



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.
Governor

June 12, 1987

Brenda Salyers
General Delivery
Berwind, WV 24815

Consolidation Coal Co.
(Bishop Coal Co. Mine #36)
P.O. Box 598
Pocahontas, VA 24635

Betty J. Hall
16221 Sunny Knoll Lane
Dumfries, VA 22026

Richard Klein, Esq.
Consol Plaza
1800 Washington Rd.
Pittsburg, PA 15241

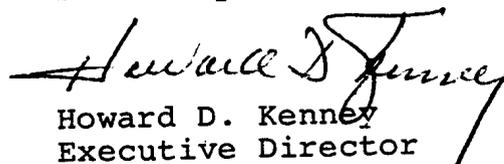
RE: Salyers v. Bishop Coal Co. Mine #36 a corporation
ES-492-81

Dear Parties:

Herewith, please find the order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this order.

Sincerely,


Howard D. Kenney
Executive Director

HDK/mst
Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Enr. H. B. 2638]

8

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an
2 application for review may be prosecuted by either
3 party to the supreme court of appeals within thirty days
4 from the receipt thereof by the filing of a petition
5 therefor to such court against the commission and the
6 adverse party as respondents, and the clerk of such
7 court shall notify each of the respondents and the
8 commission of the filing of such petition. The commis-
9 sion shall, within ten days after receipt of such notice,
10 file with the clerk of the court the record of the
11 proceedings had before it, including all the evidence.
12 The court or any judge thereof in vacation may
13 thereupon determine whether or not a review shall be
14 granted. And if granted to a nonresident of this state,
15 he shall be required to execute and file with the clerk
16 before such order or review shall become effective, a
17 bond, with security to be approved by the clerk,
18 conditioned to perform any judgment which may be
19 awarded against him thereon. The commission may
20 certify to the court and request its decision of any
21 question of law arising upon the record, and withhold
22 its further proceeding in the case, pending the decision
23 of court on the certified question, or until notice that the
24 court has declined to docket the same. If a review be
25 granted or the certified question be docketed for
26 hearing, the clerk shall notify the board and the parties
27 litigant or their attorneys and the commission of the fact
28 by mail. If a review be granted or the certified question
29 docketed, the case shall be heard by the court in the
30 manner provided for other cases.

31 The appeal procedure contained in this subsection
32 shall be the exclusive means of review, notwithstanding
33 the provisions of chapter twenty-nine-a of this code:
34 *Provided*. That such exclusive means of review shall not
35 apply to any case wherein an appeal or a petition for
36 enforcement of a cease and desist order has been filed
37 with a circuit court of this state prior to the first day
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a
40 final order of the commission within thirty days after
41 receipt of the same. or. if applicable. within thirty days
42 after a final order of the supreme court of appeals. a
43 party or the commission may seek an order from the
44 circuit court for its enforcement. Such proceeding shall
45 be initiated by the filing of a petition in said court. and
46 served upon the respondent in the manner provided by
47 law for the service of summons in civil actions; a hearing
48 shall be held on such petition within sixty days of the
49 date of service. The court may grant appropriate
50 temporary relief. and shall make and enter upon the
51 pleadings. testimony and proceedings such order as is
52 necessary to enforce the order of the commission or
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BRENDA SALYERS,

Complainant,

v.

DOCKET NO. ES-492-81

BISHOP COAL COMPANY MINE #36,
a Corporation,

Respondent.

RECONSIDERATION ORDER

On August 28, 1986, the Commission entered its order granting complainant's motion for reconsideration in the above-captioned matter. Subsequent thereto, the Commission has reviewed the entire evidentiary record, its previous order entered on June 27, 1986, the Hearing Examiner's amended recommended decision, exceptions thereto, the motion for reconsideration and responses thereto.

Upon said review, the Commission does reverse its determination as set forth in the June 27th order that complainant has not met her ultimate burden of establishing sex discrimination on the basis of disparate treatment related specifically to the respondent's denial to her of the position as faceman.

Conversely, upon said review, the Commission does sustain its prior determination that the complaint should be dismissed on the complainant's claim of sexual harassment, thereby rejecting the Hearing Examiner's proposed conclusions of law that respondent's actions, both in denying a medical excuse to the complainant and in interrogating the complainant about an alleged relationship with a supervisor, constitute sexual harassment within the meaning of WV Code 5-11-1 et. seq. As previously

stated, the medical excuse allegation has been determined by the Commission to be irrelevant and not susceptible to a sexual harassment theory. On the latter claim, the complainant has failed to establish a prima facie case of sexual harassment.

Finally, the Commission has considered the proposed recommendation of the Hearing Examiner that further evidentiary development would be necessary for determination of the complainant's claim that respondent had engaged in a pattern and practice of discrimination related to its denial of training opportunities to female employees. The Commission concurs that the evidence of the record as a whole, particularly the work force statistical data presented by the complainant, is legally insufficient to demonstrate a significant or probative disparity between the respondent's treatment of its female employees and its male employees related to training opportunities. Therefore, the Commission concludes that the complainant has not sustained her burden of proving a pattern and practice of discrimination. The recommendation of the Hearing Examiner that the Human Rights Commission either directly or indirectly involve a vocational expert to evaluate the job skills in the underground coal mining industry in southern West Virginia, while laudable, is rejected as overbroad and not related to the merits of the pattern and practice allegation against respondent.

