferred, Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995), although it need not, as a matter of law, be found. St. Mary's Honor Society v. Hicks, 509 U.S. 502 (1993).

There is also the "mixed motive" analysis under which a Complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and recognized by the West Virginia Supreme Court in West Virginia Institute of Tech., *supra*. "Mixed motive" applies where the Respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis,

the Complainant need only show that the Complainant's protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the Complainant's protected class had not been considered. Barefoot, *supra*, 193 W. Va. at 485, 487, 457 S.E.2d at 162 n.16, 164 n.18.

The Complainant has established a prima facie case of gender based discrimination that she was discharged from employment by the Respondent, Elite Coal Services, LLC after its client, Alex Energy, Inc., doing business as Edwight Mining, said Ms. Brown's services were no longer required. Elite Coal Services then failed to refer Ms. Brown for any other placements although she requested to be considered for any other openings. Ms. Brown was a female qualified red hat miner at the time having obtained her 40 hour surface miners card. Other qualified red hat miners hired at Edwight at the same time apparently were not laid off by Elite and Elite apparently continued to place red hat miners at the time in question. Thus the Commission and the complainant have made out a prima facia case of gender discrimination against the Respondent, in that Ms. Brown was a member of a protected class, female; Elite took adverse employment actions against her, laying her off and failing to place her at other positions in the industry, and by offering evidence from which it could be inferred that other male miners were not laid off from Edwight and were continued to be placed with clients, as well as, evidence that it provided false and varying reasons for the actions in regard to Ms. Brown.

The Respondent's main thrust in its defense is that its client did not discriminate

against the Complainant when it determined it did not need her continued services. Both the Respondent in this case Elite Coal Services, LLC and the Respondent, Alex Energy, Inc., in the case consolidated for purposes of Public Hearing, urge in this regard that the tribunal in these matters adopt the so called "same actor inference" as set forth in the United States Court of Appeals for the Fourth Circuit case of Proud v. Stone, 945 F.2d 796 (4<sup>th</sup> Cir. 1991). In that case the court held that it was illogical to posit that discriminatory animus would be a motivating factor in the discharge of an employee where the individual who fired the employee was the same one who hired them just six months earlier knowing them to be a member of the protected class. The West Virginia Supreme Court discussed this case in its per curium decision in Johnson v. Killmer, 633 S.E.2d 265 (W. Va. 2006). The Syllabus by the Court did not adopt this as a holding of the case however. The Commission on the other hand, urges the tribunal to consider the so called, "cat's paw" theory of liability in which the discriminatory animus of an agent of the employer which is the proximate cause of the adverse action taken by the independent decision maker may form the basis of the employer's liability for an illegal discriminatory firing. This approach was adopted by the United States Supreme Court in a Uniformed Services Employment and Reemployment Rights Act case in Staub v. Proctor Hospital, 131 S.Ct. 1186 (2011).

Since the undersigned concludes that this case may be decided on other grounds without addressing the issue of whether gender discrimination occurred at the hands of Alex Energy, Inc., that issue will not be addressed in this opinion. The evidence adduced at the

Public Hearing demonstrated that this Respondent, Elite Coal Services, LLC, is an independent entity from Alex Energy, Inc., having no ownership in common with either Alex Energy, Inc., or any of its Massey energy affiliates. Given this fact, the only issue to be decided is whether the actions of Elite Coal Services, LLC, when it laid Ms. Brown off and then failed to place her in another mining position at another mine or with another client, were motivated in whole or in part by gender discrimination. Elite does not have any on site supervision of the contract employees once they are placed with the client at their mine site. Elite's involvement in the daily activities of their employee at that point becomes limited to those instances when one of their contract employees would call them with a concern over safety or other matters that the employee cannot resolve with the client mine management to whom they would initially bring their concerns. Since Elite does not have any involvement in the supervision of the work site activities it cannot be said to be involved in a joint venture with Alex Energy, Inc., in the operations at the Edwight mine.

