

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ANGELA FRYE,

Complainant,

v.

Docket Number: ES-34-96

FUTURE INNS OF AMERICA-
HUNTINGTON, INC. AND
RICHARD HUFF, in his individual
capacity,

Respondents.

ADMINISTRATIVE LAW JUDGES

FINAL DECISION

A public hearing in the above captioned-matter was convened on January 13 and 14, 1998, at in Cabell County, West Virginia. Post hearing briefs were received through April 24, 1998.

The complainant, Angela Frye, appeared in person. The Commission's case was presented by Assistant Attorney General Joanna G. Bowles and by Senior Assistant Attorney General Paul R. Sheridan, Counsel for the West Virginia Human Rights Commission. The respondent, Future Inns of America-Huntington, Inc., appeared by its representative, Patrina Huff, and respondent Richard Huff appeared in person. Both respondents were represented by counsel, James W. St. Clair and the law firm of St. Clair and Levine in Huntington, West Virginia.

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. Complainant, Angela Frye, is a female who between the May 1993 and May of 1995, worked as a general manager at the Econo Lodge near Huntington, West Virginia.
2. Respondent, Richard Huff, is the owner and manager of Hospitality Services Unlimited, Inc., which operated several hotels, including the Econo Lodge near Huntington, West Virginia, under a contract with the owner, respondent Future Inns of America, Inc. Mr. Huff hired the complainant, first as assistant manager and later as general manager of

the Econo Lodge. and all times relevant hereto, had authority and control over the terms and conditions of her employment, including the authority to supervise, discipline and terminate her.

3. Respondent, Future Inns of America, Huntington, Inc., is the owner of the Econo Lodge near Huntington, West Virginia.

4. Complainant worked at the Econo Lodge briefly during the summer of 1990. Following this, she worked part time at various other places. Complainant continued to attend Marshall University until December 1994.

5. Mr. Huff was acquainted with complainant because he was dating Patrina Olshan, complainant's roommate and long time friend. Ms. Olshan had also been employed by Econo Lodge. At an early period during complainant's tenure, Richard Huff and Patrina Olshan were married.

6. Mr. Huff told complainant that there was going to be a change in management at the Econo Lodge. He offered complainant a job as a manager trainee, or assistant manager, and was told that she would be trained in the duties of manager so that she could later assume a manager position. At that time, complainant was asked to move into and reside at the motel, and she agreed.

7. Complainant was taking 15-16 hours of course work at Marshall University at the time she started this position. Mr. Huff was aware of this and specifically agreed that she continue with her classes. Mr. Huff was complainant's immediate supervisor at the time

she was hired, but shortly afterward Jeff Seabright was placed in the position as general manager and became complainant's immediate supervisor.

8. In April or May 1993, complainant was promoted to general manager after Jeff Seabright left the position. Complainant continued living on the property at the time she became general manager and until April, 1994.

9. As general manager, complainant was responsible for all hotel operations including: operation of the desk, reservations, housekeeping and maintenance. It was also her responsibility to "promote the hotel."

10. During the entire time she was general manager, complainant reported to Richard Huff. At no time was the complainant directed to report to anyone else. While respondents claim that toward the end of complainant's employment, Patrina Huff became her supervisor, respondents never produced a single document which corroborated this claim.

11. As general manager, complainant worked more than 40 hours. She often worked 50-60 hours per week, and was on call 24 hours a day, 7 days a week. She continued as a Marshall University student with the understanding and approval of Richard Huff, although she reduced the number of course hours she was taking.

12. Mr. Huff also continued to visit the hotel about once a month. When Mr. Huff came, he would generally stay at the hotel. He would look over the property and talk with

complainant about the operations of the hotel, which would usually result in a business dinner, where they would discuss business.

13. In September 1993, Richard Huff visited the Econo Lodge, and as he had done before, took the complainant out to dinner. They discussed business and returned to the Econo Lodge after dinner. Mr. Huff parked the car at the exterior of the hotel where they were talking about the exterior of the hotel and about lighting. On this occasion, Mr. Huff tried to kiss complainant. She rejected his advance; she pushed him away and made an excuse to get out of the car. Complainant testified that she pushed him away in a manner that "made it clear I didn't accept" his advance. Complainant stayed in the lobby, hoping that Richard Huff would go to his room, but he did not. Finally, when complainant left to go to her room, Mr. Huff followed her:

"I looked for things to do behind the desk, but like I said we were full, and there wasn't a whole lot to be done. I decided to go on to my room. I was living on the property at the time. As I went on my way to the room Richard followed me out of the lobby. We walked down the breeze way and again he turned back to being professional talking about business. We were talking about the pool, the fence around the pool. We needed to replace the fence around the pool. Continued to talk about business. We got to the door, my room was right by where the ice machine was. He said--The ice machine was really loud. We were standing right in front of my door. He insisted that we step inside because of the noise from the ice machine. After we stepped inside, he again tried to attempt to kiss me. I pushed him away. He said, "Can you handle this?" and I said, Richard, I don't want to handle it, and I don't want any part of it." And as I pulled away again, he pushed me on the bed and was on top of me on the bed. I went to push him off like this, and I couldn't move. And I told him that it was a bad time of the

month, because I didn't know what was going to happen. So. I told him it was a bad time of the month, and he finally he left."

Complainant was humiliated by the incident.

14. The next day, Mr. Huff went back to relating to complainant on a professional level. Mr. Huff did not mention the incident to complainant. She did not mention it to him. She testified that "I thought that possibly he got the point and possibly it was going to be we could forget about it."