To the extent that the amended recommended decision of the Hearing Examiner is replicated or in accordance with the findings and conclusions stated herein, it has been accepted. To the extent that it is inconsistent with the herein findings and conclusions, it has been rejected. Certain findings and conclusions have been added as necessary to a proper determination of the material issues presented.

I.

PROCEDURAL HISTORY

A complaint was filed before the West Virginia Human Rights Commission on the 17th day of April, 1981, by complainant, Brenda Salyers, alleging that respondent, Bishop Coal Company, had discriminated against her and other females on the basis of gender.

Following a probable cause determination, public hearings were convened in McDowell County, West Virginia, June 10, 1985 and July 30, 1985, respectively. The complainant appeared in person and by counsel, Betty Jean Hall. The respondent was represented by its counsel, Richard Klein. Juliet Rundle, a Pineville, West Virginia attorney, presided as Hearing Examiner. The parties waived the presence of a Hearing Commissioner.

II.

ISSUES

1. Whether respondent unlawfully discriminated against the complainant on the basis of her sex by denying her a position as faceman.
2. Whether the respondent engaged in unlawful sexual harassment against the complainant by interrogating her about a rumored affair.
3. Whether the respondent engaged in a pattern and practice of unlawful discrimination against its female employees related to training opportunities.

III.

FINDINGS OF FACT

1. The complainant, Brenda Salyers, was hired by respondent, Bishop Coal Company, a subsidiary of Consolidated Coal Company, on October 17, 1977, as an entry level miner, with an effective seniority date of February 3, 1975.

2. In early February, 1981, the complainant, then classified as a grade one beltman, bid to become a grade three faceman, a position which respondent had posted as available pursuant to a UMWA/BCOA contract.

3. Operating a scoop machine was an essential duty performed by a faceman. According to experienced scoop operators employed by respondent, the scoop was a relatively simple piece of mining equipment to operate, and skill to do so could be quickly mastered.

4. On February 13, 1981, following complainant's bid, the respondent posted a notice that there were no eligible bidders for the vacant position.

5. The complainant protested the denial of the faceman position because she had acquired the basic skill necessary to operate a scoop through self training prior to her bid.

6. According to the respondent, complainant was denied the position of faceman because she was not fully trained to operate a scoop. There is no dispute as to complainant's other qualifications to assume the position in issue.

7. Respondent further stated the complainant was deemed ineligible for the faceman position because the complainant had not been observed by respondent's foremen operating a scoop prior to the time it made its decision that there were no eligible bidders.

8. Several experienced scoop operators employed by respondent testified that they had observed complainant operating a scoop prior to February 19, 1986, and that based on their knowledge of what was required to operate a scoop and complainant's ability, the complainant was capable of operating a scoop.

9. The complainant demonstrated the basic qualifications required to operate a scoop (any worker would require additional time to perfect skill on the scoop).

10. Three to four months prior to complainant's bid, respondent had assigned a male employee, Carlton Smith, who possessed little or no training or experience, to a position as scoop operator. Mr. Smith was not tested or otherwise required to demonstrate his proficiency on the scoop. Mr. Smith was not a fully trained operator at the time of complainant's bid or tests, but rather, by respondent's admission, was still being provided on-the-job training.

11. As a result of the complainant's protest she was tested by the respondent on February 19, 1981 and March 27, 1981 to prove her ability to operate a scoop.

12. No male employee had ever been tested prior to being assigned to operate the scoop.

13. Both scoop tests were performed under less than acceptable test conditions. At the time of the first test the brakes on the scoop complainant operated were bleeding off. Respondent was aware of this defect, but the test proceeded in any event. Respondent, at the conclusion of the test, informed the complainant that she had failed the test. At the time of the second test, administered as a result of complainant's grievance, the microswitch on the scoop complainant was

operating was in reverse, a highly unusual circumstance which was brought to the attention of the respondent. In spite of this obstacle, the complainant believed that she adequately demonstrated her ability to operate the scoop. Respondent, on the other hand, determined that the complainant had not demonstrated the requisite skill needed to operate the scoop, and thus denied the faceman position to the complainant.

14. Subjective criteria was disparately applied by the respondent to the complainant in its decision making processes. The respondent used no objective or uniform criteria to determine complainant's eligibility for placement in the faceman position.

15. Immediately after the respondent determined complainant had failed the second the test, thereby disqualifying her for the position of faceman, the complainant was directed by respondent to operate the scoop as part of her regular duties the remainder of her shift.

16. During 1981, rumors of an alleged affair between the complainant and a male supervisor circulated at respondent's worksite. Respondent became aware of the rumor.

