



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Bob Wise
Governor

Ivin B. Lee
Executive Director

**VIA CERTIFIED MAIL -
RETURN RECEIPT REQUESTED**

November 26, 2002

Valerie A. Harris
15 Beechwood Dr.
Shinnston, WV 26431

Harrison County Board of Education
PO Box 1370
Clarksburg, WV 26302

Paul R. Sheridan
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Civil Rights Division
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Basis R. Legg, Jr., Esq.
116 South 5th St.
Clarksburg, WV 26301

Re: Harris v. Harrison County Board of Education
ES-223-00

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 January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

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“§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 administrative law 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 an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

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

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

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

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

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

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

If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RBW/mst

Enclosure

cc: Ivin B. Lee, Executive Director
Lew Tyree, Chairperson

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

VALERIE A. HARRIS,

Complainant,

v.

DOCKET NUMBER(S): ES-223-00
EEOC Number: 17JA00096

HARRISON COUNTY BOARD OF EDUCATION,

Respondent

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on December 6, 2001, in Harrison County, in Room 315 of the Employment Security Building at 153 Main Street, Clarksburg, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Valerie Arleen Harris, appeared in person and by counsel for the Human Rights Commission, Paul R. Sheridan, Senior Assistant Attorney General, in the Civil Rights Division of the Office of the West Virginia Attorney General. The respondent appeared in person by its representative, Frank Devono, Acting Supervisor of Personnel; as well as by counsel, Basil R. Legg, Jr., Esquire. The Public Hearing was concluded on May 29, 2002 and briefs were submitted through October 24, 2002.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed

findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

A.

FINDINGS OF FACT

1. Respondent, Harrison County Board of Education has not contested that it is an “employer” and a “person” as those terms are defined in W.Va. Code §§5-11-3(a) and (d) respectively.

2. Complainant, Valerie Harris, is a female resident of Shinnston, West Virginia. Tr. Vol. I, page 20.

3. Complainant is currently employed by respondent as a French Teacher at Bridgeport High, teaching French I through V. She has been employed by respondent since August of 1980. Tr. Vol. I, pages 20 and 21.

4. Complainant graduated from Shinnston High School in 1974 and entered Fairmont State College. She obtained her B.A. in Education in three years graduating in 1977. Tr. Vol. I, pages 21 and 22.

5. Complainant got married and moved to Morgantown, West Virginia and attended

West Virginia University from 1977 until 1979, at which time she received her Master Degree in Education Administration. Tr. Vol. I, page 22.

6. Complainant worked one semester filling in for a teacher on maternity leave in Lewis County in 1977-1978. She taught French and Social Studies for one year in Preston County Public Schools. From 1979-August 1980 complainant taught status offenders to study for the GED while employed by the Industrial Home for Girls in Salem as a general education teacher. Tr. Vol. I, page 23.

7. Complainant was hired by respondent in August 1980 teaching French I, Social Studies and Exploratory French, splitting her days half time between Shinnston Middle School and Lumberport Middle School. She transferred to full time at Shinnston Middle School until it was shut down around 1990, at which time she worked from 1990 through 1992 at Lumberport Middle School. From 1992 until the present, complainant has been employed as a teacher at Bridgeport High School. Tr. Vol. I, pages 24 and 25.

8. The complainant has always received favorable evaluations from the seven or eight different principals and assistant principals who have evaluated her both as a teacher and as a coach. Tr. Vol. I, page 29; Commission's Exhibit No. 1.

9. In 1992, complainant was one of twenty teachers and ten college professors selected by the Humanities Council to attend a two week seminar on teaching multiculturalism. Tr. Vol. I, page 50.

10. In April 1997, complainant was one of approximately six individuals selected by the respondent to attend training on Senate Bill 300. This bill radically changed the educational

requirements in West Virginia, including mandating certain levels of proficiency on the SAT-9; as well as 30 hours of job shadowing and job experience by students. Tr. Vol. I pages 37-39.

11. Complainant was a participant at the Center for Professional Development run by the State Board of Education during the summer of 1997 and was a facilitator teaching at the Center from prepared materials during the summer of 1998 at the Center. Complainant has worked for the Center for Professional Development each year thereafter with the exception of 1999, when she took off to look after her dying father-in-law. She has taught as a presenter from materials she developed on Communication Techniques With Teens, Teaching Strategies in Ninety Blocks in 2000. Other areas of focus included SAT-9 testing format and remediation programs from teaching at the Center as a facilitator. Tr. Vol. I, pages 48-50, 147 and 148.