15. Approximately a month later, the next time Mr. Huff came to visit the property, it seemed to complainant that "everything was strictly back to being business and him being back to being professional."

16. Complainant testified credibly that on this occasion, Mr. Huff made further sexual advances, which she rejected:

"We went to dinner, discussed at dinner, it was strictly business. Upon arriving back at the hotel he stated that there were items in his room in the bathroom, maintenance issues, that needed to be addressed. He wanted to show me the issues in his bathroom. So he went through to show me that there was caulking that needed to be redone and the vinyl wallpaper needed to be replaced. Upon leaving the room as soon as he showed me those items, I walked back toward the door. He tried to kiss me again. I pushed him away, and he asked me to spend the night, and I refused and I said I need to leave and I was gone."

“He insisted on showing me the maintenance problems that were in his room, and he really didn’t ask me. I wasn’t really given an option. He just said there are maintenance issues that need to be addressed, and he insisted on showing me the problems.”

17. The next time Mr. Huff came to Huntington, West Virginia, to visit the Econo Lodge property, he asked complainant to go to dinner and she came up with an excuse so as not to have to go to dinner with him. The following day, complainant found that Mr. Huff’s attitude toward her was colder.

18. The next time Mr. Huff visited the property, complainant was still feeling uncomfortable about going to dinner with complainant or doing anything outside the office. In the middle of their discussion of business, Mr. Huff adjourned the discussion to dinner. Complainant testified that under the circumstances she really did not feel comfortable saying no.

19. On other occasions, Mr. Huff would discuss business with complainant in the office. Later, after he had gone to his room, he would call complainant and tell her how good she looked in whatever she was wearing.

20. On one occasion, after Mr. Huff had taken complainant to dinner, he asked to see her apartment. She made excuses to avoid this. This occurred after April 1994, when complainant moved out of the Econo Lodge.

21. In December 1994, Mr. Huff called complainant and asked her to pick him up at the airport at 10:00 p.m. She complied. After complainant picked him up, Mr. Huff

asked her if she wanted to go for drinks and she declined. Complainant took Mr. Huff to the Econo Lodge. He asked her to let him into the office, claiming that he did not have his keys with him. She opened the door, he followed her in, and shut the door behind him. Mr. Huff then pulled out a thousand dollars in cash and gave it to complainant. Complainant understood this to be a cash bonus which she and Mr. Huff had discussed on the phone a couple of weeks before. However, at the same time he handed the cash to her, he asked complainant to spend the night with him. Complainant told him, "No, but don't take it personal," because she feared that he would become cold and demeaning toward her in the same way he had following other occasions on which she had declined his advances.

22. Complainant was embarrassed and humiliated each time Richard Huff made physical, verbally explicit, or verbally implicit sexual advances. Each time she rejected the advances. She did not quit in response to the sexual harassment by Richard Huff only because she needed the job.

23. Richard Huff denied that he ever made sexual advances toward complainant, or asked her to sleep with him. After Mr. Huff's wife confronted him about complainant's allegations, he apparently told Mrs. Huff that he had kissed complainant, but only in the manner of a family member. In light of all of the evidence, Mr. Huff's denials of sexual advances and requests for sexual favors are not credible.

24. Katie Hagley Morgan was a friend and apartment mate of complainant. Ms. Morgan was an experienced bartender, and when the Econo Lodge was in the process of

reopening its bar, complainant asked Ms. Morgan to help out in the bar. Richard Huff met Ms. Morgan in the bar one night in January 1995 and later encouraged complainant to hire Ms. Morgan, and to offer her \$5.00 per hour, slightly more than the Econo Lodge usually started its bartenders.

25. In March 1995, Richard Huff was in the bar at the Econo Lodge while Ms. Morgan was working. It was on an occasion when complainant was in California at the funeral of a relative. Around 1:00 a.m., after Ms. Morgan had closed up, and only had to mop up and "count out the bank," Richard Huff came into the bar and sat down. He talked with Ms. Morgan for a while. She cannot recall for sure whether or not she made him a drink. He asked her about complainant. As Ms. Morgan was leaving, Mr. Huff walked out with her, and as she opened the door to get out, which she had to pull toward her, Mr. Huff stepped in front of her and kissed her. Ms. Morgan urged him to move out of the way, and when he leaned toward her again, she escaped out the door. Ms. Morgan encountered Marie Brown as she came by the front desk. She testified that she was so shaken up that she "kind of threw the bag of money on the counter top" and left. She recalled that Isom Maynard was also present. Mr. Maynard, who was called by the respondents, "did not recall" the incident; however, Marie Brown did. Ms. Brown recalled that "Katie was late in closing up the bar, and that when Marie called back to the bar, Richard Huff answered the phone. Katie got on the phone and said she would be out soon with the money." Ms. Brown recalls that Mr. Maynard refused her request to go into the bar and get the money. She recalls him saying,

"I can't believe he's doing Patrina this way again." About that time, Katie Morgan came out of the bar, threw the money bag across the desk and left without clocking out. Mr. Maynard's demeanor as a witness indicates that Ms. Brown's recollection is accurate. Furthermore, because the record reflects that Mr. Huff was in Huntington on March 17, and the Huffs often spent time with others in the area when they came to the Econo Lodge, it seems more likely than not that Richard Huff was at the Econo Lodge on the occasion in March when Ms. Morgan and Ms. Brown testified these events occurred.