17. Complainant was interrogated by respondent about the rumored affair by the respondent.

18. The male supervisor also was interrogated by respondent about the rumored affair.

19. Notwithstanding the truth or falsity of the rumor, respondent's action in questioning the complainant about the alleged rumor was reasonable and equitable.

20. Although respondent had no formal training program at its worksite, complainant's statistical showing which did not involve the opinion of an expert was insufficient and not probative of disparity in respondent's workforce related to training.

21. The complainant suffered mental anguish and humiliation because of respondent's discriminatory treatment toward her.

22. The complainant suffered loss of wages because of respondent's discriminatory treatment toward her. As per the stipulation of the parties, the complainant's backpay is \$400.00. Complainant is entitled to statutory interest on that amount until it is paid.

23. Complainant's attorney reasonably expended 208.4 hours of attorney time in litigating these matters.

24. A reasonably hourly rate for the legal services rendered by complainant's attorney is \$95.00 per hour through May 31, 1983 and \$110.00 per hour commencing June 1, 1983.

25. Complainant has expended \$1,875.64 costs reasonably necessary for the litigation of this matter. Complainant's fee affidavits and cost schedules are attached as Exhibit A & B.

IV.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to WV Code 5-11-1 et. seq.

2. Complainant has established a prima facie of discrimination related to the denial of the position of faceman in February of 1981.

3. Complainant has shown that the reasons articulated by respondent for the denial of the faceman position to complainant are pretextual.

4. Respondent discriminated against complainant on the basis of her sex in violation of WV Code 5-11-9(a) by denying her the faceman position in February of 1981.

5. Complainant has failed to establish a prima facie case of sex discrimination related to allegations of sexual harassment.

6. Complainant has failed to sustain her burden of establishing a pattern and practice of sex discrimination engaged in by respondent related to the denial of training opportunities at respondent's worksite to female employees.

V.

DISCUSSION OF CONCLUSIONS

In an action to redress unlawful discrimination practices in employment under the West Virginia Human Rights Act, as amended, WV Code, 5-11-1, et seq., the burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination. If the complainant is successful in creating this rebuttable presumption of discrimination, the burden then shifts to the respondent to articulate some legitimate and non-discriminatory reason for the rejections. Should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination. Shepherdstown VFD v. West Virginia Human Rights Commission, ___ W.Va. ___ 309 S.E. 2d 342 (1983).

In the instant case, complainant has established a prima facie case of sex discrimination related to respondent's denial to her of the faceman

position in February, 1981 by proving facts, which if otherwise unexplained raise an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567 (1977); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

It is undisputed that the complainant, a protected class member, bid on an available position as faceman posted by respondent in early February of 1981. The complainant has established that she was qualified for that position by proving, upon a preponderance of the evidence, that she had acquired the skill necessary to operate the scoop, a primary duty performed by a faceman at the time of her bid, and, that despite her qualification, she was denied the position. The Complainant offered the testimony of four co-workers all of whom were experienced scoop operators and all of whom knew the complainant. They, as well as respondent's own witness, an experienced scoop operator, testified that, based on their knowledge of what was required to operate a scoop effectively and complainant's ability, that the complainant was fully capable of being a scoop operator. Several of these witnesses had observed the complainant operate a scoop prior to her first test in February 1981. Finally, complainant established that respondent had three months previously, assigned a similarly situated male, no more qualified than she, to a position as faceman.

The respondent's assertions or articulation in rebuttal of complainant's prima facie showing was that complainant was initially denied the faceman position after her bid because she was not a fully trained scoop operator, a necessary corollary of the faceman position. In addition, respondent maintained that complainant was initially denied the faceman position because she had not been observed operating a scoop by her shift foreman

or any foreman who would have been in a position to recommend an eligible bidder for placement in that job. Finally, respondent explained that because the complainant protested the initial denial on February 19, 1981, that she was provided two separate testing opportunities to prove her ability to operate a scoop but that the test results confirmed respondent's disqualification of the complainant.

Complainant has demonstrated that the reasons articulated by the respondent denying the faceman position to complainant as pretextual.

Complainant has established that the respondent applied disparate criteria to assess the complainant's qualifications when compared with criteria it utilized to determine the qualifications of a least one male employee, Carlton Smith a faceman assigned to a scoop. Standardless subjective assessments disparately applied by employers have been condemned as ready mechanisms for discrimination. Rowe v. General Motors, 457 F.2d 348 (5th Cir. 1972); Johnson v. Olin Corp., 484 F. Supp. 577 (S D. Tex. 1980) Respondent required the complainant to be a fully trained operator in order to qualify for the faceman job while assigning Carlton Smith a few months earlier to a position as faceman without imposing a requirement that he be fully trained before he assumed the position or that he pass a test. To be sure, respondent admitted that Carlton Smith was still being trained as a scoop operator the evening complainant was initially tested which was less than three to four months after he had been assigned to the faceman job. Complainant has further demonstrated the irreconcilable nature of respondent's explanation that complainant was denied the bid award because she had never been observed operating a scoop, with its articulation that the complainant was denied the bid because she was not a fully trained scoop operator.