In the instance of Ms. Brown, Elite never got any call from Ms. Brown about her assignments to work inventory rather than the rock truck or with concerns with the training process at Edwight in regard to the operation of the rock truck. These concerns were not brought to Elite's attention until after the complaint was filed with the Human Rights Commission. The Commission seeks to establish a claim of gender bias by offering evidence that Elite turns a wilful blind eye toward illegal or discriminatory actions by Massey, and facilitates them by its failure to investigate and confront Massey with such instances.

Specifically, the Commission cites to, as examples, Ms. Keener, who indicated that she left work due to being asked to work in unsafe conditions at Edwight on her unemployment forms; and, Ms. Cochran, who was terminated by Massey after complaining to them of sexual harassment. In neither instance did Elite take any remedial actions on behalf of its employees. In the first instance of Ms. Keener, Elite was informed that she had left the work site and did not wish to work there. Mr. Gross explained that he does not consider the complaints about such matter credible when they are brought after the fact by people who are disgruntled and making unsubstantiated accusations of all sorts. Specifically, with regard to Ms. Keener, the unemployment office determined that Ms. Keener had been a voluntary quit in its determination. In regard to Ms. Cochran, Mr. Gross did undertake an investigation into the allegations and was satisfied that the HR determination by Massey, that both the alleged harasser and Ms. Cochran be let go, was the appropriate one, given her admission to having taken part in voluntary inappropriate activities on the mine property during the time they were supposed to be working. The Commission also indicated that the failure of Mr. Gross to tell Ms. Brown about the safety concerns Mr. Hicks imparted to him when telling him Ms. Brown was not capable of driving the rock truck, implicate Elite in any illegal gender discrimination which resulted in that determination by virtue of his acceptance of those conclusions as fact in laying off Ms. Brown and failing to place her elsewhere. Although this fact explains Ms. Brown's failure to raise complaints of gender based discrimination and results in gross unfairness to her in the events which transpired, it cannot be said that gender

played any part in Mr. Gross's motivations. Massey is his customer. He cannot force them to keep an employee they do not need. Elite is not in a position to evaluate the performance and abilities demonstrated in the workplace because the client supervises and assigns work on site in its own discretion. Edwight had referred several women to Elite for employment with them at the Edwight mine. There is no reason for Mr. Gross to suspect that gender bias would be involved in the decision to tell Elite Ms. Brown's services were no longer needed at Edwight.

The Commission cites a number of misstatements of fact by Elite's agents and representatives during the course of its investigation and subsequent litigation of this matter as further evidence of the falsity of Elite's explanation for its actions herein. The fact that it failed to disclose two women as its former employees who have since filed suit against them during the course of the Commission's investigation is certainly quite suspicious. Elite Coal Services provided responses to interrogatories which stated at one point on page 2, "She was unable to back the truck and she damaged equipment at the her work site." Mr. Gillespie had no knowledge as to how the allegation of damage to equipment came to be made. Mr. Gross does not know where the allegation of damage to equipment came from either, and admitted that Mr. Perry never told him that Ms. Brown damaged equipment. In answer to interrogatories Elite indicated that Ms. Brown never provided it with a resume and did not possess any skills which qualified her for employment in mining when asked to provide a list of potential employers to whom it had sent her resume and the positions that were requested.

They in turn produced a copy of her resume to the Commission during their responses to the Commission's discovery request, and grudgingly admitted at hearing that she was in fact qualified to be a red hat trainee and could shovel belt at very least. In its Answer to the Amended Complaint, Elite claimed that Ms. Brown made no request whatsoever to be placed in another job after the client observed her incompetence in driving the rock truck. Mr. Gillespie admits that Ms. Brown did in fact request to be placed in another position when he talked to her. Nobody told Mr. Gillespie that Ms. Brown was grossly incompetent driving the rock truck. Taken together the shifting explanations and plain misrepresentations to the Commission in the course of the investigation and litigation of this matter are enough to raise an inference that illegal gender discrimination was the motive for the adverse actions taken by Elite in its failure to refer her for other employment opportunities and constitutes a prima facie case of gender discrimination by Elite Coal Services, LLC against Ms. Brown.