26. Richard Huff claimed that he never made any romantic or sexual advances to any women who were employed by him in subordinate positions (other than the woman who later became his wife). He testified that he met Patrina Huff when she was night auditor at the Econo Lodge and he claimed it was "love at first sight" and he asked her out on a date. Patrina Huff acknowledged that Richard Huff had the authority to fire her and that was how their relationship started. While they were dating, he gave her a series of job promotions, and pay increases that went from minimum wage to \$200 per week to \$300 per week. Eventually they were married.

27. Other employees, including Dottie Legg, who was called as a witness by the respondents, noticed that complainant was upset and stressed by her encounters with Mr. Huff. During her employment, complainant eventually told these women what was happening to her. Shortly after quitting, she told Patrina Huff.

28. Complainant was never given, nor was there ever posted, any policy as to what she or any employee should do if they believed themselves to be sexually harassed.

29. The respondent, Future Inns of America, Inc., did not have a sexual harassment policy until some time in 1995 when it published and distributed its employee handbook. The set of rules used prior to this handbook contained nothing about sexual harassment. And, even after it published its employee handbook, it was very clear from the confusion and misunderstanding among even those of its employees respondent chose to call in this case that the respondents had taken very little effort to formulate or advise its employees regarding the existence or terms of any policy against sexual harassment.

30. It is undisputed that at some point in 1995, prior to the time that complainant quit, she telephoned Richard Huff and told him she believed he was mistreating her because she refused to sleep with him. She testified that she taped recorded this conversation. Mr. Huff was provided a copy of and listened to this tape. Mr. Huff testified that when he heard the tape of this conversation, he recognized the voices; but he claimed that he had no independent recollection of the conversation. He claimed that he could not say if it had been a single conversation or a recorded compilation of several conversations. But he did not deny that complainant had accused him of retaliation in response to her refusals to sleep with him and that he had replied by saying "that is ridiculous." He testified that he never told anyone about it, even his wife.

31. The most definitive statement Mr. Huff could make about his recollection of this conversation was, "I think it may have occurred." When asked if an employee calling him and accusing him of sexual harassment would be the type of event he would be likely to remember, he replied, "Well I have trouble remembering what I have for breakfast every morning."

32. During the first six months of complainant's tenure as general manager, complainant received very positive feedback from Mr. Huff. However, complainant testified that after Mr. Huff began the pattern of propositioning her, and following her refusals, Mr. Huff became cold and demeaning in the way he treated her. She testified that he was critical of her, and that the criticism took a "personal" form.

33. The credible evidence reflects that complainant's work performance was generally good. The criticisms leveled at her by the respondents, both the personal criticisms delivered by Mr. Huff during her employment and the more specific ones articulated since the filing of this case, are unwarranted.

34. Mr. Huff's criticisms of complainant did not relate to her work performance but was personal. His criticisms were not of the type that she could respond to by changing her behavior. For example, "You're above being general manager of Econo Lodge." Mr. Huff never gave complainant any written criticisms at all and never told her that she was being written up as a disciplinary action.

35. One of Mr. Huff's complaints about complainant's performance was that "after the first six months or so [as general manager], the complainant stopped communicating with us on a regular basis. This criticism began at the same time complainant was seeking to cope with Mr. Huff's regular sexual advances.

36. Complainant found this retaliatory criticism very upsetting. Mr. Huff often left complainant in tears after speaking to her. She found it miserable working in this atmosphere.

37. Complainant credibly testified that Mr. Huff told her that she would get a raise when she graduated from college. Mr. Huff denied this, and claimed that complainant's marketing degree is not relevant to her work as a general manager. She did not get a raise at any point following her graduation.

38. The respondents claim that complainant's performance as a general manager was never satisfactory, and respondents further assert that this unsatisfactory performance was the basis for criticism which she received, could not accept, and which eventually led to her decision to leave.

39. Mr. Huff claimed that complainant never performed up to standard, that her performance never improved, and that she never changed her objectionable behaviors or activities. However, that respondent would leave his business in the hands of someone he truly believed to be completely incompetent for two years, is not credible. In addition, the written personnel policies, which respondents claim were in effect, clearly provide that

employees are to be written up for any serious performance deficiencies or other violations of rules. However, complainant was not written up or given any negative written evaluation at any time during her employment as general manager.

40. Respondents introduced evidence in an attempt to show that complainant's work performance related to accounting was a serious problem. However, the evidence reveals that the alleged problems, if they existed at all, were not entirely the fault of the complainant.

41. Mark Johnson, who was also called by the respondents, verified that accounting irregularities were attributable to procedural changes implemented from the central office and not to complainant. Mr. Johnson testified that he personally found the computers a difficult adjustment for about the first six months, which encompassed the entire period of 1995 in which complainant worked as general manager. Mr. Johnson also admitted that if his audit did not balance, he was the one who would reconcile it by adding a figure. Mr. Johnson was the night auditor whose job it was to perform the audits at the Econo Lodge.

42. Mr. Huff claimed that among the "problems" for which he held complainant accountable was an incident in which someone vandalized a vehicle in the hotel parking lot. He testified that he had reason to believe it was complainant's boyfriend who was responsible for it, and he claimed that he became aware of this from Mark Johnson. Previously, Mr. Huff had testified under oath that Mr. Johnson had shown him an incident

report which reflected this. However, Mr. Johnson testified that he had never seen an incident report and did not know any of the details of the incident, never suspected anyone in particular and would not have told Mr. Huff that he did.