12. Complainant served as cheerleading coach (or sponsor as it was referred to at the time) at Lincoln High in 1985-1986, Shinnston Middle in 1989-1990, and at Lumberport Middle Junior High either in 1990-1991 or 1991-1992. Tr. Vol. I, pages 44 and 45.

13. Complainant has been Foreign Language Chair at Bridgeport High from 1992 to 1996; and Faculty Senate Chair at Bridgeport High for two terms, 1995-1996, and 1996-1997. Tr. Vol. I, page 47.

14. Complainant has sponsored the French Club, been county coordinator of Teens Against Tobacco Use and the Key Club. Complainant has traveled abroad with students, taking students to Canada while at Lumberport and to Europe every other year since teaching at Bridgeport High. She has taken students to New York International Finance Conference and to the Fashion Conference in New York. Tr. Vol. I, pages 44 and 46.

15. In July 1981 complainant obtained her certification in 7-12 school administration; which remained in effect until June 30, 1987, when she let it expire. Complainant was again certified on December 12, 1997; and that certification is good through June 30, 2003. Tr. Vol. 1, page 40; Commission's Exhibit No. 3.

15. In Spring of 1982 respondent was adding a second assistant principal at each of its high schools and complainant applied for five positions. These were at Bridgeport High, Lincoln High, Washington Irving High, Roosevelt Wilson High and South Harrison High. Complainant was not selected for any of these positions. Complainant applied for the position of Assistant Principal at Shinnston Middle School in the Spring of 1983 and was not hired. George Rice was hired for that position. Tr. Vol. I, pages 41-43.

16. After renewing her credentials, complainant next applied for the position of assistant principal at Bridgeport High School in July 1998. She filled out the bid sheet and provided her resume, copies of the Responsible Student Program she had written, and SAT-9 materials she had gotten from the Center of Career Development to the interview committee. Tr. Vol. I, pages 51,53 and 54; and Commission's Exhibit No. 9.

17. The interview committee was composed of Susan Lee Collins, Lindy Bennett and William Ashcraft. During the interview complainant was asked if her children would interfere with her ability to do the job, and also asked if being a woman she would have a problem in going into the stands at an athletic event to handle a disruption. Complainant was not selected as the successful candidate. The successful candidate was Mark DeFazio, a basketball coach and athletic director for many years at Lincoln High. Tr. Vol. I, pages 72-75.

18. Mark DeFazio, Douglas Hogue, Deborah Harki, Anita Manning, John Christian, Michael Lynch, Mary Frances Smith and complainant applied for the assistant principal job at Bridgeport High. All of the applicants except for Michael Lynch were interviewed for the position. Anita Manning, another woman applicant, also reported being asked by Principal Bennett, in regards to the extreme amount of time required for the assistant principal positions after school for extra curricular activities; "...[W]ho will take care of your children?" This attitude by administrators evidently reflects that of certain School Board members as during one meeting regarding RIF's and bumping at the Central Office, one member commented that the women were "secondary breadwinners". A grid sheet was prepared by the interviewers based upon the statutory criteria in W.V. Code §18A-4-7a. The recommendation sheet listed Mark DeFazio citing as reasons therefore, "dedicated, loyal, willing to spend numerous hours on the job supervising students and employees, states excellent plans for supervising students and monitoring attendance and applying discipline." Tr. Vol. I, page 149, Vol. II, pages 77, 91 and 92; Commission's Exhibit Nos. 10-12, Respondent's Exhibit Nos. 1 and 2.

19. Lindy Bennett is the principal at Bridgeport High. He admits that complainant is dedicated and loyal. He admits that complainant tracks attendance well in her classes. He admits that complainant handles discipline well in monitoring the hallways between classes, during bus duty (where frequent disciplinary concerns arise), during lunch periods and during theatrical productions; but does not acknowledge the school wide nature of these discipline activities. An examination of Principal Bennett's interview notes, does not indicate any significant differences in the ideas for tracking attendance between the other candidates'

responses and that of Mr. DeFazio. Those interview notes further indicate that both Mr. DeFazio and complainant had virtually the same response to the question regarding willingness to throw students out of athletic events, that they would be willing to do so and had done so in the past. The grid sheet was filled out by Principal Bennett, and correctly notes Mr. DeFazio's GPA but misstates complainant's as 3.3 instead of the correct 3.63. Tr. Vol. III, pages 24, 48, 50, 51, 53, 55 and 56, Tr. Vol. V pages 8 and 9; Respondents Exhibits Nos. 1, 5-11, and 12(page 000087),Commissions Exhibits Nos. 12, 20(page000022 and 000029), 22 and 30.

