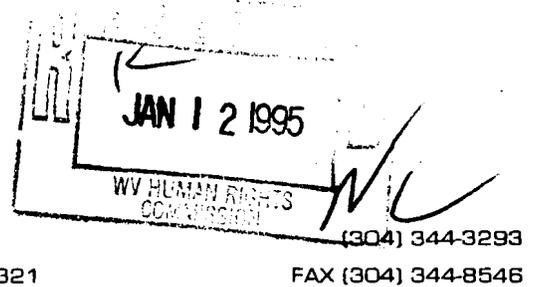


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Counsel to the Commission

Edgar E. Bibb, III
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Beckley, WV 25802
Counsel for Respondent

NOTICE OF FINAL DECISION

PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, **WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION**, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

The filing of an appeal to the Commission from the final decision shall not operate as a stay of the decision unless specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

All documents shall be directed to:

Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 104-106
Charleston, WV 25301

Dated this 9th day of January, 1995.

WV HUMAN RIGHTS COMMISSION

BY: Mike Kelly
MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

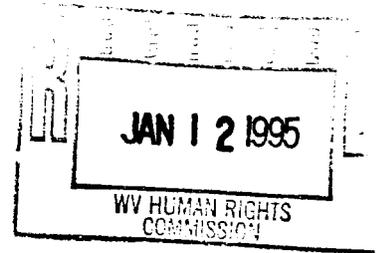
cc: Norman Lindell, Acting Executive Director
West Virginia Human Rights Commission

Rec'd 1-12-95
N/C

**BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

CYNTHIA L. HESS,

Complainant,



v.

Docket No. ES-296-92

**WEST VIRGINIA PIZZA, INC.,
d/b/a LITTLE CAESAR'S PIZZA,**

Respondent.

**FINAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

THIS MATTER matured for public hearing on 16 August 1994. The hearing was held at the Mercer County Courthouse, Princeton, Mercer County, West Virginia. The complainant, Cynthia L. Hess, appeared in person, and the West Virginia Human Rights Commission appeared by Assistant Attorney General Susan Elizabeth Jewell. The Commission presented the case on behalf of itself and Ms. Hess. The respondent appeared by its vice president, Sharon May, and by its counsel, Edgar E. Bibb, III.

This decision is written after due consideration of all the evidence, the reading of the entire transcript and all exhibits, and review of the recommended findings of fact and conclusions of law, and related argument, submitted by the Commission and the respondent.

I. ISSUE TO BE DECIDED

Whether respondent violated W.Va. Code §5-11-9(1) by terminating complainant's employment because of her pregnancy.

II. STIPULATED FACTS

The following facts were submitted by written joint stipulation of the parties:

1. The respondent is an employer subject to the jurisdiction of the West Virginia Human Rights Act.
2. The complainant, Cynthia Lynn Hess, a female, was employed by respondent in its Bluefield, West Virginia store for only two days: October 30 and October 31, 1991.
3. Margaret Agnor was employed by respondent as the manager of respondent's Bluefield, West Virginia store during the relevant time period of October 29-31, 1991.
4. The complainant submitted her job application to Margaret Agnor on October 29, 1991, to work in the respondent's Bluefield, West Virginia store.

5. When the complainant submitted her application, Margaret Agnor told the complainant to call her back later that evening for a response. The complainant called Margaret Agnor that night and Margaret Agnor told complainant that she was hired.

6. The complainant earned minimum wage, an hourly rate of \$4.25.

III. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the exhibits introduced into evidence, and the written recommendations and argument of counsel, the Administrative Law Judge hereby summarizes the essential evidence in this matter and, where noted, finds certain facts worthy of credit or not worthy of credit:¹

¹ To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

1. Cynthia Lynn Hess is a female resident of Bluefield, Mercer County, West Virginia. She attended high school and obtained a GED Degree. She is the mother of two children, the second of which was born on 24 April 1992. That child, Heather Michelle, is the child with whom complainant was pregnant in October 1991.