Moreover, the complainant established that, notwithstanding her ability to operate the scoop, that the two tests respondent set up to allow her to prove her qualification as a scoop operator, were administered under highly suspect testing conditions and were subjectively measured by respondent to her disadvantage. Finally, complainant has demonstrated pretextuality by proffering unrebutted testimony that after she was disqualified as a faceman following the second test, that respondent directed her to operate the scoop as part of her duties on the remaining part of her shift. Complainant, thus, has sustained her claim on this issue.

An opposite result is reached by the Commission on complainant's second claim, that of sexual harassment. Simply stated, the complainant has failed to establish a prima facie case of sexual harassment. Clearly, sexual harassment violates the WV Human Rights Act which proscribes discrimination on the basis of sex. WV Code 5-11-1 et. seq. The federal guidelines adopted by the Equal Employment Opportunity Commission (EEOC) relating to sexual harassment and employer liability, as well as court decisions interpreting said guidelines, provide a lodestar for the Human Rights Commission in determining claims of this nature under the Human Rights Act.

In pertinent part, the guidelines define sexual harassment as "[u]nwelcome, request for sexual favors and other verbal or physical conduct of a sexual nature." However, in order to constitute unlawful activity under the guidelines, in the context of the employment relationship, the guidelines provide that sexual harassment must meet one of three criteria:

- (1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individuals employment;
- (2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- (3) Such conduct has the purpose or effect of unreasonably interfering with an individuals work performance or creating an intimidating, hostile or offensive work environment. 29 CFR 1604.11 (a) (1981).

Applying the above standards to the case at bar, complainant's allegations of sexual harassment falls squarely within the third criteria or condition of work category. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). On this theory, in order to establish a prima facie case of sexual harassment involving a discriminatory work environment, the elements of proof the complainant must show are as follows: (1) that she belongs to a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) respondeat superior.

Although the complainant is a member of a protected class; and she has established that the conduct of which she complained was of a sexual nature, i.e., interrogation about a rumored affair with a supervisor, the complainant has failed to satisfy the third element of Henson, supra that she was singled out for adverse treatment because of her sex. It is uncontroverted that the respondent also called in the male supervisor allegedly implicated in the rumor of the affair. Having concluded the same, it is unnecessary to read the issue of whether the respondent's actions, notwithstanding the truth or falsity of the rumor was reasonable if not legally compelled.

Accordingly, it is hereby ORDERED as follows:

1. Complainant's claims alleging sexual harassment and pattern discrimination engaged in by respondent are dismissed.

2. Complainant's claim alleging unlawful sex discrimination relates to the denial of the faceman position is sustained.

3. The respondent shall immediately cease and desist from discriminating against individuals on the basis of gender. To that end, the respondent shall institute affirmative action including, but not limited to, utilization of objective standards and measurements to ensure against discrimination in its decision making practices.

4. The respondent shall pay to the complainant \$400.00 as backpay plus any statutory interest which shall accrue on said amount until it is paid.

5. The respondent shall pay to the complainant \$7,500.00 as compensatory damages for the mental anguish suffered by her because of respondent's action.

6. The respondent shall pay complainant's reasonable attorney fees of \$21,225.00. The respondent shall pay complainant's reasonably expended costs of \$1,875.64.

7. The respondent shall provide to the Commission proof of compliance with the Commission's order within 35 days of service of said order by copies of cancelled checks, affidavits or other means calculated to provide such proof.

It is finally ORDERED that the Hearing Examiner's amended decision be attached hereto but not made a part of this order.

By copy of this order, the parties are hereby notified that the original prior order of said Commission entered on June 27, 1986, has been reconsidered and has been superseded by this reconsideration order.

Accordingly, for purposes of appeal, the parties have 30 days from certified receipt of this order to seek judicial review.

Entered this 10th day of June, 1987.

WV HUMAN RIGHTS COMMISSION

BY Matthew D. Fisher
CHAIR/VICE CHAIR

Exhibit A

File -
HRT II

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BRENDA SALYERS,

Complainant,

v.

Docket No.
ES-492-81

BISHOP COAL COMPANY #36, et al.,

Respondent.

AFFIDAVIT OF BETTY JEAN HALL
IN SUPPORT OF COMPLAINANT'S REQUEST FOR ATTORNEYS FEES
AND COSTS

I, Betty Jean Hall, being first duly sworn, depose
and state:

1. I am an attorney in the above-captioned case, having served from the earliest days of the case as Complainant's counsel and having additionally been appointed to represent the interests of the West Virginia Human Rights Commission to take the case to hearing in April 1985. I make this affidavit in support of Complainant's request for an award of attorneys' fees and costs pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000E et seq and W. Va. Code Section 5-11-10.

2. I am a 1976 graduate of the Antioch School of Law located in Washington, D.C. I was admitted to the District

of Columbia Bar in 1977, the Virginia Bar in 1977 and the Tennessee Bar in 1979. In addition, I have been admitted to practice before the D.C. Court of Appeals and the U.S. District Court for the District of Columbia.