20. Susan Collins had on a prior occasion been hired by Lindy Bennett as his assistant principal at Bridgeport, before being promoted to a central office administrative position. At the time Ms. Collins had been hired to fill that assistant principal position however, Bridgeport had been allotted two assistant principal positions. Ms. Collins indicated that she had been hired to do primarily curriculum. Ms. Collins took on the discipline and attendance duties there at Bridgeport High successfully after the other assistant principal was disappointed that he would not be doing curriculum. Tr. Vol. IV, pages 340 and 341.

21. Complainant applied for the position of Assistant Principal at Lincoln High School in October 1999. She submitted her bid sheet, her resume and took copies of her Responsible Student Program, Middle Curriculum Program and Elementary Language Program she had written. Tr. Vol. I, pages 75 and 83; Commission's Exhibit Nos. 13 and 15.

22. That posting listed preferences for computer familiarity with WVEIS the system for keeping student records. Only principals, assistant principals and designees of the superintendent are allowed to use the system, but complainant had 2 graduate level computer

classes in the Masters program. It listed Stanford Achievement test program and improving scores. Obviously complainant was very qualified in that area as she taught other teachers at the Center for Professional Development in subjects related to the SAT-9. Complainant was certified on evaluation of professional personnel and was familiar with Policy 5310. Complainant had worked on committees to set up Individual Education Plans for students with mental or physical handicaps and was thus familiar with the duties of chairing the Student Based Assistant Team. She had worked with the Safe and Drug Free Schools Program as Sponsor for Teens Against Tobacco Use and wrote the Responsible Student Program when it came out. Tr. Vol. I, pages 77-80; Commission's Exhibit No. 13.

23. The interview committee for the Lincoln High Assistant Principal position was composed of Jerry Toth the Principal at Lincoln High, Bill Watson (teacher), Jackie Boyles (teacher) and Mark DeFazio, the Assistant Principal at Bridgeport High. The other applicants were Thomas F. Crowley and Brad Underwood. Complainant was not selected as Assistant Principal. Brad Underwood, a boys basketball coach at RCB, was selected. Tr. Vol. I, pages 81 and 84; Commission's Exhibit Nos. 14 and 15.

24. Prior to the interview she spoke with Mr. Toth, the Principal, who specifically mentioned that he was particularly interested in somebody with experience in the testing. Lincoln High had been on academic probation with low test scores, and boosting test scores was a particular need. Complainant not only was extremely qualified in this area, but Mr. Toth was also aware of her special qualifications in that area. Mr. Toth was not credible in testifying that he assumed Mr. Underwood to be qualified in SAT-9 test score remediation as well simply

by virtue of being a teacher. Tr. Vol. I, page 92; Vol. II, pages 266-267; Vol. IV, pages 233-234, and 236.

25. The day before the interview Mr. DeFazio came to her room to inform her that he would be on the interview committee. She and Mr. DeFazio had bad feelings from having been through the earlier job interview. Mr. DeFazio told her that only she and Mr. Crowley would be applying and specifically denied that his friend Brad Underwood would be applying for the job. When she showed up the following day Mr. Underwood was there to be interviewed for the job. When complainant expressed her surprise that he had applied, Mr. Underwood stated that he had received two calls the night before telling him to apply. In addition to the questionable propriety of Mr. DeFazio serving on the interview committee, it is interesting that the two teachers selected included, Mr. Watson, who indicated his dislike for SAT tests during the interview (an area the complainant was particularly strong), and Ms. Broyles, a teacher who questioned the complainant regarding the fact that she had removed her child from Lincoln High for curriculum reasons. Tr. Vol. I, pages 92-94 and 180.

26. Prior to the Assistant Principal position being posted it had been filled by Dr. Brisbin, on two separate occasions at Lincoln High, while the Principal was Mr. Toth. Dr. Brisbin felt that her qualifications might have been far superior to the other applicants when she was hired to fill that position. Dr. Brisbin's perception was that at the high school level, the committees always wanted a qualified male first. Dr. Brisbin testified credibly that while she served in the position of Assistant Principal at Lincoln High, Mr. Toth, the Principal at Lincoln, had expressed concerns over her ability to handle physical confrontations. Tr. Vol.

