



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

TELEPHONE 304-348-2616

29 May 1990

GASTON CAPERTON
GOVERNOR

Qewanncoii C. Stephens
Executive Director

Shirley Ann Boone
Box 126
Crichton, WV 25961

Carole L. Scotti, Esquire
216 S. Jefferson Street
Lewisburg, WV 24901

Michael T. Chaney, Esquire
P. O. Box 2031
Charleston, WV 25327

F. Thomas Rubenstein, Esquire
Westmoreland Coal Company
P. O. Drawers A & B
Big Stone Gap, VA 24219

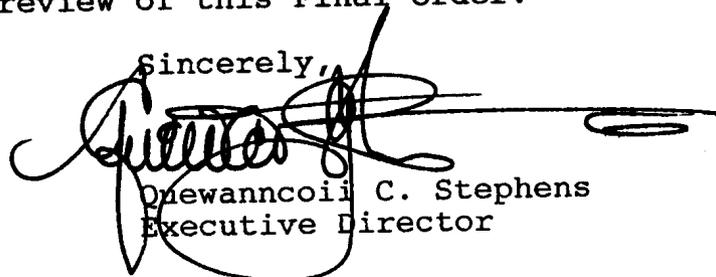
Mike Kelly
Deputy Attorney General
L & S Building, 5th Floor
812 Quarrier Street
Charleston, WV 25301

Re: Boone v. Westmoreland Coal Company
Docket Nos. ES-595-83 and EH-596-83

Dear Parties and Counsel:

Herewith, please find the Final Order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 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 a review of this Final Order.

Sincerely,



Qewanncoii C. Stephens
Executive Director

Enclosures

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

cc: Secretary of State

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 Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., 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, landlord, etc., 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.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SHIRLEY A. BOONE,

Complainant,

v.

DOCKET NOS. ES-595-83
EH-596-83

WESTMORELAND COAL COMPANY,

Respondent.

FINAL ORDER

Pursuant to the opinion of the West Virginia Supreme Court of Appeals, Westmoreland Coal Company versus West Virginia Human Rights Commission and Shirley A. Boone, 382 S.E.2d 562 (1989), this matter was remanded to the Commission with directions to fashion an Order regarding monetary damages and attorney's fees consistent with the standards set forth in Bishop Coal Company v. Salyers, 380 S.E.2d 238 (1989).

On 7 February 1990 the Commission reviewed and discussed the decision of the West Virginia Supreme Court of Appeals entered in this matter, the supplemental petition for attorney's fees and costs filed by complainant, memoranda submitted by the respective parties concerning the issues to be addressed on remand, and all other evidence and argument of counsel deemed pertinent to the remaining issues in question. Upon mature consideration of all of which the Commission does hereby make the following findings of fact and conclusions of law:

1. Respondent violated the West Virginia Human Rights Act, specifically W. Va. Code § 5-11-9(a), by discriminating against the complainant on the basis of her sex.

2. Respondent is liable in damages because of the acts of its supervisory personnel, which acts constituted unlawful sexual harassment in violation of W. Va. Code § 5-11-9(a).

3. As previously found, respondent's supervisory personnel engaged in the following forms of sexual harassment:

(a) Following complainant and verbally harassing her with requests to engage in a variety of sexual activities;

(b) Sexually assaulting complainant on one occasion;

(c) Verbally and physically sexually harassing the complainant on a regular basis.

4. Complainant prevailed on one out of the three claims of discrimination tried before the hearing examiner.

5. The recommended decision of the hearing examiner was

adopted by the West Virginia Human Rights Commission and, after reversal by the Circuit Court of Nicholas County, was reinstated in all significant parts by the West Virginia Supreme Court of Appeals.

6. The hearing examiner recommended, and the Commission concurred, that complainant's counsel be compensated for 111 hours at the rate of \$65.00 per hour. The hours included in the hearing examiner's award were expended between 6 June 1985 and 29 August 1985.

7. The reasonable hourly rate of \$65.00 was recommended by the hearing examiner, and adopted by the Commission, after considering that complainant did not prevail on the claims of handicapped discrimination or discriminatory discharge, but prevailed only on her charge of sexual harassment. The hearing examiner also recommended that the complainant be awarded her costs of \$187.22.

8. On and after 30 August 1985 complainant's counsel reasonably expended 97.1 hours on this matter.

9. Additionally, after 30 August 1985 complainant's counsel reasonably expended 10.5 hours in travel related to this matter.