2. In late October 1991, complainant was informed by the State Bureau of Employment Programs that respondent was seeking applicants for work. She applied on 29 October 1991 and was told by manager Margaret Agnor to report to work the next day. On that same day, Mr. Agnor hired a male employee, Vincent Scott Wolfe. The next day she hired another male employee, Jerry Harmon.

3. Ms. Agnor had approximately fifteen months' experience as a store manager for respondent. She had the authority to hire and fire employees, and was responsible for employee training.

30 OCTOBER 1991

4. Ms. Hess reported to work on 30 October 1991 at 3:00 p.m., as instructed by Ms. Agnor. She was taken to a back room to complete necessary paperwork. After completing the paperwork, and while changing into a company issued shirt and apron, Ms. Hess informed Ms. Agnor that she (Ms. Hess) was pregnant. Ms. Hess was about three months pregnant at this time.

5. While working with a co-employee early in the shift, the latter commented to Ms. Hess "you don't look pregnant". Ms. Hess had not informed anyone at the store, except Ms. Agnor, about her pregnancy.

6. Ms. Agnor testified that she was unsure how to handle complainant's pregnancy, so she called respondent's central office in Beckley, West Virginia, for guidance. While on the phone with respondent's central office, Ms. Agnor asked complainant if she could obtain written permission to work from her doctor. Complainant said that she could obtain such permission and would do so at her next appointment with her obstetrician.

7. Ms. Agnor testified that it was her belief that a pregnant employee who could not produce a work permission slip from her doctor could be discharged, stating "you would have been afraid to go ahead and work her if she didn't have the slip saying she could lift or she could do . . . other kind of things." Even with a permission slip, Ms. Agnor added, ". . . I would have restricted her from lifting anyway".

8. As instructed by Ms. Agnor, complainant's duties primarily involved taking orders, operating the cash register and working the "front" of the store. In its answer to interrogatories, respondent identified complainant's job duties as "general kitchen worker, started out as counter person, no specific job duties, per se, but duties do include greeting customers, taking orders, collection sales money, handing out orders, cleaning, assistance in other areas as needed." (Commission's Exhibit E).

9. After an initial orientation of her duties, Ms. Hess testified, she went into the kitchen and asked if she could help make pizzas. She testified credibly that Ms. Agnor ushered her back to the front of the store, advising her that the front was her primary work station. After awhile, Ms. Hess asked if she should sweep and mop the store. Ms. Agnor said "no", stating that Ms. Hess might fall and hurt herself and/or her baby.

10. Ms. Agnor testified that she expected Ms. Hess, when her "front" duties were slack, to work other stations, such as taking phone orders, making sandwiches and "pizza dress". She stated that Ms. Hess' duties went beyond operation of the cash register since it was a small volume store and all employees needed to be cross-trained. In support of her emphasis on cross-training, Ms. Agnor stated "even the guys did cash registers there at the store". (Tr. 176).

11. Robert Hensley is respondent's general manager and held that position in 1991. At the time of the events in question, he was twenty (20) years old. He has an eighth grade education. He has, and had in 1991, the authority to hire and fire employees. Mr. Hensley testified that due to a labor shortage, he was assisting Ms. Agnor in the Bluefield store on both 30 and 31 October 1991. He observed complainant's work performance on 30 October and characterized it as "no motivation, not willing to work. She didn't want to try and just wanted to stand and gaze out the window." He testified that at the end of the work day, he spoke with Ms. Agnor and told her that if Ms. Hess and the new male employee (Mr. Wolfe) did not show more enthusiasm on the next shift that she should "let them go". He testified that he did not know that Ms. Hess was pregnant when he made his statement to Ms. Agnor.