II, pages 203-206 and 234.

27. Respondent school system currently employs 21 principals and assistant principals in the traditional grades 6-12 middle and high schools. Twenty are men and only one is a woman in these slots. The one woman was the best qualified individual for the job and awarded the position of Assistant Principal at South Harrison Middle School through the competitive bid process in 1992, but was hired only after she had filed a complaint with the Human Rights Commission and it had been litigated to the West Virginia Supreme Court. That woman is Pamela Carson-Leggett. In the past the respondent has employed Dr. Brisbin and Susan Collins as high school and middle school in school administrative staff. Dr. Brisbin had superior educational and work experience advantages at the time she had been hired. Ms. Collins did not receive any of the seven new assistant principal positions when they were posted in 1982 for the high schools and was subsequently hired as an elementary administrator. Ms. Collins had been hired in at the 6-12 level at a time when two assistant principals were employed at Bridgeport High School; and had been hired to work primarily on curriculum. Both subsequently moved into administrative positions in the central office. Tr. Vol. II, page 204; Vol. IV, pages 22, 23, 137 and 339-341; Commission's Exhibit No. 23 and Harrison County Bd. Of Educ. v. Carson-Leggett, 466 S.E.2d 447 (W.Va. 1995).

28. Interviews are conducted following the seven statutory criteria listed in the Code; which are reflected in the various categories on the grid sheet prepared for the interview, and upon which grid various information is recorded under those columns for each of the candidates. Some witnesses claimed that there is a system for weighing but differ upon which

categories of qualification are subject to weighing one candidate against the other, and which you either get credit for or not. No two administrators described the distinctions as the same. Some times numerical scores are given on the grids sometimes not. The systems setting the relative weights assigned to each criteria are supposed to be provided in advance of the interview. Sometimes the interview committees are selected by the Faculty Senate, sometimes by the Board Central Office, sometimes there is more than one interview committee. Although the Superintendent of Schools makes the decision to recommend who the Board of Education should hire, that individual usually goes along with the recommendation of the interview committees or acquiesces to the desires of the principal at the school. In the present case there is no indication that any system for scoring the weight of the various candidates under each criteria was developed in advance of the interviews regarding either the Bridgeport or Lincoln Assistant Principal postings. No Scores appeared for the grid sheet on the Bridgeport posting and the two candidates were tied according to the grid sheets for the Lincoln posting. Commission's Exhibits No. 12 and No. 15; Tr. Vol. III, pages 163-165, 168-170 and 200-204; Tr. Vol. IV, pages 114-123, 127, 201, 218, 279-281, 288-290, 316, 319 and 320.

29. Mr. Toth was only able to articulate two criteria in the posting for which Mr. Underwood was exceptionally qualified, those criteria being attendance and discipline. Mr. Toth acknowledged that Complainant was qualified in these areas as well. In all of the other criteria, Complainant was evidently better qualified. It is difficult to know exactly what criteria were used in evaluating other factors under the grid sheet or what Mr. Underwood's qualifications were because respondent represented that the file folders for this posting and

that of the Bridgeport Assistant Principal posting had been removed by persons unknown. Furthermore, no comparator information was provided for Mr. Underwood despite this information having been subpoenaed for public hearing. No adverse inference was made by the undersigned concerning this failure to keep comparator information as required by regulations or the failure to comply with the subpoena duces tecum over protestations by Commission's counsel that complainant was prejudiced thereby. Tr. Vol. I, pages 7-10; Vol. IV, pages 248 and 249.

30. Based upon a preponderance of the evidence before the undersigned, complainant has demonstrated that she was not selected for the position of Assistant Principal at Lincoln High School because she was female; and, that a less qualified man was hired in her stead based upon stereotypes concerning the abilities of women to handle discipline and attendance at the middle school and high school levels.

31. The undersigned concludes that these same stereotypes, concerning the ability of men to handle discipline better than women, have resulted in a continuing pattern and practice violation of the West Virginia Human Rights Act by respondent regarding hiring decisions for middle school and high school principal and assistant principal job postings.

32. As a result of the unlawful sex discrimination of respondent, complainant was hurt and felt violated, by not being given an equal opportunity to do that for which she was educated and trained; and, is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity.