43. The respondents also blamed the complainant for unpaid debts incurred by the Blizzard Hockey Team and the Cubs Baseball Team. While it appears that the Econo Lodge did have to write off some bad debts, there is no reasonable basis for blaming complainant for the financial insolvency of these customers.

44. Complainant did not deny making and receiving personal calls on the hotel phone, but testified credibly that it had never been an issue which had been raised during her employment.

45. At no time did Richard Huff, or anyone else, put in writing any of the alleged problems which plagued complainant through her employment as general manager. This is in spite of personnel policies which clearly provide that employees will be written up for misconduct and provided with evaluations of their performance. Mr. Huff did testify that he did perform written reprimands of other employees, including general managers, when it was necessary.

46. According to the commission, it was not until after this discrimination complaint was filed did the respondents generate the first document which reflected any alleged performance problems with complainant. In response to inquiries by the Human

Rights Commission, the respondents listed 21 alleged problems with complainant's performance.

47. Mr. Huff admitted that the bonuses he offered and paid to complainant were not directed in any way at any of the alleged performance problems, and therefore do not support the respondents' claim that there were practices of complainant which needed "addressing."

48. Brenda Kay Ross, who currently works at the Econo Lodge as a desk clerk and was called by respondents as a witness, acknowledged that she found complainant to be a good manager.

49. Complainant received raises in pay in May 1993 at the time she was promoted to general manager, in August 1993 and August 1994. At the time she quit in May 1995, she was earning \$365 per week.

50. In addition, Richard Huff paid complainant \$1,000 cash bonus in October 1994 and a \$1,000 cash bonus in December 1994.

51. During 1994, Mr. Huff offered complainant two separate bonus schemes for increasing sales at the Econo Lodge. First, he offered to pay her \$500 for each month in which room revenues exceeded \$100,000.

52. In addition, he offered complainant a vacation trip for two if year end sales in 1994 exceeded the amount of the previous year, plus and additional \$500 spending money

for the trip if she could meet a particular sales goal. This was the only time he ever gave a trip such as this to any manager.

53. Mr. Huff claimed that the cash bonus was designed to get complainant "motivated into this job more than she appears to be," because of her "lackluster performance." However, the evidence does not support this explanation that the bonuses were motivated by some performance deficiencies on the part of complainant. The bonuses were directed solely at increasing sales, which is an area of complainant's work with which respondents never even claimed to have found fault.

54. Mr. Huff also claimed that these bonuses were not unique to complainant, that it was "not a new thing," that they were used on lots of other properties he managed and were in an amount comparable to other occasions.

55. Despite the fact that Patrina Huff claimed to be supervising the Econo Lodge after August 1994 and managing all the accounting for the Econo Lodge from January 1995, Richard Huff managed to keep from her that he gave complainant a trip for two to the Cayman Islands. It was not until complainant told Mrs. Huff in July 1995 that Mrs. Huff realized it was her husband who had paid for this vacation. Despite the claim made by both Patrina and Richard Huff that Mrs. Huff had been in on planning this "bonus," Mrs. Huff confessed to being upset in July by complainant's disclosure.

56. Complainant testified that when Richard Huff first discussed with her the vacation bonus sometime in 1994, she had the impression that he still expected to succeed

with his sexual advances toward her, and expected to be going on the trip. After she achieved the trip bonus, and informed Mr. Huff that she wished to take the trip with her boyfriend, Huff delayed the trip. Complainant was originally told by Mr. Huff that it would be best for her to take her bonus trip in January or February 1995 when business is typically slow.

57. Jennifer Schwartz, who testified on behalf of the respondents, testified that she was the comptroller of the Econo Lodge since October 1994, and that it was her job to review the accounts and to make sure that the dollars went where the records said they went. She testified that she had no knowledge of the \$1,000 cash bonuses paid by Mr. Huff to complainant. She testified that procedures required that there be records of all monies paid out, but that she was not aware of any records of cash transactions of that size having ever been made since she became comptroller.

58. Complainant was miserable working in this environment, but for as long as she could, she refrained from quitting because she needed the job. By May, 1995, complainant had endured 18 months of regular physical and verbal sexual advances from Mr. Huff, and his demeaning and belittling comments when she refused him. While she did receive a cash bonus just a few months before, it had been delivered by Mr. Huff with a pointed request that she sleep with him. Although she had been awarded a trip for her successful work performance, she perceived that Mr. Huff was upset that she had not elected to spend it with him, and he delayed the trip. She had not received the pay raise she had

been told she would receive when she graduated from college. When she had confronted Mr. Huff about her perception that she was being mistreated because of her consistent refusals of his advances, he told her she was being ridiculous and made it clear that her complaints were not going to bring any relief. These are circumstances which any reasonable person would have found intolerable.

59. When complainant returned from her bonus trip, she testified that she "realized that this job is not worth going through this." Shortly thereafter, she quit.

60. Between May and August 1995, complainant suffered lost wages of \$325.00 per week and lost benefits in a value of approximately \$300 per month.

61. Complainant worked at Rebels and Redcoats, a restaurant in Huntington, West Virginia, for two weeks in July 1995. She worked approximately 30 to 35 hours per week. The first week was training, for which she was paid \$4.25 per hour. The second week she was paid \$2.10 per hour plus tips, which she estimated to be approximately \$30.00 per week.

62. In August 1995, complainant found a permanent job working for a hotel in Columbus, Ohio. While the job required a move, once she made the move and began working, she was being paid more than she had been paid by Future Inns of America.