Having advanced a prima facie case of discrimination at the third step of the burden shifting formula, the Complainant, Ms. Brown, and the Commission, nevertheless retain the ultimate burden of proving by a preponderance of the evidence, that the legitimate non discriminatory reasons advanced by Elite Coal Services for not referring Ms. Brown for other employment with its coal surface mines were false and a cover for gender based discrimination. As stated in the previous paragraph, the falsity of some of its claims certainly casts doubt upon the motivations and reasons for its failure to find alternate employment for Ms. Brown. Nevertheless, to judge the legitimacy of its reasons, Elite's evidence regarding

its actions must be examined as well to make a determination of the preponderance of evidence on the discriminatory motive alleged on its part.

There is strong evidence to suggest that Ms. Gross legitimately believed that Ms. Brown was not going to be suitable for a position as a rock truck driver. The very client that referred her to Elite for employment in that capacity as a trainee was aware of her being female when it hired her. Edwight Mining personnel were the only ones competent to make a determination regarding her abilities because Elite had no one on site at Edwight who would have any way of observing or monitoring her progress as a rock truck driver. As Mr. Gross and Mr. Gillespie pointed out at Public Hearing, Edwight makes money by furnishing employees and has strong incentive to recoup its investment in the initial training and screening of its employees. Thus, given that Massey made up ninety percent of Elite's business, the fact that Ms. Brown would not be suitable as a rock truck driver, certainly not in Massey's eyes, having identified her as a safety concern at that point, Elite could not refer her for the vast majority of entry position for red hat miners. The fact that the coal industry started to suffer a severe contraction in demand and prices, with consequent decrease in production, beginning in November and December of 2008, certainly lends credence to the belief that Ms. Brown did not possess the skills that would be in demand in such a contracted market. Elite lost 100 to 150 contract employees overall in 2009. This together with Elite's self interest to furnish contract employees makes discriminatory animus in the failure of finding alternate placement of Ms. Brown highly less likely. Bearing in mind that the law

provides that pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and where pretext is shown, discrimination may be inferred, Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995), although it need not, as a matter of law, be found. St. Mary's Honor Society v. Hicks, 509 U.S. 502 (1993); it must be concluded that the preponderance of the evidence supports a conclusion that pretext for discriminatory animus is unwarranted in the instant case.

## VI.

### CONCLUSIONS OF LAW

1. The Complainant, Ilona Brown, is an individual aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act, W. Va. Code §5-11-10.
2. The Respondent, Elite Coal Services, LLC, is a "person" and an "employer" as those terms are defined under W. Va. Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.
3. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.
4. The Complainant has established a prima facie case of gender discrimination against the Respondent in that she is a member of a protected class, female; she was subjected to the adverse actions of being laid off by Respondent and a failure of Respondent to

refer her to other potential surface coal mining employment, and that she has offered evidence of pretext on the part of Respondent in its proffered explanations for those actions.

5. The Respondent has demonstrated by a preponderance of the evidence that it is not involved in joint venture with Alex Energy, Inc., at the Edwight surface mine, and is not an alter-ego for Alex Energy or any other Massey related company, as no ownership interest had been alleged between Elite Coal Services, LLC and those other business entities.
6. The Respondent has proven by a preponderance of the evidence that legitimate non discriminatory reasons were the real reason it laid off the Complainant and was subsequently unable to find alternate placements for the Complainant; in that Respondent laid off the Complainant when its client informed them her services were no longer required in keeping with the de facto business arrangements between the Respondent and its client operating Edwight surface mine, and that its failure to secure alternate placement was the result of Elite's reason to believe that Complainant was not suitable for placement in position of rock truck driver and the contraction of their business made her placement elsewhere impossible during the time in question.

VII.

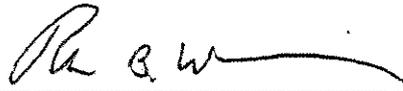
**RELIEF AND ORDER**

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** that this case be dismissed with prejudice and be closed.

It is so **ORDERED**.

Entered this 17<sup>th</sup> day of February, 2012.

**WV HUMAN RIGHTS COMMISSION**



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