33. As a result of respondent's unlawful failure to hire complainant for the Assistant

Principal position at Lincoln High in 1999, complainant is entitled to a back pay award of \$42,429.17 through November 30, 2002, award of the next available assistant principal position at the high school level, and front pay of \$1,364.40 per month until instated into such a position. Joint Exhibit No. 1 and November 18, 2002 correspondence from Paul R. Sheridan Senior Assistant Attorney General Civil Rights Division per undersigned's Order updating back pay damage calculations through November 2002 and monthly front pay differential.

B.

DISCUSSION

West Virginia Code § 5-11-9(1) of the West Virginia Human Rights Act, makes it unlawful "for any employer to discriminate against an individual with respect to ... hire, tenure, conditions or privileges of employment if the person is able and competent to perform the services required..." The term "discriminate" or "discrimination" as defined in W.Va. Code § 5-11-3(h) means to "exclude from, or fail or refuse to extend to, a person equal opportunities because of sex..." In order to establish a case of disparate treatment for discriminatory discharge or failure to hire under W.Va. Code § 5-11-9, with regard to sex, the complainant must prove as prima facie case, that:

1. The complainant is a member of a protected class;
2. The employer made an adverse decision concerning the complainant; and,
3. But for the complainant's protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

A discrimination case may be proven under a disparate treatment theory which

requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and, adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a prima facie case of discrimination; the respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by the respondent was not the true reason for the decision, but rather pretext for discrimination.

The term “pretext” has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986). Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and, where pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). Although, discrimination need not be found as a matter of law. St. Mary’s Honor Society v. Hicks, 509 U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the “mixed motive” analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v.

Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. “Mixed motive” applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the complainant need only show that the complainant’s protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the complainant’s protected class had not been considered. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

Applying these standards, complainant has established that she is a member of a protected status in that she is female. The respondent took adverse employment action against complainant when she was not selected as the successful candidate for the position of Assistant Principal of Lincoln High School in Harrison County. The successful candidate was a male. Thus, complainant has established a prima facie case of unlawful sex discrimination. The respondent has offered non discriminatory reasons for not selecting complainant as the successful candidate. The preponderance of both the direct and circumstantial evidence indicates that a discriminatory motive was at least involved in the decision not to select complainant as the Assistant Principal at Lincoln High School in 1999. Further, under the burden shifting formula of McDonnell Douglas the complainant has shown by a preponderance of the evidence that those reasons advanced by respondent for the termination were pretextual. Under the mixed-motive analysis of Price-Waterhouse certainly the respondent has the opportunity to show that the complainant would not have been selected absent the unlawful

discriminatory animus of the respondent but has failed to do so.

Perhaps the most compelling evidence for sex discrimination on the part of respondent in its hires for in school administrators at the middle school and high school level are the overall numbers of assistant principal and principals at this level by sex of those individuals holding the job. Currently, twenty positions are held by men and one by a woman. That one woman is Pamela Carson-Leggett, who filed a discrimination case in 1990 and was hired by competitive bid as the most qualified assistant principal at South Harrison Middle School in 1992. Dr. Brisbin, has twice been hired as Assistant Principal at Lincoln High School; while Mr. Toth was Principal there. Certainly Dr. Brisbin's academic achievement and experience seem to be far in excess of that of the other candidates whose credentials are in the record before the undersigned from different hiring decisions. There is direct evidence that Mr. Toth does not see discipline as an area where woman can be as effective as men. Principal Toth directly expressed his concerns regarding Dr. Brisbin's physical safety during disciplinary incidents. The remaining woman who has served as Assistant Principal at middle or high school levels, was hired by respondent while Mr. Bennett was Principal at Bridgeport High School. That individual was Susan Collins. She was hired at a time when two assistant principals served at Bridgeport High and was hired primarily to handle curriculum.

Further circumstantial evidence that the reason given for the recommendation of Brad Underwood as Assistant Principal is pretextual has to do with the make up of the Lincoln High School Assistant Principal posting interview committee. Although the central office appointed Mark DeFazio to serve on that committee, it would appear that the Principal, Mr. Toth had