12. Chuck Simmons is, and was at all times relevant herein, the manager of respondent's Oak Hill, Fayette County, West Virginia, store and an area manager over several other stores, including the Bluefield operation. He accompanied Mr. Hensley to Bluefield on 30 and 31 October 1991. He, like Mr. Hensley, testified that he observed complainant's work performance on 30 October and noticed that she was reluctant to leave the counter area: "Margaret would ask her to come back and help and she would come back and do a little and then she would go back up front." He stated that at the conclusion of the work day he told Ms. Agnor that Ms. Hess "has to work more, she needs to do more, hustle more." He admitted that he had learned from Ms. Agnor on 30 October that Ms. Hess was pregnant. Though he rode home with Mr. Hensley, he denied that they discussed Ms. Hess' pregnancy. His denial of any discussion with Mr. Hensley concerning the pregnancy lacked credibility.

13. When asked on direct if she recalled discussing Ms. Hess' performance with Mr. Hensley and Mr. Simmons after work on 30 October, Ms. Agnor answered "I do not recall." Complainant recalled seeing the two male managers at the store, but testified that she had little contact with them and they did not give her any assignments. Complainant testified credibly that at the end of her first work day, Margaret Agnor put her hand on her shoulder and praised her work at the register and with greeting and servicing the public.

31 OCTOBER 1991

14. Complainant returned to work at 5:00 p.m. on 31 October 1991, her second and last day of employment with respondent. She clocked in and then went to her position at the front counter. Complainant testified that it was a busy evening, but that every time it would get slow, she would ask Ms. Agnor if she could do anything in the back. She was always sent up to the front. Complainant testified that besides working the front area, Ms. Agnor did permit her to dry and stack pizza pans. After she finished that task, she was again directed to go to the front near the cash register. Finally, complainant testified, when she asked if she should clean the door windows, which had become smeared, Ms. Agnor responded that she should not because she might hurt herself and/or the baby. Complainant denied that she avoided work or training in the rear area.

15. Towards the end of the evening, Ms. Agnor approached complainant and said that since business was slowing down, she was going to allow complainant to go home, but that she first wanted to talk to her in the stockroom. On the way back to the stockroom, complainant ordered a pizza for herself to take home. When they got back to the stockroom, complainant testified that Ms. Agnor told her that she had to let her go. Complainant asked her why and Ms. Agnor responded that complainant had lied. When complainant asked what she had lied about, Ms. Agnor said that she had lied because she didn't mark on her application that she had a disability. Complainant testified that she responded "I don't have a disability" and Ms. Agnor replied "Pregnancy is a disability". Complainant testified that Ms. Agnor then told her that other restaurants like Wendy's and McDonald's had maternity clothes and that she could work there and retain a job throughout her

pregnancy. Ms. Hess then left the room, and started to write a check for the pizza which she had ordered, but Ms. Agnor told her that she could have it for free. Complainant left the store.

16. Respondent's job application (Commission Exhibit A) asks applicants "Do you have any medical or health problems that would interfere with or detract from your ability to perform your job?". Ms. Hess had checked the space marked "No".

17. Ms. Agnor testified that on 31 October 1991 complainant still "liked to stand and just look out the window" and that she again had to constantly request that Ms. Hess help out other workers with their duties.

18. Mr. Hensley testified that prior to beginning work on 31 October, Ms. Agnor told him that complainant was pregnant. He alleges that he did not know about the pregnancy until then. He stated that he did not notice any improvement in Ms. Hess' work performance on her second day on the job.

19. Mr. Simmons, likewise, testified that Ms. Hess continued to perform poorly. He spoke with Mr. Hensley and they agreed that both Ms. Hess and Mr. Harmon, who had worked that night, should be fired.

20. Ms. Agnor testified that Mr. Hensley directed her "to go ahead and get rid of her. She was not going to work out. I think that was after about three hours that she had worked." Ms.

Agnor testified that when she terminated complainant, she told her that the reason she was being fired was because she was "hugging the counter". Ms. Agnor denied that they had any discussion about the employment application, about Ms. Hess lying on the application, about her being pregnant, or about anything whatsoever regarding a disability. (Tr. 211).

21. Mr. Harmon, a new male employee, was not discharged on 31 October. He worked the next day, 1 November 1991, and was fired after having a family member call in sick for him on his third scheduled work day. The other new employee, Mr. Wolfe, was not discharged at all. He also returned to work on 1 November and quit shortly thereafter.