63. In July 1995, prior to making the move to Columbus to accept the hotel job, complainant worked for two weeks at a restaurant in Huntington. The first week she was paid \$148.75. The second week she was paid \$103.50. Complainant's mitigation for the period was \$252.25.

B.

Discussion

West Virginia Code § 5-11-9 declares that it is “unlawful for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions, or privileges of employment....” In 1989, in the case of Westmoreland Coal Co. v. WV Human Rights Commission, 382 S.E.2d 562 (1989), the West Virginia Supreme Court of Appeals, following the lead of the United States Supreme Court of Appeals in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), interpreted the Human Rights Act to prohibit sexual harassment.

It is well settled that the West Virginia Human Rights Act “imposes on an employer a duty to ensure, as best they can, that their workplaces are free of sexual harassment that creates a hostile or offensive working environment.” Conrad v. ARA Szabo, 480 S.E.2d 801 (1996). Where this duty is breached, it gives rise to “an independent basis for stating a Human Rights Act claim.” Conrad, 480 S.E.2d at 809; see also Hanlon v. Chambers, 464 S.E.2d 741 (1995).

To establish a hostile environment claim, the commission must prove:

- (1) that the complainant was subjected to unwelcome sexual conduct;
- (2) that the complainant was victimized at least in part because of her sex.

(3) that the conduct was sufficiently severe or pervasive to alter her conditions of employment; and

(4) that the conduct is imputable on some factual basis to the employer.

Conrad, 480 S.E.2d at 811; Hanlon at Syl. Pt. 5.

In this instant matter, the complainant maintained that she was repeatedly propositioned and made the object of Richard Huff's sexual advances throughout her tenure as general manager. Respondents, on the other hand, contend that there was no improper sexual conduct.

Quid pro quo (this for that) sexual harassment occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." The typical quid pro quo situation involves a situation where a supervisor explicitly or implicitly expects sexual consideration in exchange for employment benefits. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982). A tangible economic loss may include termination, transfer, denial of benefits or adverse job evaluations. Recently, the U.S. Supreme Court of Appeals established that the loss not necessarily just be economical but also may be psychological.

Sexual harassment was first recognized as a violation of Title VII in Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976). The Court found for a plaintiff alleging that after she refused the sexual advances of her supervisor, he harassed, humiliated and ultimately fired her. The Court stated that there was a violation of Title VII because "the conduct for

the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other despite the fact that both genders were similarly situated." The Court rejected a defense contention that the supervisor discriminated not against women, but only against people who refused to submit to his sexual demands. Saxbe, 413 F. Supp. At 657-658.

To prevail in a quid pro quo case, the employee must prove: (1) she is a member of a protected group; and (2) she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment complained of was based upon sex; (4) her submission to the unwelcome advances was an express or implied condition for receiving job benefits or that her refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment; and (5) the existence of respondeat superior liability.

Under the facts of this case, the evidence credibly establishes that the complainant was subjected to quid pro quo sexual harassment by respondent, Richard Huff, during the period between September, 1993 and the spring of 1995. Complainant testified that beginning in September 1993, whenever Mr. Huff visited the Econo Lodge, he regularly asked her to sleep with him, occasionally physically forced his affections upon her, and otherwise made sexual advances toward her. She testified that she consistently refused his advances. Her refusals did more than fail to end the advances; they precipitated retaliation in the form of belittling criticism.

In recounting the first incident of sexual harassment by Mr. Huff which occurred in September 1993, complainant provided a graphic, detailed explanation. This was the first occurrence of what was to become a pattern, and also the most physically forceful.

At dinner, Mr. Huff and complainant discussed business and then returned to the Econo Lodge. Mr. Huff parked the car at the exterior of the hotel where they talked about the exterior of the hotel and about lighting. Then Mr. Huff tried to kiss complainant. She pushed him away, and made an excuse to get out of the car. She testified that she pushed him away in a manner that "made it clear I didn't accept" his advance. After they went inside, complainant stayed in the lobby, hoping that Mr. Huff would go to his room so that she could go to her room alone, but he did not. Finally, when complainant left to go to her room, Mr. Huff followed her.

"I looked for things to do behind the desk, but like I said we were full, and there wasn't a whole lot to be done. I decided to go on to my room. I was living on the property at the time. As I went on my way to the room Richard followed me out of the lobby. We walked down the breeze way and again he turned back to being professional talking about business. We were talking about the pool, the fence around the pool. We needed to replace the fence around the pool. Continued to talk about business. We got to the door, my room was right by where the ice machine was. He said--The ice machine was really loud. We were standing right in front of my door. He insisted that we step inside because of the noise from the ice machine. After we stepped inside, he again tried to attempt to kiss me. I pushed him away. He said, "Can you handle this?" and I said, Richard, I don't want to handle it, and I don't want any part of it." And as I pulled away again, he pushed me on the bed and was on top of me on the bed. I went to push him off like this, and I

couldn't move. And I told him that it was a bad time of the month, because I didn't know what was going to happen. So, I told him it was a bad time of the month, and he finally he left."

The next day, Mr. Huff went back to relating to complainant on a professional level. She testified that neither brought up the incident of the night before and she was hopeful that it was an isolated event. She did not mention it to him. She testified that "I thought that possibly he got the point and possibly it was going to be we could forget about it." In contrast, Mr. Huff had nothing to say about the event except that the claim that he had made sexual advances toward her was "absolutely, positively untrue."