3. Since 1977, I have served as Executive Director and General Counsel of the Coal Employment Project (CEP), a 501(c)(3) tax-exempt corporation whose purpose is to help women gain and keep jobs as coal miners. I was also the founder of that organization. As such, my entire legal career since 1977 has been devoted to assist women miners and would-be miners break the barriers of sex discrimination in the coal industry. To my knowledge, I am the only attorney in the country who has devoted her career exclusively to advocating on behalf of women miners and would-be miners.

4. We request the following hourly rates for attorney Betty Jean Hall based on the customary fee for similar work in the Washington, D.C. community, of which Dumfries, Virginia, is a part:

a. \$95 an hour for work done from the acceptance of the case in June 1980 through May 31, 1983, during which time she was in her seventh year after graduation from law school;

b. \$110 an hour for work done from June 1, 1983 through the present time, during which time she has been in her eighth through tenth year after graduation from law

school.

5. Our rate calculations are based primarily on an investigation conducted in 1983 by Washington attorney Bruce J. Terris, a partner in the law firm of Terris & Sunderland, a firm which engages almost exclusively in litigation in areas which have come to be termed public interest law. In an affidavit, a copy of which is attached as Attachment A-3, Terris estimates that employment cases, including cases involving individual and class claims under Title VII, have averaged approximately one third of the firm's caseload. This affidavit was prepared as part of a fee petition in the case of ALISON PALMER, ET AL. v. GEORGE P. SHULTZ, Civil Action No. 76-1439, in the U.S. District Court for the District of Columbia. The affidavit was notarized on December 12, 1983 and addresses, INTER ALIA, customary attorneys' fee rates for Title VII litigators in the Washington, D.C. area. In his affidavit, Terris states (p. 39) that the requested rates (as reflected below are equal to or below prevailing market rates in the District of Columbia for lawyers of similar skill and experience, as of late 1983.

6. In the affidavit, at page 38, Terris requests the following hourly rates for attorneys, law clerks, and paralegals:

a. \$150 an hour for lawyers in their twentieth year or more after graduation from law school;

decisions in other cases to determine fee calculations is consistent with the statement of the Court of Appeals for the District of Columbia Circuit that "(e)vidence submitted by attorney fee applicants in prior cases may also be relied on in compiling an attorney fee application. There is no requirement that each attorney develop all of the evidence for the hourly rate he seeks from scratch." NATIONAL ASSOCIATION OF CONCERNED VETERANS v. SECRETARY OF DEFENSE, 675 F.2d 1319, 1326 (D.C. Cir. 1982). Thus, we have not spent a significant amount of time obtaining affidavits from discrimination law practitioners in the D.C. area. However, if our fee petition is challenged, we are prepared to do so.

10. The final calculation of Complainant's fees request in this case is shown in the following table:

Merits Lodestar	\$18,706	
Expenses	\$ 1,786	
	TOTAL	\$20,492

11. In Attachment A-1 affixed to this Affidavit I have set forth a true and accurate list of the hours I have spent working on this case based on my contemporaneous time records.

12. In Attachment A-2 I have set forth a true and accurate list of expenses incurred in connection with this cause.

Betty Jean Hall
Coal Employment Project
16221 Sunny Knoll Court
Dumfries, Virginia 22026
703/670-3416
Attorney for Complainant

Commonwealth of Virginia)
County of Price William) ss:

Subscribed and sworn to before me this ___ day of
October, 1985.

Geraldine Smerick
Notary Public

My Commission Expires: _____

DATE	TYPE OF WORK PERFORMED	HOURS
6/28/80	P/C Brenda re Sunburn Case; Memo to File	.5
2/19/81	P/C w/Totten re Case	.3
2/21/81	Review Salyers Letter	.2
2/27/81	P/C Brenda; start drafting complaint	1.0
3/3/81	Draft Complaint & File Complaint; P/C Brenda	4.0
3/17/81	P/C L. Neil re Jurisdictional Issue	.3
3/18/81	P/C Brenda & R. McMillan re status	.5
3/20/81	Written response to dismissal; transmit questionnaire	1.0
3/29/81	Review formal complaint; P/C Brenda	.5
4/6/81	P/C L. Neal re redoing sworn complaint	.3
4/7/81	Review revised formal complaint	.3
4/7/81	Letter to Brenda re status	.3
6/23/81	Call from investigator Paul Cook; letter to Cook	.4
7/5/81	P/Cs to set up factfinding Conference	.3
7/13/81	Travel to Princeton for Factfinding Conf	5.5
7/14/81	Preparation for Factfinding Conference	3.1
7/14/81	Factfinding Conference	1.5
7/14/81	Post Factfinding Conference Session	.5
7/14/81	Travel Home from Factfinding Conference	5.5
8/6/81	Write Brenda re affidavit; analyze panel sheets; write Cook re Analysis	3.2
2/19/82	P/C with P. Cook & Brenda re Status	.4
10/21/82	Personal Conf. w/Brenda re status in Tazewell	1.0
11/4/82	P/C with Brenda re probable cause determination & what that means; go over questions to be answered; and strategy	1.0
11/8/82	Review file; P/Cs w/Brenda & Paul Cook re strategy	1.0
7/31/84	P/C w/Brenda re status	.3
3/29/85	Review Notice of Hearing; try tracking down Brenda	.3
4/9/8	P/C Cosby re importance of tracking down Brenda re status of case; strategy	.3
4/10/85	Track down Brenda via Cosby & Edith re status of pretrial	.4
4/10/85	Series of calls w/E. Spieler, Klein & Rundell's office re prehearing	.5
4/12/85	Talk w/Brenda re status	.2
4/16/85	Review file; prehearing Conference call; follow-up call to Brenda and Cosby re status; memo to file	2.1
4/17/85	Review Consol's Answer; P/C w/ Spieler re my role	.3