SUPPORTING EVIDENCE

22. Each side offered evidence in support of its respective position. The Commission offered the testimony of Etta Hess, complainant's mother, who recalled that on 31 October 1991 she received a telephone call from her daughter in which she was informed that Ms. Hess had been fired because she was pregnant. She testified that her daughter told her that Ms. Agnor had accused her of lying on her application by not revealing that she was pregnant and by stating that she did not have a disability. She saw her daughter in person the next day and she was very upset and didn't understand why she had been fired.

23. The senior Ms. Hess is employed as a nurse in the labor and delivery section of Bluefield Regional Medical Center. Dr. Bruce Lasker, chief of obstetrics at the hospital, testified that he recalled the senior Ms. Hess asking him if pregnancy was considered a disability. He later learned that the junior Ms. Hess had allegedly been fired because of pregnancy.

24. Ms. Connie Crider is a nurse who works in the labor room at the hospital. She recalled that in early November 1991, the younger Ms. Hess presented at the hospital with cramps and possible contractions. She testified that Ms. Hess was crying and very upset, and that she stated to Ms. Crider that she had lost her job because her employer considered pregnancy to be a disability.

25. Respondent presented alleged contemporaneously produced business journals which reflect that Ms. Hess was fired due to poor performance. Respondent's Exhibit 2 are Ms. Agnor's handwritten notes concerning her day to day activities. This exhibit reflects that the store was disorganized, in October 1991, and that Ms. Agnor was under a lot of stress during the week in question. Particularly in regards to complainant, Ms. Agnor's notes state that on Wednesday, October 30, "I worked Lynn just four hours. Tried to get her to come back and help me some, but she liked hugging the front. I sent her home." For October 31, she wrote "We were busy tonight. I let the new girl go (Lynn). She never made any attempts when asked her to come back and learn how to do sauce or cheese or sandwiches. She just hugged the front. I told her it wasn't a glamorous job and that she would have to learn how to do everything, but she didn't show any initiative that she wanted to learn. I hired a new EMP, Jerry, tonight. Not sure he will last. And Scott told me he has a chance to get another job and wants to talk to me."

26. Respondent's Exhibit 3 are the handwritten notes of Mr. Simmons. He recounts the evening of 30 October 1991 as follows: "New person on landing, Kevin [actually Scott] won't make it. He talks and stares too much. New girl on front, Cynthia, won't make it either. She lacks motivation and does not try to learn. Robert and I talked about the new girl on our way home. He agrees with me that she will not make it due to not trying. Kevin also won't make it due to the lack of motivation." His entry for 31 October reads: "New people don't look promising. Watched the new girl again. No movement at all. No different than last night. Told Margaret to let her go due to lack of hustle. Jerry needs to go also. These two need to go. Need to hire more people."

27. Respondent also offered evidence that it has employed other women who were pregnant or became pregnant and they were not discharged.

POST-DISCHARGE

28. After being terminated, Ms. Hess searched for other employment without immediate success. She was required to apply for public assistance to support herself and her child and received food stamps. She also had to borrow money from her family.

29. The Commission presented evidence that, had she not been discharged, complainant would have worked between thirty and thirty five hours per week for respondent. Respondent countered that new employees typically work only fifteen to twenty hours per week.

ASSESSMENT OF CREDIBILITY AND KEY FINDINGS OF FACT

Based on the testimony and demeanor of each witness, and after a thorough review of the transcript and supporting exhibits, the factfinder resolves the disputed evidence as follows:

30. Ms. Hess' pregnancy was the reason respondent discharged her on 31 October 1991.

This finding is based on the following considerations:

(a) The testimony of Ms. Hess and her witnesses were, generally, more credible than the testimony of Ms. Agnor, Mr. Hensley and Mr. Simmons;

(b) Ms. Agnor, Mr. Hensley and Mr. Simmons were all aware of complainant's pregnancy prior to the termination and Ms. Agnor, in particular, exhibited a negative reaction to it; Ms. Agnor was aware that discrimination because of pregnancy was unlawful;

(c) Ms. Agnor, at hearing and in her deposition (portions of which were admitted into evidence as Commission's Exhibit D), exhibited adverse stereotypical attitudes and beliefs in regard to pregnant employees and their ability to work. To a lesser, but still noticeable extent, Ms. Agnor and Mr. Hensley both believed that certain duties were more suitable for female employees and other duties were more suitable for male employees. The latter attitude reflects a management ethic that more likely than not is based on stereotypes, rather than the actual abilities or disabilities of individual employees.