10. Complainant reasonably expended \$264.66 for costs

incurred after 30 August 1985.

11. Complainant's counsel has represented complainant for a period of over four years.

12. Complainant's counsel has been licensed to practice law since 1 May 1980.

13. Complainant's counsel's current normal hourly rate for civil rights cases is \$100.00 per hour.

DISCUSSION

A. Damages:

Complainant is entitled to incidental damages in the amount of \$2,500.00. In Bishop Coal v. Salyers, 380 S.E.2d 238 (1989), the West Virginia Supreme Court of Appeals authorized the Commission to award up to \$2,500.00 for humiliation, embarrassment, emotional and mental distress and loss of personal dignity suffered by a complainant as a result of an unlawful discriminatory practice. Given the facts of this matter, which the hearing examiner found "can only be characterized as disgusting and humiliating" (p. 40 Hearing Examiner's Recommended Decision), the Commission believes, and so holds, that an award in the entire amount of \$2,500.00 is justified.

Respondent's argument that complainant is only entitled to an award in the range of \$1,000.00 to \$1,500.00 because she prevailed on only one of her three claims is simply without merit. Because she failed to prevail on her other claims, complainant is not entitled to reinstatement or back pay. However, all of the claims, if successful, would have given rise to an incidental damage award, provided that the total sum assessed against one respondent does not exceed \$2,500.00. While the Commission is mindful that it should not award \$2,500.00 as a matter of course, the facts of this case compel an assessment of the maximum amount allowed by law.

B. Fees and Costs:

Complainant is entitled to attorney's fees and costs. In Salyers, the Court held that "When the relief sought in a human rights action is primarily equitable, 'reasonable attorney's fees' should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate -- the lodestar calculation -- and (2) allowing, if appropriate, a contingency enhancement." Syl. pt. 3 of Salyers. The Court further advised that the general factors outlined in Aetna Casualty and Surety Company v. Petrolo, 342 S.E.2d 156 (1986) "should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and, (2) the allowance and amount of a

contingency enhancement." Ibid.

We begin our journey toward arriving at a reasonable attorney's fee by declining to reconsider the previous award of \$65.00 per hour for the 111 hours expended prior to 30 August 1985. At the time the award was made, complainant made clear that she did not object to this part of the hearing examiner's recommendation and, in fact, she requested that this Commission "affirm the hearing examiner's decision with regard to the issues of sexual harassment, incidental damages and attorney's fees." (Complainant's Exceptions, p. 10).

Recognizing that a "fee award based on the rates in effect at the time attorney hours were expended ('historic rates'), will not be fully compensatory unless the award accounts in some way for the loss due to the delay in payment," the Commission may modify the award to account for this loss. Catlett v. Missouri Highway and Transportation Commission, 828 F.2d 1260, 1271 (8th Cir. 1987). See also, Daily v. Hill, 790 F.2d 1071, 1081 (4th Cir. 1986). Here, we award complainant a ten percent (10%) enhancement, or \$702.00, on the pre-30 August 1985 lodestar amount of \$7,028.00 (111 hours X \$65.00 per hour).

Regarding the post-30 August 1985 hours, we find that the rate of \$100.00 per hour requested by counsel is a reasonable rate given counsel's experience and reputation, the customary

fee for civil rights cases in this state, and the time and labor this particular matter required. This rate favorably compares with the rates of \$130.00 and \$110.00 per hour approved in Casteel v. Consolidation Coal Company, 383 S.E.2d 305 (1989), and \$95.00 and \$110.00 an hour awarded in Salyers, 380 S.E.2d at 249. The increase in the fee from \$65.00 to \$100.00 is proper in that it reflects counsel's continued commitment to this case over a long period of time, as well as her accumulation of experience in this field of law. See Salyers at 249.

We also believe that the hours expended by counsel were, for the most part, reasonably required. We subtract, however, 3.3 hours spent on exceptions filed before the Commission, 1.1 hours for a motion to reconsider and .1 hour regarding the Commission's subsequent order on the motion to reconsider. We deduct this time because complainant was wholly unsuccessful in each of these efforts and should not be compensated for the same.

We have additionally subtracted 10.5 hours in travel from the lodestar calculations. We do, however, compensate travel time at half counsel's normal hourly fee, thereby awarding complainant fees for 10.5 hours of travel at the rate of \$50.00 per hour, or a total of \$525.00. Travel requires no legal ability and should not be compensated at the same rate as time spent using one's professional skills.