The complainant testified that the second occasion of sexual harassment occurred a month later, when Mr. Huff returned to the Econo Lodge. Complainant explained that initially "everything was strictly back to being business and him being back to being professional." However, following dinner, Mr. Huff again used his supervisory authority in an attempt to manipulate sexual favors from complainant. "He insisted on showing me the maintenance problems that were in his room, and he really didn't ask me. I wasn't really given an option. He just said there are maintenance issues that need to be addressed, and he insisted on showing me the problems." Again, in some detail, she recounts the incident.

"We went to dinner, discussed at dinner, it was strictly business. Upon arriving back at the hotel he stated that there were items in his room in the bathroom, maintenance issues, that needed to be addressed. He wanted to show me the issues in his bathroom. So he went through to show me that there was caulking that needed to be redone and the vinyl wallpaper

needed to be replaced. Upon leaving the room as soon as he showed me those items, I walked back toward the door. He tried to kiss me again. I pushed him away, and he asked me to spend the night, and I refused and I said I need to leave and I was gone.”

Although Mr. Huff denied this allegation of sexual harassment, he was not believable. Although the next time Mr. Huff visited the Econo Lodge property and asked complainant to go to dinner, she was able to come up with an excuse so as not to have to go to dinner with him. The following day, complainant found that his attitude toward her was colder.

However, following the next time Mr. Huff visited the property, the complainant testified that she tried to avoid having dinner with him. In the middle of their discussion of business at the hotel, Mr. Huff adjourned the discussion to dinner. Complainant testified that under the circumstances she really did not feel comfortable saying no.

Complainant testified that when Mr. Huff visited the Econo Lodge and asked her to sleep with him, she consistently refused him. She also testified to other incidents which added to her sense of pressure and discomfort regarding his advances. For example, on occasions Mr. Huff would discuss business with complainant in the office. Later, after he had gone to his room, he would call complainant and tell her how good she looked in whatever she was wearing. On another occasion Mr. Huff told complainant that he would like to take her to Atlantic City. On an occasion, after complainant had moved from the Econo Lodge, Mr. Huff asked to see her apartment. She made excuses to avoid this.

Another incident complainant vividly recalled occurred in December 1994. On that occasion, Mr. Huff called complainant and asked her to pick him up at the airport at 10:00 p.m. She complied. After complainant picked him up, Mr. Huff asked her if she wanted to go for drinks and she declined, using the excuse of needing to study. Complainant took Mr. Huff to the Econo Lodge. Although by this time she no longer lived at the Econo Lodge and could have just dropped him off, he asked her to let him into the office, claiming that he did not have his keys with him. She opened the door, he followed her in, and shut the door behind him. Mr. Huff then pulled out a thousand dollars in cash and gave it to complainant. Complainant understood this to be a cash bonus which she and Mr. Huff had discussed on the phone a couple of weeks before. At the same time he handed the cash to her, he asked complainant to spend the night with him. Complainant told him "No, but don't take it personal," because she feared that he would become cold and demeaning toward her in the same way he had following other occasions on which she had declined his advances.

Other evidence of record indicates that this incident happened as complainant testified. Mr. Huff made no specific denial with regard to this incident, except to claim that he was never at the Econo Lodge in December 1994. He did, however, admit elsewhere that he delivered \$1,000 cash bonuses to complainant in both October and December 1994, and he acknowledged that the cash bonuses were probably delivered to complainant in person.

One incident of quid pro quo harassment may establish a cause of action even if not so severe or pervasive as to create a hostile environment. In this case, the early incidents

were sufficient unto themselves to constitute a hostile environment, but they were only the beginning of a pattern of quid pro quo harassment which went on throughout her employment. The complainant testified that she did not quit in response to the sexual harassment she experienced because she needed the job.

Quid pro quo sexual harassment cases more often than not turn upon credibility, because the harassment usually occurs outside the presence of other witnesses. There are usually two competing versions of the facts, the question is which version, in light of the totality of the evidence and the demeanor of witnesses is more than likely true. The complainant compellingly and credibly described the events which occurred while she was an employee of the respondents. Moreover, prior consistent statements made by complainant to third parties, and witnesses to related events, corroborated the complainant's version of the facts.

Katie Hagley Morgan, Marie Brown and Dottie Legg credibly testified that complainant indicated to them, prior to the day she quit, that she felt pressured by Mr. Huff for sex. Ms. Morgan testified that, while the harassment was going on, complainant confided to her that Mr. Huff was making sexual advances toward her and was not taking "no" for an answer. She testified that complainant appeared stressed. Marie Brown testified that around the time Ms. Morgan quit, complainant confessed to Ms. Brown that Mr. Huff had been coming on to her.

Ms. Legg testified that while complainant was working at the Econo Lodge, and in

response to some upsetting conversation between complainant and Mr. Huff, that complainant told her “everything would be alright he she [Angela] would sleep with him [Richard Huff].”

Although Mr. Huff vehemently denied that he had ever propositioned or forced his affections upon the complainant, Angela Frye, his testimony was evasive involving critical matters including the taped conversation with complainant. Moreover, he was inconsistent with regard to respondent’s practices regarding evaluations and disciplinary matters.

In addition to his harassment of the complainant, the evidence reveals that Mr. Huff harassed at least one other woman who worked under his supervision. Such evidence can be an indication of a sexually hostile environment. Tinsman v. Hott, 424 S.E.2d 584 (1992).