31. At the time of her discharge, Ms. Hess was informed by Ms. Agnor that she was being discharged for lying about her pregnancy on her application. This finding is based on the assessment that the testimony of Ms. Hess was, generally, more credible than that of Ms. Agnor, and Ms. Agnor's very obvious belief that Ms. Hess' condition was not compatible with working at respondent's place of business. Consideration was also given to the very credible testimony of Ms. Crider that complainant was still extremely upset a few days after her discharge and gave her pregnancy as the reason she was fired.

32. Poor performance was not the true reason for complainant's discharge. This finding is based on the assessment that the testimony of Ms. Hess was, generally, more credible than the testimony of Ms. Agnor, Mr. Simmons and Mr. Hensley, and the uncontested fact that Mr. Wolfe and Mr. Harmon, who were also cited as poor performance by Mr. Hensley and Mr. Simmons, were not discharged at the end of the work shift, but were brought back to work another day.

33. The business journals of Ms. Agnor and Mr. Simmons are not credible when compared to Ms. Agnor's hearing testimony and, for that reason, are given little weight. It is obvious from Ms. Agnor's deposition and hearing testimony that she was concerned and troubled by Ms. Hess' pregnancy. The fact that the journals make no mention at all of her pregnancy lead the factfinder to conclude that they are not genuine, at least not in part, but were re-written for use at hearing.

34. Had complainant not been fired, she would have worked, on average, thirty to thirty-five hours per week. This finding is based on Commission's Exhibit D and the testimony of Ms.

Agnor that in a typical week an employee in the Bluefield store would work that many hours. Ms. May, respondent's vice president, testified credibly that a typical new employee averages only fifteen to twenty hours a week, but her testimony was based on an average of all of respondent's operations and did not specifically refer to the Bluefield store during the period at issue. The evidence produced by the Commission outweighed the evidence produced by respondent on this issue.

IV. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

Under the West Virginia Human Rights Act (HRA), "employment discrimination based upon pregnancy is an unlawful discriminatory practice", *Montgomery Gen. Hosp. v. W.Va. Human Rights Comm'n*, 176 W.Va. 580, 346, S.E. 2d 557, 559 (1986); *Frank's Shoe Store v. W.Va. Human Rights Comm'n*, 179 W.Va. 53, 365 S.E. 2d 251 (1986); *West Virginia Department of Natural Resources v. Myers*, 443 S.E.2d 229 (1994), and an employer may not discharge a female employee solely because she is pregnant.²

This case having been heard in its entirety, with all evidence submitted and considered, it is not necessary to address whether the Commission established a *prima facie* case.³ Once all the

² The Commission does not argue that this case is appropriate for analysis under the "mixed motive" theory. See, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 2d 1775 (1989); *West Virginia Inst. of Technology v. W.Va. Human Rights Comm'n*, 181 W.Va. 525, 383 S.E. 2d 490 (1989).

³ Moreover, respondent does not allege that the Commission failed to make a *prima facie* case.

evidence has been heard, and the "defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether plaintiff really did so is no longer relevant." *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482 (1983). The job of the factfinder, after taking all of the evidence, is to address "the ultimate question of discrimination *vel non*". 103 S.Ct. at 1481.

In other words, the factfinder must now determine, on the basis of all of the evidence, whether the Commission has proven by a preponderance of the evidence that the proffered reason for complainant's discharge, poor performance, was not the true reason for her firing and that her pregnancy was. It is determined that the Commission has met its burden.