Factoring in the above reductions in hours, we arrive at lodestar calculations of 97.1 hours multiplied by \$100.00 per hour, or a lodestar amount of \$9,710.00 for work performed on and after 30 August 1985.

In summary, we award complainant's counsel fees in the amount of \$7,028.00 for work expended prior to 30 August 1985; \$702.00 as an enhancement for loss of fees during the intervening years; \$9,710.00 for 97.1 hours reasonably expended since 30 August 1985, and; \$525.00 in travel.

The total lodestar calculation for the entire case, therefore, is \$17,965.00.

C. Enhancement or Reduction of Lodestar:

Complainant asks for an enhancement award of 25 percent. Respondent, on the other hand, argues for a reduction in the lodestar calculation because complainant did not prevail on all of the issues raised during the course of the litigation.

In Salyers the Court instructed the Commission on the proper method of determining an attorney's fee award when a complainant is only partially successful:

Often plaintiffs will have one basic problem which, in a complaint, they express in numerous alternative ways, each corresponding to a slightly different legal theory. When this occurs, as it did in the case before us, the fact that the Commission or court selects one of the theories upon which to award relief does not necessarily mean that the plaintiff has not substantially prevailed. However, when a plaintiff sets forth distinct causes of action so that the facts supporting one are entirely different from the facts supporting another, and then fails to prevail on one or more such distinct causes of action, the appellant is correct that attorney fees for the unsuccessful causes of action should not be awarded.

Salyers, 380 S.E.2d at 250.

Here, though there are facts which may be connected with one of complainant's three causes of action, but not to the other two, there is, nonetheless, a common core of the most significant facts which apply to all of her legal theories. In such a case, the Commission can exercise its discretion in arriving at a reasonable fee award that takes into account complainant's limited success "either by attempting to identify specific hours which should be eliminated or by simply reducing the award" Texas Teachers v. Garland School District, 103, L.Ed.2d 866, 876 (1989). See also, Hensley v. Eckerhart, 461 U.S. 424, 436-37 (1983).

Since we find it difficult to separate out the hours complainant's counsel expended on each issue, we have opted to simply reduce the total lodestar calculations by one-third. We believe that such a reduction is particularly appropriate

given the failure of the complainant to prevail in her quest for reinstatement, a result that necessarily makes the outcome of this litigation a partial or limited success from complainant's vantage point. Our reduction results in a final fee award of \$11,982.65, plus costs of \$451.88 which we also award.

Because the results obtained were noticeably less than the relief sought, we decline to award a fee enhancement. We likewise reject respondent's request to reduce the fee even further. This matter was a case of first impression in West Virginia and was vigorously litigated by the parties. The fee awarded counsel should reflect the novelty and difficulty of a case, as well as the skill required to perform the legal services properly. We believe that a fee award of \$11,982.65 is fair to all parties.

CONCLUSIONS OF LAW

1. Respondent violated W. Va. Code § 5-11-9(a) and is liable to complainant for incidental damages.
2. Respondent is additionally liable for complainant's reasonable attorney's fee and costs.

RELIEF AWARDED

The West Virginia Human Rights Commission ADJUDGES,
ORDERS and DECREES as follows:

1. Respondent shall pay to complainant the sum of \$2,500.00 in incidental damages for the humiliation, embarrassment and emotional and mental distress caused to complainant as a result of its discriminatory acts.

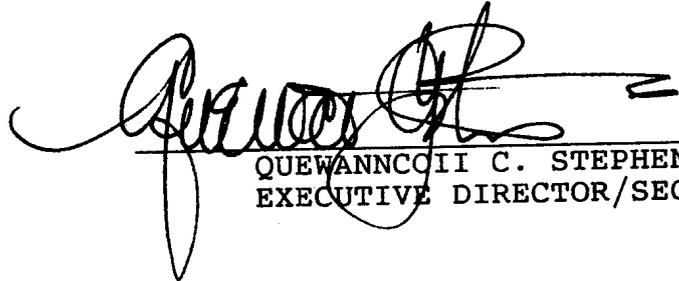
2. Respondent shall pay to complainant's counsel the sum of \$12,434.53 in attorney's fees and costs.

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 have ten (10) days to request that the Human Rights Commission reconsider this final order or they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia
Human Rights Commission this 31st day of May,
1990 in Charleston, Kanawha County, West Virginia.



QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR/SECRETARY