selected the two teachers to serve on the committee. It seems very suspicious that the two teachers would have an aversion to SAT-9 testing, as did Mr. Watson, or dislike that complainant's daughter was going to a different high school, as did Ms. Broyles. These suspicious circumstances are compounded by the fact that Mark DeFazio, who served under Principal Toth as Athletic Director and Coach for many years, and Principal Toth himself, appear to have called Mark DeFazio's buddy, Brad Underwood, the night before the interviews to get him to apply for the position. The only direct evidence of the relative qualifications of the two applicants, is the grid sheet filled out by the interview committee, which indicates that the two scored equal at 4 points. The category under which Brad Underwood scored a point which complainant did not was that of performance criteria of job description on the grid sheet. Certainly a review of the credentials indicates that Brad Underwood had nowhere near the credentials regarding SAT-9 testing and remediation, an area of particular concern supposedly. He did not have the level of education that complainant had, as he only had his MA; while complainant had an MA +30 (the point which she got and he didn't on the grid sheet). Complainant had much greater experience in professional development. All of this evidence makes it more likely than not, based upon the preponderance of the evidence of record, that the supposed reason for selecting a male, Brad Underwood, is merely pretext for discriminating against complainant in the hiring decision for the post of Assistant Principal at Lincoln High School, because she is a woman.

The undersigned could not look at all hiring decisions for the past twenty plus years in ascertaining the merits of this case. Thus the undersigned concentrated on the two postings for

which complainant did apply and which were specified in her complaint. The Board of Education consisted of five men in 1998 and 1999 when these recommendations and hiring decisions were made. One of the five commented to Annita Manning in response to why she was being let go and not more recent hires, was told well the women affected were “secondary breadwinners.” The Bridgeport High School posting was handled by the respondent Board of Education just one year earlier. It involved a different interview team. Thus the undersigned considered it in regards to the continuing pattern and practice claim of the complainant regarding the general hiring decisions for these types of positions, but not for purposes of determining whether she was discriminated against in regards to the Lincoln High School posting. In that instance similar reasons were also advanced for the hiring of the successful applicant, a male, over that of complainant and others, including other highly qualified women. In that instance again, the primary duties of the assistant principals at the middle school and high school level were stated to be in the area of attendance and discipline. The undersigned found it very curious and suspicious given the stated reasons for that selection, that Mark DeFazio had better ideas for attendance and discipline, those reasons just didn’t seem to hold water when the interview notes of Principal Bennett were reviewed. Regarding going into the stands to put students out of athletic events, complainant and Mr. DeFazio answered the question the same according to those notes. Ideas for discipline as reflected in those interview notes indicate that many of the woman interviewees answered that portion of the interview questions with essentially the same response as did Mr. DeFazio. Despite stating that Athletic Director experience does not count for relevant Administrative Experience, those two male

candidates that had such experience had it at least noted if not counted both under that category and under the Other Indicators category as well. While other experience which those who served on interview teams or as Personnel Director indicated would be relevant to these categories do not appear on the grid sheet. Complainant's GPA was misrepresented on the grid sheet for the Bridgeport High posting. That posting seem to indicate that the assistant principal would be responsible for duties of the Athletic Director, however, in both cases the high school already had a separate athletic director. Complainant had her evaluation certificate and thus was authorized to conduct evaluations of coaches and athletic directors. The fact that she had that certificate is not noted for her on the grid sheets.

An examination of the interview process would seem to indicate that it can be quite subjective and carried out without much consistency or objective documentation. This leaves the undersigned (and those conducting appellate review) with very little to look at besides the raw numbers, which don't look good for respondent. Although the undersigned would conclude that the preponderance of the evidence proves a case of continuing violation pattern and practice failure to hire female principals and assistant principals for the middle and high schools in Harrison County; the evidence is not particularly coherent enough or extensive enough to make such a determination regarding a disparate impact claim. It cannot be discerned on this record whether this continuing pattern and practice failure to hire women administrators in the middle and high schools appears due to disparate treatment involving plain discrimination based on the perception that women won't be good at discipline and attendance, or due to disparate impact because the athletic directors and mens basketball and football

coaches receive unlawful preferences and tend to be men historically. Since the finding of the undersigned is that the complainant has proven by a preponderance of the evidence that she was discriminated against unlawfully on the basis of her gender by the respondent in failing to hire her for the Assistant Principal at Lincoln High School in 1999; the undersigned will issue a cease and desist order on that basis, without ruling on the issues of whether there is a disparate impact on women in violation of the West Virginia Human Rights Act by virtue of an unavowed priority for those applying for these positions with respondent who have served in the past as athletic directors or as men's basketball or football coach. Certainly, the evidence before the undersigned strongly suggests that this is in fact the case and therefore a statewide investigation into this phenomena would be very desirable so that accurate statistics can be generated and gathered on a statewide basis.