The respondent's articulated reason for terminating Ms. Hess is that she "hugged the counter" and was otherwise unaggressive in pursuing her known duties and in learning new ones. This explanation for complainant's discharge, however, is determined to not be credible after consideration of the following evidence:

(1) Ms. Hess testified credibly that she sought out other duties, but was continually redirected to the front of the store by Ms. Agnor;

(2) At the conclusion of the first day, Ms. Agnor testified on direct that she told Ms. Hess ". . . that she was doing fine and she was doing fine on the register. I asked her to pick up her speed; and when I asked her to come on back . . . to please come on back, we would try to learn more

things" (Tr. 187); on re-direct, Ms. Agnor reiterated that "I did have a talk to her and tell her to speed up. But it's all stuff that I would tell any employee. I mean, it's hard when you first start out, and I would try to give encouragement . . . that was my way of talking to them." (Tr. 209);

(3) By her own testimony, Ms. Agnor, at the conclusion of the first day, made no mention to Ms. Hess of her alleged "counter hugging" problem;

(4) The hearing testimony of Ms. Agnor contradicts Respondent's Exhibit 2, her business journal, to the extent that the writing intimates that Ms. Hess was "sent home" on 30 October because she had been hugging the counter; the hearing testimony, as stated supra, indicates that Ms. Hess performed generally well on her first day;

(5) The notes of Mr. Simmons state that Mr. Wolfe and Mr. Harmon were also poor performers who should have been fired, but neither were discharged like Ms. Hess. Only complainant, the pregnant employee, was called into the backroom and fired. Mr. Harmon was not fired until he had someone call in sick for him on the next work day and Mr. Wolfe was not discharged at all;⁴

(6) The hearing and deposition testimony of Ms. Agnor revealed numerous stereotypical beliefs regarding the inability of pregnant employees to perform their duties, such as:

⁴ Evidence showing that an employer treats a person in a protected class less favorably than similarly situated employees may be used as indirect evidence of discrimination. *City of Ripley v. W.Va. Human Rights Comm'n*, 179 W.Va. 375, 369 S.E. 2d 226 (1988).

- (a) She would not let Ms. Hess mop floors or wash windows (Tr. 236);
- (b) She would not let Ms. Hess roll dough (Tr. 238);
- (c) She would not let Ms. Hess lift heavy pans (Tr. 238-2239); and
- (d) She would not let Ms. Hess "carry and lift cheese out, because it's in boxes. But we learned later on how to do it without any of the girls ever lifting it up" (Tr. 219).

(7) Ms. Agnor's attitude towards Ms. Hess' pregnancy is best summarized by her own deposition testimony:

QUESTION: "Washing windows, was that something that general kitchen workers would do?"

ANSWER: "Yes."

QUESTION: "And is that something that you would have wanted to have restricted her from doing or?"

ANSWER: "I mean, personally I would. I don't know about the doctor. I would, because I wouldn't want, you know, if someone is pregnant and if they're in their early months, you know, regardless of whether it's old wives tales or whatever else, I wouldn't want them stretching, you know, too far above their heads."

QUESTION: "So it's true that --"

ANSWER: "Right, this was my feeling, yes."

(Tr. 239).

Similar testimony was elicited at hearing:

QUESTION: And while you were on the job in the position of manager, you directed her job activities in such a way

to conform with what you personally thought a pregnant woman should or shouldn't do?

ANSWER: Right, I wanted her to be careful, that was all.⁵

(Tr. 236).

(8) The hearing testimony of Ms. Agnor and Mr. Hensley also evinced stereotypical beliefs as to the work abilities of males and females in general, assigning males, for example, the responsibility to mop the floors while females operate the cash registers. This evidence tends to support the Commission's position that harmful stereotypes were at work in this case.

As recognized in *Conaway v. Eastern Associated Coal Corp.*, 35 S.E.2d 423, 429 (1986), discriminatory intent can be inferred from "the elimination of the apparent legitimate reasons for the decision". 358 S.E.2d at 430. *See also, West Virginia D.N.R. v. Myers*, 443 S.E.2d 229, 334 (1994). Based on the whole record, the Commission proved by a preponderance of the evidence that the reason proffered by respondent to explain complainant's discharge is not credible and that more likely than not respondent was motivated by a discriminatory reason.

Direct evidence of discriminatory ominous may include comments from a decision maker regarding the reason complainant is being discharged. *Buckley v. Hospital Corp. of American*, 758 F.2d 1525 (11th Cir. 1985). Here, the Commission also offered credible direct evidence of

⁵ Employers may not discharge pregnant workers because of personal beliefs of what a pregnant woman should or should not do. *EEOC v. Red Barron Steak Houses*, 47 FEP Cases 49 (N.D. Cal. 1988).

discrimination in the form of Ms. Hess' testimony that Ms. Agnor told her that she was fired because of her pregnancy and her failure to reveal her "disability" on the job application. To the extent that Ms. Agnor denied making such statements, her testimony is rejected.

The direct evidence of discrimination, when coupled with the evidence proving that respondent's articulated reason for complainant's discharge is not true, leads ineluctably to the conclusion that respondent discriminated against Ms. Hess and that the HRA has been violated.

V. FINDINGS OF ULTIMATE FACTS

1. The Administrative Law Judge finds as fact that complainant is a member of a protected class under the HRA.

2. The Administrative Law Judge finds as fact that the reason given by respondent to explain its discharge of Ms. Hess was not the true reason she was fired, but is a mere pretext for unlawful discrimination because of her pregnancy.

3. The Administrative Law Judge finds as fact that respondent discharged plaintiff because of her pregnancy and that, by doing so, respondent violated W.Va. Code §5-11-9(1).

4. The Administrative Law Judge finds as fact that as a result of respondent's unlawful act complainant suffered lost earnings and is entitled to a "make whole" remedy.

5. The Administrative Law Judge finds as fact that as a result of respondent's unlawful discriminatory act Ms. Hess suffered embarrassment, humiliation, annoyance and mental and emotional distress.

VI. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W.Va. Code §5-11-3(d).
2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W.Va. Code §5-11-3(a).
3. The Human Rights Commission has jurisdiction over this matter, complainant having filed a timely, verified complaint and complied with all procedural requirements of the West Virginia Human Rights Act W.Va. Code §5-11-1, et al.
4. The Commission showed by a preponderance of the indirect evidence that respondent's explanation for complainant's discharge was not the true reason that she was fired, but was a mere

pretext for unlawful discrimination, and that more likely than not plaintiff was discharged because of her pregnancy.

5. The Commission showed by credible direct evidence that respondent discharged complainant because of her pregnancy.

6. Respondent violated W.Va. Code §5-11-9(1) by discharging Ms. Hess because of her pregnancy.

7. Complainant is entitled to the following relief:

(a) Based on 32.5 hours of work per week, and after accounting for all interim earnings, Ms. Hess is awarded \$4,348.06 in back pay for the period of 1 November 1991 until November 1992 when she secured a position which paid more than she would have earned with respondent;

(b) Prejudgment interest on back pay in the amount of \$1,234.56; and

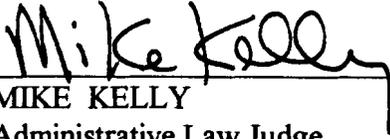
(c) Incidental damages in the amount of \$2,950.00 for the humiliation, embarrassment and loss of personal dignity suffered by complainant as a result of the respondent's unlawful act.

8. The respondent shall reimburse the Commission and the Attorney General its costs in the amount of \$1,594.93.

9. Finally, a cease and desist Order is hereby directed against respondent to cease and desist from engaging in acts of unlawful discrimination in violation of the West Virginia Human

Rights Act. Respondent is further **ORDERED** to post a copy of this decision in all of its stores in West Virginia, so it is fully accessible to its employees, but not the public.

Decided this 9th day of January, 1995.



MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293