Ms. Morgan who worked as a bartender for the Econo Lodge for a brief period in early 1995 credibly testified to an incident which occurred in the Econo Lodge bar while Ms. Morgan and Mr. Huff were there alone. Ms. Morgan testified that, as she was attempting to close up the bar, Mr. Huff cornered her and attempted to kiss her. With the exception of the kiss, which she was not in a position to witness, Marie Brown corroborated the testimony of Ms. Morgan.

Mr. Huff not only disputes that this ever occurred, he disputes that he was at the Econo Lodge at any time during the middle part of March when Ms. Morgan recalls the incident occurred. Isom Maynard, who was also present with Marie Brown in the lobby area of the hotel the night Ms. Morgan was sexually harassed, and who was called by the

respondents to refute Ms. Brown's testimony, merely testified that he could not recall any such event. Mr. Maynard's demeanor as a witness belies his lack of recall, and nevertheless, indicates Mr. Huff's presence on that occasion.

In a quid pro quo sexual harassment case, it is not essential that a supervisor make good on the explicit or implied threats or promises to the victim in order to constitute actionable harassment. It is now widely recognized that merely placing an employee where she reasonably believes that her future terms and conditions of employment may turn upon her response to romantic or sexual overtures constitutes a violation of the Act. Hanlon v. Chambers, 464 S.E.2d 741 (1995); Conrad v. ARA Szabo, 480 S.E.2d 801 (1996). However, in this case, the evidence establishes that complainant paid a price for refusing Mr. Huff's advances.

It is undisputed that Mr. Huff regularly criticized complainant, mostly in telephone calls, and occasionally brought her to tears. What is disputed is the motivation for this criticism. Although Mr. Huff now contends that it was legitimate criticism for performance deficiencies, the evidence reveals that this criticism and other demeaning treatment was in retaliation for complainant's resistance to sexual overtures. As with the sexual overtures, the only witnesses to the conversations in which complainant was criticized by Mr. Huff were these two people, and their versions of these events differ. However, here, too, complainant's version is corroborated by other evidence.

First, if complainant's conduct and performance was as bad as respondents claim,

then she was virtually incompetent as a manager during her entire tenure there. Yet, in the face of what they now characterize as a lengthy record of incompetence on her part, complainant was never written up or disciplined once in two years. The respondent went well beyond not disciplining this employee which they now characterize as inept. They regularly gave her raises, and substantial, non-routine bonuses.

Courts have been extremely skeptical of alleged reasons which are not asserted until the latter stages of a discrimination dispute. The fact that the employer's alleged reasons were not asserted until the hearing "casts doubt on their authenticity and suggests that they were fabricated after the fact to justify a decision made on other grounds. Foster v. Simon, F. Supp. 533; Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. Pa. 1973).

Although "quid pro quo" and "hostile environment" harassment are theoretically distinct claims, the line between the two sometimes blurs, and often the two forms of harassment occur together. If a supervisor makes sexual advances even after he had been put on notice that they are unwelcome, he can create a sexually hostile environment even apart from the explicit or implicit employment consequences simply by compelling the employee to endure the sexually aggressive conduct. The West Virginia Supreme Court of Appeals set forth the elements of proof to establish a hostile environment claim:

To establish a claim for sexual harassment under the West Virginia Human Rights Act, WV Code, 5-11-1 et seq. Based upon a hostile or abusive work environment, a plaintiff-employee must prove that (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) it was imputable on some factual basis to the employer.

Conrad v. ARA Szabo, Syl. Pt. 3, 480 S.E.2d 801 (1996) (citing Hanlon v. Chambers, Syl pt. 5, 464 S.E.2d 741, 745 (1995)).

For sexual harassment to be actionable, it must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

The evidence offered by the commission establishes that over the period of complainant's tenure as general manager, continuing into 1995, Mr. Huff made unwanted sexual and romantic advances toward her, and that the pattern of conduct was sufficiently severe and pervasive to create for complainant a hostile and offensive work environment. On at least two occasions, Mr. Huff forced his affections on complainant by kissing her or attempting to kiss her. On one occasion, he pushed her onto a bed, got on top of her, and attempted to put his hand up her skirt. These physical touchings, without more, are severe enough to constitute a hostile work environment. Moreover, in addition to the overt physical assaults, Mr. Huff repeatedly subjected the complainant to offensive, demoralizing and

reprehensible conduct of a sexual nature. This conduct occurred over an extensive enough period to be pervasive and to constitute a sexually hostile environment.

In order to prove a claim of constructive discharge in West Virginia,

a plaintiff must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit.

Slack v. Kanawha County Housing and Redevelopment Authority, 423 S.E.2d 547, 558 (1992).

Constructive discharge is recognized in sexual harassment cases. Hunter v. Countryside Ass'n for the Handicapped, Inc., 710 F. Supp. 233 (N.D. Ill. 1989); Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D.525 (M.D. Fla. 1988); Trout v. Charcoal Steakhouse, 835 F. Supp. 899 (W.D. Va 1993).

The evidence in this case establishes that complainant stayed on the job, and endured the sexual harassment and related belittling of Mr. Huff, long beyond where a reasonable person would have been compelled to quit, because she needed the job. Not only did she endure physical and sexual harassment on several occasions, but month after month of requests for sex with the knowledge that her continued refusal would result in demeaning and belittling comments and criticisms. The only person who had the authority to end the sexual harassment was the very person who was engaging in it.