4/24/85	Letter to Spieler confirming my role	.3
4/27/85	Review letter from Spieler	.2
5/9/85	Draft our Interrogatories plus cover letters	2.5
5/20/85	Phone conversations w/Klein re	.3
5/22/85	Review Commission File	2.4
(week of)	settlement possibilities	
5/23/85	Review Prehearing Order	.2
5/27/85	Travel to meet w/client to answer interrogatories & develop strategy	7.5
5/28/85	Answer Interrogatories	5.3
5/29/85	Travel home from answering interr.	7.5
6/3/85	Review Respondent's Answers to Interrogatories & Match Up With Files	1.3
6/7/85	P/C w/Klein + followup	.5
6/7/85	Travel to Tazewell for Hearing	7.5
6/8/85	Meeting with Houchins; Conf w/Brenda; Meeting w/Lou Hardin; analyze panel sheets; review file; prepare trial notebook	12.0
6/9/85	Prepare for trial: Meeting w/Brenda and go over case in detail; Meeting w/Klein & Consol official; P/C Everett; interview Cosby; redo charts to reflect new breakdown; numerous other phone calls trying to track down witnesses	13.2
6/10/85	Trial	8.5
6/11/85	Travel Home	7.5
6/13/85	P/C w/Klein & Rundell's office re new hearing date	.3
7/28/85	Travel to Tazewell for Hearing	7.5
7/29/85	Prepare for Hearing; Review File	6.4
7/30/85	Hearing + Followup	9.0
7/31/85	Travel Home	7.5
8/8/85	Review first Half of Transcript	2.4
9/12/85	P/C w/Klein & Rundell's office re status of Transcript	.3
9/20/85	P/C Rundell's office & Klein re status	.3
9/24/85	Review Second Half of Transcript	2.6
9/26/85	Review Act, Rules & Portions of Transcript	1.7
9/27/85	Digest Transcript on Computer	6.7
9/30/85	Digesting Transcript - Computer	2.1
10/2/85	Writing Brief	8.1
10/3/85	Writing Brief	4.6
10/6/85	Petition for Attorney Fees	1.3

Pre-June 1983 Hours	=	32.6	(x \$95 = \$ 3,097)
Post-June 1983 Hours	=	141.9	(x \$110 = \$15,609)

Total Hours = 174.5 (= \$18,706)

SALYERS v. CONSOL EXPENSES

TRAVEL:

To July 13-14, 1981 Factfinding Conference in Princeton, W. Va.	\$192
To Tazewell May 27-29, 1985 to Answer Interrogatories & Develop Strategy	\$236
To Tazewell-Welch June 7-11, 1985 for Hearing	\$389
To Tazewell-Bluefield July 28-31, 1984 for Hearing	\$342
TOTAL TRAVEL	(\$1,159)

TELEPHONE:

February 1981 - October 1982 (Est.)	\$100
Nov-Dec. 1982	\$ 28.55
January 1983	\$ 26.12
May 1985	\$ 15.96
June 1985	\$ 49.48
July 1985	\$ 31.76
August 1985	\$ 10.51
September-October 1985 (Est.)	\$ 20.00
TOTAL TELEPHONE	(\$282)

TRANSCRIPTS:

Transcripts (paid \$150 for 1st one plus got billed \$29.82 from a different source and additional copy plus approximately \$30 for second half)	(\$210)
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XEROXING:

(\$ 91)

POSTAGE:

(\$ 44)

TOTAL EXPENSES:

-- \$1,786--

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

_____)	
BRENDA SALYERS,)	
)	
Complainant,)	
)	
vs.)	Docket No.
)	ES-492-81
BISHOP COAL COMPANY #36, et al.,)	
)	
Respondent,)	
_____)	

SUPPLEMENTAL AFFIDAVIT OF BETTY JEAN HALL IN SUPPORT OF
COMPLAINANT'S REQUEST FOR ATTORNEYS FEES AND COSTS

I, Betty Jean Hall, being first duly sworn, depose and state that I and my employer, the Coal Employment Project, have expended the following legal time and incurred the following expenses in connection with the above-referenced case since we filed our original petition for attorneys fees on October 7, 1985:

Time:

10/10/85	Review Respondent's Trial Brief; phone Salyers and Totten	1.2
10/23/85	Review Klein Letter and Reply	.4
10/24/85	Witness Fee Letter + Excuse to Witness Houchins	.4
1/2/86	Review Hearing Examiner's Recommended Decision; series of calls with Salyers & Totten re same	.8
1/6/86	P/Cs with Bill Talty & Emily Spieler re filing exceptions; review file	.5
1/12/86	Follow-up letter to Talty	.2
1/13/86	Review file, including portions of transcript and file exceptions	6.2

5/17/86	Review Amended Recommended Decision; series of phone calls re same	1.3
5/30/86	Review Respondent's Exceptions; phone calls with Saiyers & Totten re same	.5
7/5/86	Review Commission's Decision; series of calls re same	.7
7/7/86	Review Commission's rules & law concerning filing motion for reconsideration vs. filing in circuit court; series of calls for advice re the same	1.8
7/11/86	Review entire transcript and file and make notes in preparation for filing motion for reconsideration	4.2
7/13/86	Draft Motion for Reconsideration plus amended affidavit	4.7
	<u>TOTAL HOURS =</u>	<u>22.9</u>

22.9 hours x \$110/hour = \$2,519

Expenses:

TELEPHONE:

November 1985	\$ 1.43
January 1986	\$ 40.08
February 1986	\$ 16.01
March 1986	\$.71
April 1986	\$ 1.41
May 1986 (Est.)	\$ 5.00
June-July 1986 (Est.)	\$ 25.00
<u>TOTAL</u>	<u>\$ 89.64</u>

COPYING:

July 1985 (Estimated)	\$ 25.00
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TOTAL EXPENSES INCURRED OCTOBER 7, 1985 - JULY 14, 1986:
\$114.64

Betty Jean Hall
Betty Jean Hall
Coal Employment Project
16221 Sunny Knoll Court
Dumfries, Virginia 22026
703/670-3416
Attorney for Complainant

Commonwealth of Virginia)
County of Prince William) ss:

Subscribed and sworn to before me this 14th day of
July 1986.

Geraldine Smerick
Geraldine Smerick
Notary Public

My Commission Expires: My Commission Expires February 21, 1987

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

BRENDA SALYERS,

COMPLAINANT,

VS.

CASE NO. ES-492-81

BISHOP COAL COMPANY MINE #36,
a corporation,

RESPONDENT.

*Additional
APC
5/16/86*

AMENDED RECOMMENDED DECISION

I. PROCEDURAL HISTORY

A complaint was filed before the West Virginia Human Rights Commission on the 17th day of April, 1981, by Complainant, alleging Respondent discriminated against her in regards to her sex. A pre-hearing conference was held on April 16, 1985.

A hearing was held on two dates, with the first being June 10, 1985 and the second being July 30, 1985. The Complainant appeared in person and by counsel, Betty Jean Hall. The Respondent was represented by counsel, Richard Klein, who appeared.

Proposed Findings of Fact were timely submitted to this hearing examiner by both parties. A Recommended Decision dated December 30, 1985 was served on all parties and filed. Counsel for the Respondent filed exceptions dated January 10, 1986 and counsel for Complainant filed exceptions dated January 14, 1986.

II. ISSUE

Whether the sex of the Complainant was the basis for the denial of the job on the scoop.

Whether the Complainant was a victim of sexual harassment.

Whether a pattern of sexual discrimination against women in general existed at Bishop Coal Company #36.

III. FINDINGS OF FACT

1. On February 13, 1981, the Complainant was denied the job of Scoop Operator at Bishop Coal Mine #36, Bishop, West Virginia. Her usual job was General Inside Labor and she was assigned to shovelling around the belt.

2. That Complainant, on numerous occasions, attempted to bid for or be trained on the scoop.

3. That Complainant was finally tested on February 19, 1981, and March 27, 1981, as to her ability to operate a scoop.

4. That male employees were not tested prior to being assigned to operate the scoop.

5. That both "scoop tests" were performed under less than acceptable test conditions.

6. That the scoop is a relatively simple piece of mining equipment to operate based upon the testimony of the record as a whole (TR Volume II, page 90).

7. That Complainant demonstrated the basic qualifications required to operate a scoop. (Any worker would require additional time to perfect operating skills on the scoop.)

8. That no organized training program existed at Bishop Coal Company during the time-frame in question.

9. The allegations of an "affair" or "affairs" taking place on the job between the Complainant and male co-employee or co-employees was not supported by the weight of the evidence.

10. That the Complainant was laid off on October 31, 1982.

IV. CONCLUSIONS OF LAW

In an action to redress unlawful discrimination practices in employment under the West Virginia Human Rights Act, as amended,

W. Va. Code, 5-11-1, et seq., the burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination. If the Complainant is successful in creating this rebuttable presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason for the rejections. Should the respondent succeed in rebutting the presumption of discrimination, then the Complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination. Shepherdstown VFD v. West Virginia Human Rights Commission, _____ W. Va. _____ 309 S.E. 2d 342 (1983).

A complainant in a disparate treatment, discriminatory discharge case brought under the West Virginia Human Rights Act, Code 5-11-1 et seq., may meet the initial prima facie burden by proving by a preponderance of the evidence (1) that the complainant is a member of a group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined or was disciplined less severely, than the complainant, though both engaged in similar conduct. State Ex Rel. State of W. Va. Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc. 329 S.E. 2d 77 at page 79 (1985).

If the employer articulates a legitimate nondiscriminatory reason for its actions, the complainant may still prevail by per-

suading the trier of facts that the discriminatory reason more likely than not motivated the employer, or indirectly by showing that the employer's explanation is a pretext and unworthy of credence.

This examiner finds that the nondiscriminatory reason of the complainant being unable to operate the scoop was a pretext to denying her the job for which she was qualified. This conclusion is based upon a consideration of all the evidence offered by both parties to this proceeding.

This examiner is of the opinion that further evidentiary development would be necessary for a determination of whether all women at the Bishop Coal Company were victims of discrimination and would recommend to the Human Rights Commission that a Vocational Expert be retained to evaluate the job skill requirements for the operation of equipment in the underground coal mining industry in Southern West Virginia. In making this recommendation we are in no way suggesting that the job skills of operating the scoop are anything more than simple.

The denial of the medical excuse on the complainant's sunburn constituted sufficient evidence for a finding of sexual harassment against the complainant, Brenda Salyers. Further it is the conclusion of this hearing examiner that the allegations of sexual affairs are not supported by credible evidence and constitute an additional basis for a conclusion that the complainant, Brenda Salyers, was a victim of sexual harassment within the

meaning of the law.

It is this hearing examiner's conclusion that the Complainant has carried the burden by a preponderance of the evidence that she is a victim of both disparate treatment, and, by reason of her sex, sexual harassment.

It is the final conclusion that the female, Brenda Salyers, is a member of a protected group and was accorded different treatment than nonmembers engaged in similar activity. Burdette v. FMC Corp., supra 566 F. Supp. at 815. See also McDonnell Douglas v. Green, supra 411 U.S. at 804, 93 S. Ct. at 1825-6, 36 L. Ed. 2d at 679; McDonald v. Sante Fe Trail Transportation Co., 427 U.S. 273, 281-5, 96 S. Ct. 2574, 2579-85, 49 L. Ed. 2d 493 (1975).

V. DETERMINATION

This examiner recommends finding that there was gender-based discrimination and that it is violative of Chapter 5, Article II, Section 9a, et seq., of the code of West Virginia and further recommends as follows:

1. That the Complainant be awarded her back pay of \$400.00 plus \$158.00 in prejudgment interest;
2. That Compensatory damages be awarded to Complainant in the amount of \$7,500.00 for psychic damages; and,
3. That an attorney fee be awarded to Complainant's attorney in the amount of \$15,000.00 in light of the voluminous paperwork involved in this action; and,

4. That the expenses be paid to the attorney for the Complainant in the amount of \$1,786.00.

Juliet W. Rundle

JULIET WALKER-RUNDLE
HEARING EXAMINER
P. O. BOX 469
PINEVILLE, WV 24874-0469
304-732-6411

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Recommended Decision was served upon Betty Jean Hall, 16221 Sunny Knoll Court, Dumfries, Virginia 22026 and Richard J. Klein, Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241, by depositing true and correct copies of same in the United States Mail, postage prepaid, this 13th day of May, 1986.

John W. Rundle

3. The Amended Recommended Decision is null and void as said Amended Recommended Decision was not filed in accordance with Rule 7.26(c) of the West Virginia Human Rights Commission Emergency Rules.

4. The Amended Recommended Decision is null and void as a violation of the due process guarantees of the Federal and West Virginia Constitutions.

5. Respondent excepts to the Amended Recommended Decision for the reasons stated in Respondent's original Exceptions.

6. Respondent excepts to the Amended Recommended Decision for the reasons stated in Respondent's Post-Hearing Memorandum.

7. Respondent excepts to Finding of Fact number 2 in that it is not supported by substantial evidence.

8. Respondent excepts to Finding of Fact number 4 in that it is not supported by substantial evidence.

9. Respondent excepts to Finding of Fact number 7 in that it is not supported by substantial evidence.

10. Respondent excepts to Finding of Fact number 9 in that it is not supported by substantial evidence.

11. Respondent excepts to the Amended Recommended Decision Conclusions of Law in that they (a) raise issues outside the scope of the Complaint; (b) raise issues that

were not raised by a timely Complaint, and (c) are not supported by Findings of Fact.

Respectfully submitted,

BISHOP COAL COMPANY

By Richard J. Klein
Richard J. Klein

Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241
(412) 831-4116

Counsel for Respondent
Bishop Coal Company