The West Virginia Supreme Court has held that the Commission's jurisdiction to hear a case is dependant upon adequate notice of the discriminatory practice or those sufficiently related to or growing out of the allegations in the complaint. McJunkin Corporation v. West Virginia Human Rights Commission, 369 S.E.2d 720 (W.Va. 1986). An examination of the complaint filed in this matter indicates that she plainly contests the failure to hire for the Lincoln High School Assistant Principal position within a timely fashion. I believe the case law constrains the Commission to award back pay damages only for those failures to hire which are filed within the statute of limitations for these claims, i.e. within three hundred sixty five days of the notification that he complainant was not hired. Nevertheless, the undersigned concludes that the Human Rights Act does contemplate a pattern and practice continuing

violation claim in regards to hiring practices. When a legitimate candidate for a job has demonstrated that he has been the subject of unlawful discrimination in the employment process, he is entitled to an injunction against future, or continued discrimination. Nanty v. Barrows Co., 660 F.2d 1327, at p. 1333 (9th Cir. 1983).

C.

CONCLUSIONS OF LAW

1. The complainant, Valerie Harris, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, W. Va. Code §5-11-10.

2. The respondent, Harrison County Board of Education, is a “person” and an “employer” as those terms are defined under W. Va. Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.

3. The complaint in this matter was properly and timely filed in accordance with W. Va. Code §5-11-10.

4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

5. The complainant has established a prima facie case of sex discrimination. The respondent has articulated a legitimate non discriminatory motive for the respondent’s action, that the complainant was not the most qualified applicant for the position of Assistant Principal at Lincoln High School; which the complainant, by a preponderance of the evidence has proven

to be pretext for sex discrimination.

6. As a result of the respondent's unlawful discriminatory conduct, complainant is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity.

7. As a result of the respondent's unlawful discriminatory conduct, complainant is entitled to back pay from the date of hire for the Assistant Principal at Lincoln High School in 1999 through the end of the month of the date of the Final Decision, November 30, 2002; in the amount of \$42,429.17, plus simple 10% prejudgment interest on that amount; reinstatement in the next assistant principal position at the high school level, and front pay of \$1,364.40 per month until so instated.

8. The Commission is entitled to reasonable costs in the amount of \$3,381.20; and, the Office of the West Virginia Attorney General, Civil Rights Division is entitled to reasonable cost of \$518.65, incurred in the prosecution of this matter, as set forth in West Virginia Human Rights Commission's Itemization of Litigation Expenses attached to Commission's proposed Findings of Fact and Conclusions of Law and Memorandum of Law.

D.

RELIEF AND ORDER

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

1. The above named respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of the receipt of the undersigned's order, the respondent shall pay the Commission reasonable costs in the amount of \$3,381.20; and, the Office of the West Virginia Attorney General, Civil Rights Division reasonable cost of \$518.65, incurred in the prosecution of this matter, as set forth in West Virginia Human Rights Commission's Itemization of Litigation Expenses attached to Commission's proposed Findings of Fact and Conclusions of Law and Memorandum of Law.

3. Within 31 days of receipt of the undersigned's order, the respondent shall pay the complainant incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination, plus statutory interest of ten percent.

4. Respondent shall tender back pay from the date of hire for the Assistant Principal at Lincoln High School in 1999 through the month of the date of the Final Decision, November 30, 2002; in the amount of \$42,429.17, plus simple 10% prejudgment interest on that amount; instate the complainant in the next assistant principal position at the high school level, and tender front pay of \$1,364.40 per month until so instated, plus statutory interest of ten percent on all back pay plus prejudgment interest thereon and front pay awarded.

5. In the event of failure of the respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Ivin B. Lee, Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 25th day of November, 2002.

WV HUMAN RIGHTS COMMISSION

BY: *Robert B. Wilson*
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

STATE OF WEST VIRGINIA
I, *Cheryl B. Lee*,
EXECUTIVE DIRECTOR OF THE WEST VIRGINIA
HUMAN RIGHTS COMMISSION DO HEREBY CERTIFY
THAT THE FOREGOING IS A TRUE COPY FROM THE
RECORDS OF THE COMMISSION GIVEN UNDER MY
HAND AND SEAL THIS 26 DAY OF Nov. 2002
Monica S. Furlow CLERK
WEST VIRGINIA HUMAN RIGHTS COMMISSION
STATE OF WEST VIRGINIA