The evidence is compelling that the complainant unequivocally rejected Mr. Huff's overtures, making it clear to him they were unwelcome. In an attempt to preserve their working relationship, she asked him not to take her rejections personally. On at least one occasion (in a conversation she taped), complainant told Mr. Huff she believed he was mistreating her as an employee because she had refused to sleep with him. His response was that she was being ridiculous.

The complainant has established that respondent, Future Inns of America, Inc., is liable for the sexual harassment of its employee, Angela Frye, by its manager Richard Huff.

In Paxton v. Crabtree, 400 S.E.2d 245 (1990), the West Virginia Supreme Court of Appeals addressed the issue of employer liability for the discriminatory actions of its supervisors.

If a discriminatory act has been committed by an officer or a supervisory employee, an employer may be held liable without showing that the employer knew or reasonably should have known of the misconduct, except where the supervisory employee was acting outside the scope of his employment.

The Commission's legislative regulations provide that "An employer...is responsible for its acts and those of its officers, agents and supervisory employees with respect to sexual harassment[.]" 6 WV C.S.R. § 77-4-3.1.

The evidence in this record reflects that complainant was an employee of Future Inns of America and that management authority over the Future Inns' employees of the Econo Lodge in Huntington was exercised by Richard Huff, under a contract between Future Inns

of America, Inc. and Hospitality Services Unlimited, Inc. To be sure, respondent maintained that Future Inns of America, Inc. had no direct responsibility for managing its own employees clearly evidencing that, Richard Huff was the management agent of Future Inns. The liability for Mr. Huff's sexual harassment of complainant therefore is imputed to Future Inns of America, Inc.

The complainant has established that Richard Huff is personally liable for his sexual harassment of the complainant.

The West Virginia Human Rights Act, WV Code § 5-11-9(7), provides that it is unlawful:

For any person...to:

Engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss to ...any person...;

Engage in any form of reprisal or otherwise discriminate against any person because he had opposed any practices or acts forbidden under this article....

WV Code § 5-11-9(7) (A) & (C). Person is defined very broadly in WV Code § 5-11-3(a) to include "one or more individuals" and certainly applies to Richard Huff.

It has been recognized that this section of the Human Rights Act creates a cause of action against "persons" other than the employer itself. Marshall v. Manville Sales Corp., 6 F.3d 229 (4th Cir. 1993); Holstein v. Norandex, Inc., 461 S.E.2d 473 (1995); Hanlon v. Chambers, 464 S.E.2d 741 (1995).

Richard Huff, the person who sexually harassed complainant by making unwanted sexual advances and request for sexual favors, is liable under this section.

C.

Conclusions of Law

1. Complainant, Angela Frye, is an individual claiming to be aggrieved by an unlawful discriminatory practice and is a proper complainant for the purposes of the West Virginia Human Rights act, WV Code § 5-11-10.

2. Respondent, Future Inns of America, Inc., was at all times relevant hereto, employed the requisite number of employees, and as such is an employer as defined by the West Virginia Human Rights Act, WV Code §§ 5-11-3(d) and is therefore subject to the provisions of the West Virginia Human Rights Act

3. The respondent, Richard Huff, was at all times relevant to this action, an agent of the respondent, Future Inns of America, Inc. and acted in that capacity

4. The respondent, Richard Huff, is a person as defined by the West Virginia Human Rights Act, WV Code §5-11-3(a), and is therefore subject to the provisions of the West Virginia Human Rights Act.

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

5. The commission proved by a preponderance of the evidence that the respondents engaged in unlawful sexual harassment, in violation of the West Virginia Human Rights Act, WV Code §5-11-9(1).

6. The respondent, Future Inns of America, Inc. and the respondent, Richard Huff, are jointly and severally liable for damages of back pay, benefits, prejudgment interest in the amount of \$7,807.27 through the end of July, 1998 as set forth in Exhibit A and thereafter prejudgement interest through December of 1998.

7. Each respondent is liable for incidental damages in the amount of \$3,227.45 for the emotional distress wreaked upon complainant by their illegal sexual harassment.

D.

Relief and Order

Pursuant to the above findings of fact and conclusions of law, the complainant, Angela Frye is entitled to make whole relief and it is **ORDERED** as follows:

1. Within 31 days of receipt of this decision, each respondent, Future Inns of America, Inc. and Richard Huff shall pay to the complainant \$3,227.45 as incidental damages for emotional distress.

2. Respondents, Future Inns of America, Inc. and Richard Huff, shall within 31 days of receipt of this decision, jointly and severally pay to the complainant back pay and interest in the amount of \$7,807.72 through July of 1998; as well as prejudgement interest compounding through December of 1998.

3. Complainant is directed to within ten days of receipt of this decision, provide additional calculations on prejudgement interest through December, 1998. Said calculations shall be transmitted to the commission and to the respondents.

4. Respondents, Future Inns of America, Inc. and Richard Huff, jointly and severally shall within 31 days tender to the West Virginia Human Rights Commission \$2,277.35 as expenses incurred in prosecuting this claim.

5. Respondents, Future Inns of America, Inc. and Richard Huff, jointly and severally shall tender to the Attorney General's Office, Civil Rights Division \$237.38 as expenses incurred in prosecuting this matter.

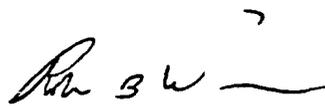
6. Respondents shall immediately cease and desist from continuing their illegal discriminatory employment practices.

It is so **Ordered**.

Entered this 28th day of January, 1999.

WV HUMAN RIGHTS COMMISSION

BY



ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE