STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Quewanncoil C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

April 6, 1994

Wayne R. Crozier
150 Roxalana Hills Apts.
Dunbar, WV 25064

LensCrafters Store #163
Huntington Mall
Barboursville, WV 25504

Willy Proctor
Associated Relations Rep.
United State Shoe Corp.
1 Eastwood Dr.
Cincinnati, OH 45227

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Charleston, WV 25322

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L & S Bldg. - 5th Floor
812 Quarrier St.
Charleston, WV 25301

David J. McPherson, Esq.
8650 Governor's Hill Dr.
Cincinnati, OH 45242-9580

Re: Crozier v. LensCrafters, Inc.
ER-273-91

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the 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 administrative law judge, or an order remanding the matter for further proceedings before a 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 a 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 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:

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

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. 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 a 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 the executive director of the commission at the above address.

Yours truly,

Gail Ferguson
Administrative Law Judge

GF/mst

Enclosure

cc: Glenda S. Gooden, Legal Unit Manager

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WAYNE CROZIER,

Complainant,

v. DOCKET NUMBER(S): ER-273-91

LENSCRAFTERS, INC.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on the 29th and 30th days of September and 1st day of October, 1993, in Kanawha County, at the office of the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, West Virginia, before Gail Ferguson, Administrative Law Judge. Briefs were received from the parties through January 25, 1994.

The complainant, Wayne R. Crozier, appeared in person and by Mary C. Buchmelter, Deputy Attorney General, counsel for the Commission. The respondent, LensCrafters, Inc., appeared by its representative David McPherson and by counsel, Gene W. Bailey, II, Esq. and Michael Whitt, Esq.

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 not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. Wayne Crozier, complainant herein, is an African American male and a native West Virginian. Complainant graduated from Huntington High School, Huntington, West Virginia, in 1977. He then attended college at Southwestern Christian College in Terrell, Texas, as a biology major, with a minor in business. Complainant graduated from the two-year program and then entered Morehouse College in Atlanta, Georgia, as a political science major. He remained at Morehouse for one year.

2. Upon returning to West Virginia, complainant worked a variety of jobs. He first worked at Huntington Alloys. He enrolled in Marshall University and attended classes there in the afternoon while working. He continued working at Huntington Alloys until he was laid off. After the lay-off, complainant worked for 7-11 for

about two years. After leaving 7-11, he worked at Big Bear for a few years and then got a job at Ashland Oil. He worked for Ashland Oil for about two months and then was hired by LensCrafters, Inc., respondent herein, in the Huntington Mall, at its Store No. 163.

3. Complainant was first hired by respondent on April 10, 1989, on a part-time basis as a lens stylist. He worked approximately 20 hours a week until he was hired on a full-time basis on June 9, 1989. Complainant was hired by Contessa Grayson, who was the general manager. Ms. Grayson hired numerous black people while she was the general manager.

4. When complainant began work for respondent, the store employed approximately 30 people. There were two divisions of the store, a retail side and a optical or laboratory side. Complainant worked on the retail side as a lens stylist helping customers pick out frames and selling them. From there, the frames and lenses would go into the lab, where technicians make the glasses.

5. When complainant began work on a full-time basis, his immediate supervisor was Mary Beasley, assistant retail manager. Joy Estes Rose, a white female, was retail manager. On the laboratory side, Don Bailey was the lab manager, A. J. Linkous was his assistant, and Bruce Adams was Linkous' assistant. As general manager, Grayson was manager of both the lab and retail division of the store.

6. Complainant's beginning full-time pay was approximately $5.00 per hour. There were available, however, commissions or "spiffs." Complainant made the majority of his money on commission.

When his pay was raised, the general manager characterized him as the "top frame stylist."

7. When complainant was evaluated by Contessa Grayson, he scored superior in all categories. Complainant had a good working relationship with Grayson.

8. It is undisputed that complainant was a top salesperson for respondent. He won sales contests and consistently outsold his co-workers. He made more in commission than he made in hourly salary. He often made more money than the general manager. The more he sold, the better he became. Complainant was undeniably one of the best salespersons in the store.

9. Complainant enjoyed selling and got along well with his co-workers and supervisors, with the exception of Joy Estes Rose. While Contessa Grayson was general manager, complainant could "go around" Estes Rose. He would ask and receive permission from Grayson to "bargain" with customers to offer incentives such as free tint or a free breakage program in exchange for a large purchase.

10. Ms. Grayson was promoted at one point and left the store. Those in management then moved up. Joy Estes Rose moved from retail manager to general manager. Tim Hazelett, who had been assistant manager, moved to Joy Estes Rose's previous position as retail manager. Previous to Grayson's promotion, Mary Beasley had left the position of assistant manager. She was replaced by M. M. Montera, and then Montera was replaced by Hazelett. That left a vacancy as assistant retail manager. Previously, when a slot in management would become vacant, the most competent person in sales or optics would move up to fill the slot.

11. General Manager Estes Rose implemented a "competition" for the position. Lynn Chapman, a white female retail associate, and complainant were selected by Estes Rose as contenders for the position. After announcing the competition, a third employee expressed an interest in the position. Tammy Burford, an optician, requested that she too be considered in the competition. It then became a three-way race for the position. It is undisputed that Ms. Chapman was not a top salesperson.

12. This competition created a change in atmosphere in the store. Tensions developed, and employees began lining up, sometimes along racial lines. There had always been problems between Estes Rose and complainant. Estes Rose had a high school GED equivalent. She thought complainant was "pushy." She told him she did not think it was right that complainant made more money than she did. One night as they were taking cash to the night depository, Estes Rose made a comment to complainant that she "thought all black people liked chicken and watermelon." She would give other employees permission to "barter" with customers when making sales, but deny that permission to complainant.

13. During the training program, the three competing employees were required to train in the performance of all duties of the assistant retail manager. In addition to sales, the duties of assistant retail manager included cash register operations, store opening and closing as well as customer relations. According to Estes Rose, complainant had difficulties in operating the cash register and on one occasion she felt compelled to give complainant a verbal counseling regarding his operation of the cash register.

She testified that, although verbal counseling is the mildest form of counseling, counseling was needed to alert complainant that continued problems could result in disciplinary action.

14. Although Estes Rose had set a date for the winner of the competition for assistant manager to be named, that date came and passed with no winner being announced. Subsequent dates were designated, and still no assistant manager was named. At some point, Ms. Burford dropped out of the competition. During this period Estes Rose called complainant into her office and said, "I'm not going to fill this position at this time and I hope you get mad and quit." Complainant told her that he was not going to quit and that he had no intention of quitting. Shortly after this conversation, rather than appoint anyone to fill the empty position, Estes Rose declared both complainant and Chapman managers-in-training. Both shared assistant manager duties, and neither was given a raise in pay.

15. It is undisputed that complainant was a qualified employee. Complainant's and respondent's witnesses testified that complainant was a superior salesperson. Complainant's evaluations from supervisors other than Joy Estes Rose were superior. Complainant received a majority of "significantly exceeds performance standards" from Grayson.

16. When Contessa Grayson left respondent and Joy Estes Rose became general manager, Estes Rose gave complainant unsatisfactory evaluations. On a counseling form she stated that he had raised his voice to her and did not show "respect" for her, as a manager. She also threatened termination. The employee witnessing the form, Rodney Elliott, disagreed with her statement.

17. The differences between Estes Rose's evaluation and Grayson's evaluation are dramatic. Grayson gave complainant S+ and 1's (the highest grades). Estes Rose lowered complainant to only S and 2's and 3's, and threatened to take him out of management training and put him back as a frame stylist.

18. During this period, respondent had a policy whereby employees who were deemed eligible by management could receive a "remake" of their lenses, frames or both. A remake involves a reconditioning or other alteration of glasses. Under this policy, employees could receive free remakes if certain conditions were met and if management approval was obtained prior to receiving the remake.

19. In response to management concerns regarding the number of employee remakes at Store No. 163, a mandatory store meeting was held on October 20, 1990 where company policy regarding remakes was discussed. The complainant attended that meeting. At that meeting, it was explained to employees that management approval was required prior to receiving an employee remake. Furthermore, it was explained to employees that obtaining a remake without prior management approval was considered an offense which would result in termination of employment with respondent.

20. On Saturday, November 17, 1990, complainant left work at about 5:15 p.m. He left his glasses in his locker as he always had. Complainant did not wear glasses outside the store. It was store policy that all frame stylists wear glasses during working hours. His glasses had no prescription for acuity.

21. When complainant returned to the store on Monday afternoon, November 19, he was called into Estes Rose's office. Don Bailey, the

lab manager, was present. Estes Roses basically asked him why he had Todd Cremeans "remake" his glasses. Complainant said he told Cremeans he liked his (Cremeans') glasses, but he had never asked Cremeans to make him any. Estes Rose handed complainant a "corrective counseling form" which had been filled out by Estes Rose. The form indicted that complainant had a "remake" of his glasses done without management approval. The form stated that complainant's action was considered "theft." Estes Rose then told him then that he was fired and directed him to leave the premises.

22. Complainant denied that he had requested a remake of his glasses. He asked to speak with Rufus Wood, the area manager by telephone. Following his conversation with Wood, Wood told him to leave the store. Wood then told Don Bailey to escort complainant from the store. Complainant left with Bailey.

23. The remake slip was not filled out by complainant. It was not signed by complainant. It does not contain his "prescription."

24. Wanda Hill, a frame stylist, filled out the remake slip. Ms. Hill's testimony that complainant asked her to fill out the slip is suspect. Ms. Hill equivocated in her testimony. Her demeanor was evasive and rehearsed. She had no plausible explanation as to how she would have known the correct prescription for complainant. Ms. Hill's truth and veracity as a witness were seriously impeached. Her testimony is not credited.

25. Todd Cremeans, who presently works for respondent, testified that he did not remember who told him to make complainant's glasses. He did not remember writing the instructions on the remake

sheet. He did not remember where he put the glasses when they were finished.

26. Joy Estes Rose's demeanor while testifying was not convincing. Her testimony was fraught with inconsistencies and is not unbelievable. The information she gave upper management was false and misleading. She indicated that she had refused complainant's request for a remake, but in testimony admitted that she could not remember where or when he had requested the remake.

27. The investigation conducted by respondent was perfunctory. No one talked to complainant, Cremeans or Hill before a decision was made. Complainant's termination was a "done deal" according to Don Bailey before he even walked in Estes Rose's office.

28. Complainant credibly denied and continues to deny that he ever requested a remake. He did not need a remake on glasses that he rarely wore. If it had been an emergency, he could have obtained permission. Complainant was a credible witness in his own behalf. His memory and total recall of the facts surrounding his employment and termination are convincing. He never equivocated or evaded. His testimony was strong and impressive.

29. Todd Cremeans' testimony does not substantiate Estes Rose's nor Hill's. He repeated that complainant had never asked him for a remake. He stated that he did not remember who gave him the instructions on the remake he conducted. Although he testified that he made the glasses, he never testified that complainant had any part in that process.

30. Rufus Wood's testimony is totally unbelievable. There is no testimony or evidence to substantiate his allegation that

complainant "confessed" to him that he had, in fact, ordered the remake. The respondent's own witnesses deny this and corroborate complainant's claim that he has always denied it. Wood's testimony is discredited.

31. Amber Whitfield and Paulette Crutchfield testified to investigation that preceded complainant's termination. Their testimony does not aid in reaching a decision on whether or not complainant violated company policy.

32. Don Bailey's testimony is not contradictory to complainant's. He testified that complainant never asked him to approve a remake. Bailey testified primarily about the termination and how it occurred. He had no knowledge of the preceding events.

33. Joy Estes Rose did not get along with black people. While general manager, she did not hire any blacks, and she fired three black employees.

34. Valeria Anderson and Marva Hornbuckle, two African-American females who previously worked for respondent, were credible witnesses about Joy Estes's attitude toward complainant and other black people.

35. Tim Hazelett was a credible witness about Joy Estes Rose's attitude toward and treatment of complainant. Joy Estes Rose had no problems with the white manager, Tim Hazelett.

36. Joy Estes Rose set up complainant to be fired. He did not ask here for a remake. He did not attempt to remake without authorization.

37. The complainant suffered humiliation, embarrassment and emotional distress because of respondent's action.

38. The complainant's backpay and loss of benefits minus mitigation and prejudgment interest on backpay totaled $76,522.58 through March 31, 1994 as set forth in Appendix A.

39. The complainant made diligent efforts to mitigate his damages, found other work, and did partially mitigate.

B.

CONCLUSIONS OF LAW

1. The complainant, Wayne R. Crozier, is an individual claiming to be aggrieved by an unlawful discriminatory practice, and is a proper complainant for purposes of the Virginia Human Rights Act, WV Code §§5-11-3(a) and 5-11-10.

2. The respondent, LensCrafters, Inc., is an employer as defined by WV Code §5-11-3(d) and is a proper respondent in this action.

3. The complaint in this matter was timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of the complaint.

5. Complainant has established a prima facie case of race discrimination that respondent terminated him because of his race, African-American.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful race discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of $76,522.58 as of March 31, 1994, plus statutory interest.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of $2,950.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. The complainant and/or the Commission are entitled to their reasonable costs in the litigation of the case.

C.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. WV Code §§5-11-1 to -19. Section 5-11-9(a)(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment..." The term "discriminate" or "discrimination" as defined in §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of...race...."

To recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful discrimination, or the Commission acting on his behalf, must ultimately show by a preponderance of the evidence that:

(1) the employer excluded him from, or failed or refused to extend to him, an equal opportunity;

(2) the impermissible classification was a motivating or substantial factor causing the employer to exclude the complainant from, or fail or refuse to extend to him, an equal opportunity, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); and

(3) the equal opportunity denied a complainant is related to any one of the following employment factors: compensation, hire, tenure, terms, conditions or privileges of employment.

In general, a case of discrimination against a member of a protected class can be proven by direct evidence, by circumstantial evidence or by a combination of both. McDonnell Douglas Corporation v. Green, 411 U.S. 792; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, (1981); State ex rel. West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (1985).

Proof of discrimination by circumstantial evidence is more common, since discriminating employers usually attempt to hide their illegal motive, making direct evidence unavailable. A complainant may use circumstantial evidence to show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, supra, and adopted by our Supreme Court in Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Commission, 309 S.E.2d 342 (1983). The McDonnell Douglas method requires that the complainant (or Commission) first establish a prima facie case of discrimination. The burden of production then shifts

to the respondent to articulate a legitimate nondiscriminatory reason for its action.

Finally, the complainant or Commission must show that the articulated reasons proffered by respondent was not the true reason for the employment decision, but rather a pretext for discrimination. The term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." West Virginia Institute of Technology v. West Virginia Human Rights Commission, 383 S.E.2d 490, 496 (1989), citing Black's Law Dictionary, 1069 (5th Ed. 1979). A proffered reason is a pretext if it is not "the true reason for the decision." Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423, 430 (1986).

Even where an articulated legitimate, nondiscriminatory motive is shown by the respondent to be nonpretextual, but in fact a true motivating factor in an adverse action, a complainant may still prevail under the "mixed-motive" analysis. This analysis was established by the United States Supreme Court in Price Waterhouse v. Hopkins, supra, and recognized by the West Virginia Supreme Court of Appeals in West Virginia Institute of Technology v. West Virginia Human Rights Commission, supra. If the complainant proves that his race played some role in the decision, the employer can avoid liability only by proving that it would have made the same decision even if it had not considered race.

In an action to redress an unlawful discriminatory practice in employment, the initial burden is on the complainant or the

Commission to prove by a preponderance of the evidence a prima facie case of discrimination.

While the test for establishing a prima facie case of employment discrimination has been variously articulated, the essential elements are that the complainant is a member of the protected class, that he suffered an adverse action, and that the adverse action was related to his protected status. The Court has articulated the test in slightly different ways, depending on the type of discrimination and the context, i.e., failure to hire, failure to promote, discharge, etc.

The West Virginia Supreme Court has articulated the generic requirements as follows:

> In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, WV Code §5-11-1 et seq. (1979), the plaintiff must offer proof of the following:
>
> (1) That the plaintiff is a member of the 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.
>
> Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423, 430, syl. pt. 3 (1986); Kanawha Valley Regional Transportation Authority v. WV Human Rights Commission, 383 S.E.2d 857, 860 (1989)

Criterion number three of this formulation has engendered some confusion because of the use of the words "but for," whereas other formulations have required a showing that other similarly situated individuals not in the protected class have been treated

differently. But it is clear that it was not the intent of the West Virginia Court to heighten the standard to prove a prima facie case. In Kanawha Valley Regional Transportation Authority v. WV Human Rights Commission, supra, the Court said:

> However, it is clear that our formulation in Conaway was not intended to create a more narrow standard of analysis in discrimination cases than is undertaken in the federal courts. This is manifested by our reliance on applicable federal cases as illustrated by WV Institute of Technology v. WV Human Rights Commission, 181, WV 525, 383 S.E.2d 490, 495 (1989), where we cited a number of federal cases and described the type of evidence required to make a Conaway prima facie case.
>
> "[B]ecause discrimination is essentially an element of the mind, there will normally be very little, if any, direct evidence available. Direct evidence is not, however, necessary. What is required of the complainant is to show some circumstantial evidence which would sufficiently link the employer's decision and the complainant's status as a member of a protected class so as to give rise to an inference that the employment related decision was based upon an unlawful discriminatory criterion."
>
> KVRTA, 383 S.E.2D AT 860; see also Holbrook v. Poole Associates, Inc., 400 S.E.2d 863 (1970); WV Institute of Technology v. WV Human Rights Commission, 383 S.E.2d 490, 494-495 (1989); Dobson v. Eastern Associated Coal Corp., ___WV___, 422, S.E.2d 494 (1992).

This requirement that there be evidence of a "link" between the employer's decision and the employee's status may be satisfied by circumstantial evidence of various kinds, including evidence that other similarly qualified individuals not in the protected class were treated differently.

Here, clearly the complainant has made a prima facie case of discrimination. First, complainant is an African-American and is thus a member of a group protected by the Human Rights Act.

Moreover, it is not in issue that he met the qualifications for the position he held. Third, the complainant suffered adverse action when he was terminated under circumstances which give rise to an inference of discrimination, i.e., at the behest of a supervisor who had a propensity against member of complainant's race and complainant in particular, as evidenced by her racially derogatory comments and actions.

It is not sufficient for respondent to give legitimate, nondiscriminatory reasons for which the complainant could have been fired; the reasons must be those which actually motivated the adverse action. Hypothetical legitimate reasons which were not motivating factors are pretext.

Where a respondent's decision maker articulates a legitimate, nondiscriminatory reason and makes a definitive claim to its being the true reason, then the question is truly whether what is offered is pretext. Here the proffered reason is presented by a series of people who all tell a different story. There is no consistency; nor is there logic. Respondent claims that complainant violated company policy by requesting a remake of his eyeglasses after being denied permission for that remake by his supervisor. An examination of the testimony of both the Commission's witnesses and the respondent's witnesses illustrates the absurdity of this claim.

It is undisputed that complainant did not need or wear eyeglasses. He used glasses periodically at work because his employer had mandated that all people in sales wear glasses on the floor. His glasses had no prescription for strength. He wore those

glasses, provided by respondent, only while in the store, leaving them in his locker when he left, putting them on when he returned.

Complainant's testimony is that he left the store on Saturday, November 17, 1990, at about 5:15 p.m., placing his glasses in his locker before he left. He returned to work on Monday, November 19, went to his locker, put on his glasses and walked onto the floor. He was summoned shortly after that to Joy Estes Rose's office. She was there with Don Bailey. She asked why Todd Cremeans would make a new pair of glasses for him. Thinking this was a hypothetical question, he answered, "maybe because I admired his." He was then terminated by Ms. Estes Rose, who handed him a corrective "counseling form" for theft and his paycheck. She told him that an unauthorized remake of glasses results in termination. Complainant asked if he could call Rufus Wood, the area manager. It was obvious to complainant that Wood already knew about his termination. Wood told complainant to leave the premises and instructed Don Bailey to escort him out. Complainant maintained then and continues to maintain that he never asked Todd Cremeans, or anyone else, to remake his glasses and that he was perfectly happy with his glasses; in fact, he did not know anyone had made new glasses until he was told by Estes Rose. Each of respondent's witnesses tells a different story and they all contradict one another.

Don Bailey, a Caucasian male, was employed by the respondent during the relevant period as lab manager. He reported directly to the general manager, Contessa Grayson. Mr. Bailey testified on direct examination that complainant had a "conversation" with him on November 17. He remembered complainant "complaining to him about

scratches on his lens.[1/] He said they also discussed the possibility of doing a roll and polish on complainant's lenses. Bailey testified further that "Wayne did not asked me at any time if I would approve the job for him." Bailey repeated this testimony, sua sponte, during cross-examination:

> Q. And you had a conversation with Wayne about remakes in general or remakes specifically?
> A. Well, the conversation that Wayne and I had it was specifically about his glasses. But at no time did he approach me and ask me to approve a remake on his glasses.

Bailey also testified that if he had been the only manager in the store at that time, he would have approved a request for a remake.

Bailey's testimony primarily covered complainant's termination. Bailey testified that the termination occurred on the morning of Monday, November 19. Bailey said he did not remember a lot that transpired from the time complainant entered the room up until the point that a telephone call was initiated to Mr. Wood. Bailey did say, though, that the termination was a "done deal" before complainant entered the room. He testified about listening to one side of the conversation between complainant and Rufus Wood and said that he heard complainant telling Wood, "Not to call me 'brother.' I'm not your brother. I didn't do anything. I haven't done anything." Bailey further testified that Wood directed him to escort complainant from the room and that complainant answered, "No I'm not

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[1/] The "remake" of complainant's glasses never included work on any scratches. In fact, respondent's own witnesses state that repair work such as that is automatically approved.

going to give you any trouble. I'll leave." and that he and complainant walked to the front door together.

Wood was formerly an area manager for respondent for Cincinnati, Northern Kentucky and West Virginia, which encompassed the store 169 at the Huntington Mall.

Mr. Wood testified that he spoke at length with Joy Estes Rose before complainant's termination. He said it was his understanding that Estes Rose had told complainant "not to do a remake or whatever" and found out later that it was done. He said they "determined" that if this was actually done and all the information had been gathered, that based on company policy, the complainant would have to be terminated.

Wood's testimony about the documentation procedure is incredulous. The documentation was the paper handed to complainant terminating him. Wood testified that he had Estes Rose talk to Wanda Hill and Mr. Bailey, but later on cross-examination admitted that the conversations with both Wanda Hill and Don Bailey occurred after the decision to terminate.[2/] All of the conversations Wood referred to in direct examination took place after complainant was terminated. It is apparent that the investigation was specious.

Wood further testified that he never knew of any racial animus in the Huntington store. He denied that Valeria Anderson, a former

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[2/] Perhaps as a "Freudian slip" Wood testified in response to respondent's counsel's questions:

Q. Do you remember after Mr. Crozier's termination later discussing the matter with Ms. Rose?

A. Yes, sir.

Q. Do you remember what was discussed?

A. To make sure all the documentations (sic) was there; to follow up with what other associates had seen it fabricated and so forth; just make sure all the paperwork was done correctly.

black employee, ever complained to him. He said he did not get very many calls about problems. He said he did not even get many calls before Contessa Grayson became general manager. Another of respondent's witnesses, Don Bailey, testified that there were real racial problems at Store No. 163 before Grayson came on as general manager.

Rufus Wood was the only person who testified that complainant "admitted" having his glasses remade. Not only has complainant denied and continued to deny this assertion, but respondent's other witnesses testified that complainant always denied that he ordered a remake. Even Joy Estes Rose testified on direct examination:

> Q. Did you confront Mr. Crozier about this unauthorized remake?
> A. Yes.
> Q. What did Crozier tell you?
> A. He said that he had been framed, that someone had done this without his knowledge and that he left for work and came back the next morning and found his glasses in his locker.

Don Bailey testified about being in the room with complainant during his conversation with Wood. Bailey made absolutely no allegation that complainant admitted the remake.

Also, respondent's witness, Amber Whitfield, testified in direct:

> Q. Were you ever involved in investigating Mr. Crozier's termination?
> A. Yes. A couple of days after that termination, Mr. Crozier called me personally and said that he did not feel that he should have been terminated.
>
> He said to me, at that time, that he did not make the lenses for his glasses, that he did not know who had made the lenses and, therefore, he should have not been terminated for that.

Ms. Whitfield's testimony corroborates complainant's position in that he has always maintained his innocence. (See Rufus Wood's testimony supra). She testified that she had never even been to the Huntington store until two months before this case went to hearing. Ms. Whitfield said that she first heard of the complainant's termination from Paulette Crutchfield. She claimed that she was involved in an "investigation" when complainant called her a few days after his termination and said that he did not think he should have been fired.

Todd Cremeans is an employee of respondent. He has been employed there for four years and was a lab technician during the period of November 1990. Respondent brought on Mr. Cremeans' testimony because he is the person who actually did the remake on complainant's glasses. Mr. Cremeans, however, does not remember much about the infamous remake. He testified that he remembers making the glasses. He testified that it was his printing on the remake slip. He testified that he wrote the special instructions that say SAVE OLD LENSES POLISH EDGES. No one asked if he remembered writing that. The rest of Cremeans' testimony is vague and ambiguous. Mr. Cremeans' testimony in cross-exam:

Q. You remember remaking the glasses, you wrote that down?
A. Yes.
Q. But Mr. Crozier didn't tell you that, did he?
A. I don't remember if he did or not. I don't know who told me to write it down?
Q. You don't remember having a conversation with him about writing that down.
A. No, I sure don't.
Q. Did Wanda tell you?
A. I don't remember if she did or not.
Q. You don't remember?
A. No.
Q. You still work there, right?

A. Yes.

Later in his testimony Cremeans said:

Q. After you made them, where did you put them?
A. I would put them in the window up front where the dispensing optician would have checked them again.
Q. You say, "I would have put them there." Do you remember putting them there?"
A. No.
Q. You're just saying that would be the--
A. That would be the procedure.
Q. But you don't remember that you did put them there?
A. I don't even know if I checked them out. It could have been any number of people in the lab who checked the glasses out.
Q. Anybody could have picked them up?
A. Right--well, they could have picked them up from the window after the lab tech would have checked them. You know, somebody out front could have picked them up?
A. No.
Q. Anybody could have. They were setting there. If you following the procedure that you normally followed, you would have put them in a tray and you walked away and you don't know what happens to them--or you would have put them in the window?
A. Right, put them in the window and from there--
Q. Anything could happen?
A. Right.

Cremeans' entire testimony about the remake is that he just does not remember. He does not remember who ordered it; he does not remember what happened to the glasses after they were finished.

Strangely, Cremeans does remember an earlier conversation when complainant questioned him about his (Cremeans') glasses.

Q. Now, that conversation you had with Mr. Crozier about your glasses, he was just admiring them, right?
A. Right.
Q. He liked how they looked?
A. The polish on them.

Q. He didn't say to you, "Make me a pair," did he?
A. No.
Q. He didn't ask you to make him any?
A. No.

The respondent's defense has always been that complainant asked Estes Rose for a remake of his glasses, she refused, and he had it done anyway. In fact, all of the subsequent managers in the termination testified that complainant had requested a remake, it had been denied, and he did it anyway. Ms. Estes Rose's testimony destroys that defense. Her testimony is that her alleged conversation with complainant about a remake occurred at some indeterminate time. She testified:

Q. Well, let's talk about this termination. You said that Wayne Crozier came to you and asked for a remake.
A. Yes.
Q. It wasn't an emergency, right?
A. No.
Q. It wasn't any kind of an emergency. When did he come and talk to you about a remake?
A. I don't remember what day it was.
Q. You don't remember what day?
A. No.
Q. It wasn't the day of the remake when you found a slip, it was another day?
A. I don't remember.
Q. Was it a week before?
A. I don't remember.
Q. Was it a month before? Six months before? It could be any of those?
A. Yes.
Q. You just remember that he asked for a remake and you turned him down?
A. Yes.
Q. And that was in a conversation?
A. Yes.
Q. With you somewhere in your office?
A. I don't know.

Estes Rose represented to everyone that complainant had requested a remake and she had turned him down. The clear implication was that the request was made, denied, and then closely followed by

complainant's getting the remake anyway. When viewed in the context of Estes Rose's subsequent testimony, it changes the whole outlook. Estes Rose's further testimony about the "investigation" and termination made her story even more ludicrous. She said she found a slip in a tray. She did not remember what time of day; she thought it was morning. She also found the glasses, but she did not remember what she did with them. She kept the slip, and she recognized Wanda Hill's writing on the slip. But she did not call Wanda Hill or even speak to her about the situation until after complainant was terminated.

The respondent brought on Wanda Hill to testify that complainant asked her to remake his glasses.

Ms. Hill, a former employee of respondent, testified on direct that she and "a few of the co-workers that were standing around just talking and complainant was getting ready to leave and he would ask me if I could do a remake on his glasses." She said she told him yes, and he gave her his glasses in a tray. Interestingly, no co-workers were brought on to substantiate this testimony. The remake slip shows 5:20 p.m. as the time the glasses went into the lab. Hill said the handwriting was hers but the "special instructions" were not her writing.[3/] She said she filled out the slip from an "original copy" from a file. Hill said she then put the glasses in that tray, and 5:30 is the time the glasses went into the lab. "Q. It appears that there are some time entries here, it

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[3/] Todd Cremeans testified that he printed the special instructions, but he does not remember who told him to. Wanda Hill does not say that she told Cremeans, or that Crozier told her what he wanted.

says, 5:20--A That's the time they went into the lab." Hill further testified that she never saw the glasses again.

On cross-examination, Ms. Hill was evasive, confused and agitated. She said she had gone into complainant's file to find a prescription. She "did not know if there were any other slips in his file." She could not explain how she knew which ones were his. She testified that she simply took these instructions from him, filled out a slip, put the glasses in the tray and never saw them again.

Ms. Hill testified that she was questioned by Joy Estes Rose and asked to "write down on paper what happened." However, that did not happen until November 26, seven days after complainant was fired! Even though Hill could have "violated" policy by writing up a remake without any management authorization, she was not fired or disciplined for her role. Wanda Hill was not a credible witness. Her testimony, even without regard for evidence of a prior conviction offered by the complainant for impeachment purposes, was not persuasive and is given little weight.

The Commission clearly showed the respondent's defense to be pretextual.

After the Commission's attempt to show pretext, "it is incumbent upon [the factfinder] to make the ultimate determination whether there was intentional discrimination on the part of respondent." Shepherdstown V.F.D. v. WV Human Rights Commission, supra. In short, the factfinder "must decide which party's explanation of the employer's motivation it believes." United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983).

In determining which side to believe, it is up to the factfinder to assess the credibility of witnesses and the persuasiveness of the evidence. Westmoreland Coal Co. v. WV Human Rights Commission, 382 S.E.2d 562, 567, n.6 (1989).

It is also axiomatic that it is the role of the factfinder to resolve conflicts in testimony, weigh the evidence and judge the credibility of witnesses. United States v. Manbeck, 744 F.2d 3 60, 392 (4th Cir. 1984); United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982); United States v. Fisher, 484 F.2d 868, 869-870 (4th Cir. 1973), cert. denied, 415 U.S. 924 (1974).

Given the conflict in testimony, an assessment and determination must be made of who is more credible. Factors courts have traditionally considered are: (1) whether the testimony is internally consistent, (2) the demeanor of the individuals while testifying, and (3) which testimony is better supported by the record. Maturo v. National Graphics, Inc., 722 F. Supp. 916 (D. Conn. 1989).

A party's testimony at trial should demonstrate an ability to remember and recount incidents at issue. Daniels v. Essex Group, Inc., 740 F. Supp. 553, 556 (N.D. Ind. 1990) (a race case in which the court found plaintiff's testimony more credible than defendant's because its manager had difficulty remembering when incidents occurred and could have easily completely forgotten incidents which he found to be insignificant as a white supervisor); see also Sasser v. Averitt Express, Inc., 839 S.W.2d 422, 427 (Tenn. Ct. App. 1992); and United States v. Allen, 736 F. Supp. 917, 920 (N.D. Ill. 1990). The failure of Hill, Estes Rose and Cremeans to remember significant

events, such as who gave Cremeans his orders, who gave Wanda Hill her orders and what happened to the glasses, seriously affects their credibility.

In the instant case, having observed the complainant's demeanor, particularly his candor, sincerity and consistency while testifying, when compared with that of Joy Estes Rose and Wanda Hill, which indicate selective recall and evasiveness, the conclusion is that the complainant is credible and respondent is not.

Finally, the factfinder, in reaching her decision on the ultimate issue, may look at "facts concerning the employer's general policy and practice with respect to minority employment," McDonnell Douglas Corp. v. Green, supra and "historical, individual, or circumstantial evidence" of discrimination, Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 817 (5th Cir. 1981), cert. denied, 459 U.S. 1038 (1982), which may include evidence involving other acts of respondent against persons other than complainant. The latter evidence is properly admissible under West Virginia Rule of Evidence 404(b) to prove an employer's "motive...intent...or [plan]...." Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524, 1532 (11th Cir. 1983).

In this case, the Commission brought on credible testimony about the racial animus of respondent, especially with regard to the actions of Joy Estes Rose. First, complainant testified about the treatment he received from Estes Rose. Complainant testified that he and Estes Rose were walking to the bank to make a deposit when she (Estes Rose) commented that she wanted some chicken and a "good old piece of watermelon." Complainant replied, "I don't really care for

watermelon." He added that he did not like chicken, and she responded, "I thought all black people liked chicken and watermelon." Complainant testified about other occasions where Estes Rose, who was his immediate supervisor, treated him differently than white employees. He testified about the time at a going-away party for Contessa Grayson when he put on a tape of black gospel music. After just a few seconds, the tape was removed by Estes Rose's son. When complainant asked him why he removed it, he said, "My mom said she doesn't want to hear that."

Other witnesses corroborated complainant's testimony about how Estes Rose treated complainant. Valeria Anderson, an African-American woman, testified for the Commission. Ms. Anderson worked as a cashier for respondent. She said that Ms. Estes Rose had a "hit list" of black people whom she got rid of.[4/] Ms. Anderson testified that Estes Rose told her that "she wished Wayne would just leave the workplace."

Marva Hornbuckle, an African-American female, also testified for the Commission. Ms. Hornbuckle was employed at respondent's store from September 1988 to May 1990 as a cashier and stock person. Ms. Hornbuckle testified that she had the opportunity to observe Estes Rose and how uneasy she appeared around complainant and black people.

Ms. Hornbuckle's testimony during direct examination is revealing:

[4/] Estes Rose fired three blacks and never hired any.

Q. Did you ever observe Ms. Estes in any behavior or language that centered on race or racial stereotype?
A. Yes.
Q. What was that?
A. There was an incident one time--As a company, we would order food once a month. There was an incident that we ordered Kentucky Fired Chicken and we all were taking turns going back and eating.

I had gone back there and I had put all the condiments on my plate and I left the chicken off the plate and she had came back and she said, "You're not going to eat any chicken? and I said, "No." She said "Well, you're the first black person I know--

MR. WHITT: I'm going to object to this statement for the reasons I stated earlier. I don't think that any allegedly racially derogatory statement made to Ms. Hornbuckle can be considered in determining whether Mr. Crozier was discriminated against.

Just note that objection.

THE COURT: I'll note your objection and overrule it at the same time

BY MS. BUCHMELTER:
Q. You may continue.
A. I said "No." and she said, "Well, you're the first black person I know that didn't eat chicken." I looked at her and I said, "Well, no, I don't like watermelon that much either."

At the time, Wayne was standing back there; and when she told me that, it just shocked me and just stepped me back. I had told Wayne about it and he said something similar that she had stated to me.

There was another incident that she had said about my hair because I never wore my hair the same. She would always say, "Do you wear a wig? Don't black people wear braids in their hair?"

When asked on cross examination, "Q. You can't name any instances in which Ms. Rose treated a black person in terms of promotion or

employment decision any differently from a white person can you?" Ms. Hornbuckle answered:

> A. Yes, because she didn't make those same comments to the white people as she did to the black people. When she approached white people, she could look them in their eye and talk to them and get up in their face with eye to eye contact.
>
> When a black person approached her, she couldn't do that. She couldn't tell them what she demanded of them, what she asked of them. She couldn't look them--Her body language was different when she approached me or Wayne or anyone that was black, even Contessa and that was the GM who was black.

Finally, the Commission brought on the very credible testimony of Tim Hazelett. Hazelett, a Caucasian male, was a manager at respondent's store from May 1987 until September 1991. When he was asked if he had ever observed the interaction between Estes Rose and complainant, he said:

> A. Yes.
> Q. How would you characterize that?
> A. Tense, upscale, personality clash.
> Q. Did you observe that kind of relationship between Ms. Estes Rose and any other employee?
> A. One other.
> Q. Who was that?
> A. Valerie Anderson.
> Q. Valerie Anderson is also African American?
> A. Yes.
> Q. Did you notice any kind of that tension between Ms. Estes Rose and any of the white or Caucasian employees?
> A. Not to my knowledge.
> Q. How did Estes Rose treat you?
> A. I didn't have any problem at all with her. We worked well together.
>
> Tr. 238-239.

Hazelett was asked in cross: "Q. There were a number of black employees at the LensCrafter's store, is that correct? A. I would

say approximately eight to ten." Then, in redirect, Mr. Hazelett was asked: "Q. [D]o you remember who hired the black employees that were there when you were there? A. Contessa Grayson. Q. Do you remember who fired them? A. Joy Estes Rose."

To be sure, the Commission has produced an overwhelming preponderance of the evidence that the respondent, through its manager Estes Rose and later with complicity from others set the complainant up because of his race. The complainant was not terminated because of a violation of store policy but because Estes Rose could not abide a highly competent and self-assured black male who in her stereotypical perception would not stay in his place, happily enjoying watermelon and fried chicken.

The Commission has shown the respondent's defense to be contrived and pretextual. Alternatively, respondent argues that, even if the complainant has met his ultimate burden in proving discrimination, that he is precluded from recovery on the basis of the doctrine of after acquired evidence; to wit, that an employer may rely on evidence of employee misconduct discovered after the discharge even though the misconduct discovered was not the basis itself for the discharge decision.

It is clear that most jurisdictions do not accept the after acquired evidence doctrine as a complete defense to a discrimination claim. Again, this rationale is based on Price Waterhouse v. Hopkins, supra, which holds that in a discrimination case in order for an employee to avoid liability it must be able to articulate a legitimate nondiscriminatory reason that actually motivated the decision. Moreover, even though complainant cites cases to the

contrary, several courts have rejected the after acquired evidence rule outright as having no relevance even at the remedy stage of a claim. Norris v. City of SanFransisco, 900 F.2d 1326 (9th Cir. 1990). See also Jolly v. Northern Telecom., 766 F. Supp. 480 (E.D. Va. 1991). "An employer may not rebut a prima facie case by articulating after the fact hypothetical nondiscriminatory reasons for its actions." Smallwood v. United Airlines, 728 F.2d 614 (4th Cir. 1984).

Even in the minority of jurisdictions which have precluded relief to employees based on this doctrine, the employer must prove that the employee made a material misrepresentation or omission that bears direct relationship to assessing the candidate's qualification for the job. Such is not the case here. Although respondent maintains that the complainant "misrepresented" his prior employment and education history[5/] on his application for employment, the complainant has satisfied the trier of fact that his omissions were neither intentional or purposefully calculated to deceive. Significantly, respondent has not established that the omitted information consisted of material facts which were relevant in its decision to hire or terminate the complainant, under the Millegan-Jansen standard.[6/] See also Calloway v. Partners

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[5/] Complainant neglected to list his one year of college at Morehouse. The complainant neglected to list his last employer, Ashland Gas, from his application and the circumstances of his departure because of legal settlement.

[6/] Complainant was approved for employment by respondent on April 6, 1985. His application for employment is dated April 7, 1989.

National Health Plan, 986 F.2d 446 (11th Cir. 1993). Finally, the respondent has not proven that had the omitted information been known to the respondent that it would have resulted in complainant's immediate discharge. Washington v. Lake County, 969 F.2d 250 (7th Cir. 1992); Kristafek v. Hussman Food Service Co., 985 F.2d 364 (7th Cir. 1993).

As stated succinctly in Bazzi v. Western and Southern Life Insurance Co., 808 F. Supp. 13066 (E.D. Mich. 1992), the purpose of an antidiscrimination statute is to achieve equality of employment opportunity, not to provide an insurance policy covering bigotry in the guise of after acquired evidence. It is urged that the West Virginia Human Rights Commission adopt this standard.

In the instant case, the commission and the complainant have established by a preponderance of the evidence that complainant's termination was due to his race, and as such is a violation of the West Virginia Human Rights Act.

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices. The respondent shall post an unobstructed and prominently displayed notice at its premises indicating that respondent is an equal opportunity employer and that violations may be reported to the West Virginia Human Rights

Commission. The respondent shall disseminate its equal employment policy to all employees.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant backpay in the amount of $76,522.58.

3. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

5. The respondent shall pay ten percent per annum interest on all monetary relief.

6. Respondent shall immediately reinstate the complainant as a management trainee at its Huntington, West Virginia store.

7. The complainant's and/or commission's attorney shall, within ten (10) days of receipt of this decision, submit to the commission and respondent an itemized statement of compensable expenses associated with prosecution of this case.

8. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Legal Unit Manager, Glenda S. Gooden, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 31 day of March, 1994.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE