

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KATHY VARNEY,

COMPLAINANT,

v.

Docket No: ES 222-77

ES 298-77

FRANK'S SHOE STORE,

RESPONDENT.

FINDINGS OF FACT &
CONCLUSIONS OF LAW & ORDER

I.
PROCEEDINGS

This cause came on for public hearing the 19th day of April 1979, at the Cabell County Court House, Huntington, WV, and was concluded the 19th day of April 1979. The Complainant, Kathy Varney, appeared in person and by her counsel, Cheryl Fuller, Esquire, and the Respondent, Frank's Shoe Store, appeared by its counsel, James W. St. Clair, Esquire. This hearing was presided over by the Honorable Russell Van Cleve, Commissioner of the West Virginia Human Rights Commission and the Honorable J. David Cecil, Esquire, Hearing Examiner for the WV Human Rights Commission. The admissibility and authenticity of certain documents, by stipulation, between counsel for the parties were entered into the record, pursuant to a pre-hearing conference held on March 16, 1979. Certain other exhibits were offered at the hearing.

After full consideration of the entire testimony, evidence, motions, briefs, and arguments of counsel, and the Hearing Examiner's Recom-

mendations, and exceptions of the Respondent thereto, the Commission concludes and decides as follows.

SUMMARY OF THE EVIDENCE

There was much testimony in this matter relating to the transfer, or alleged transfer, of complainant from the first to the basement floor of Respondent's store and increased duties relative to cashing checks for customers. The evidence relating to these alleged discriminatory actions are not of any moment in the decision of this case and, if so, the preponderance of the evidence shows that such transfer and/or changes were legitimate exercises of business management discretion; complainant has failed to demonstrate or prove by any satisfactory proof that such changes were either the direct result of or substantially motivated by any discriminatory conduct.

Doctor Edwin J. Humphrey is a practicing obstetrician and was Kathy Varney's physician during the period in issue in these complaints. His testimony was that Complainant had a normal pregnancy with no known complications and although he did not recall specifically telling Complainant that she could continue working at her present job during her pregnancy, he would have indicated as he normally did where no such medical complications were present that she could continue her usual activity including her usual occupation. [T.6-7].

On cross-examination Dr. Humphrey was asked a hypothetical

question relating to the types of duties or activities which Complainant performed as part of her work routine and whether he would counsel an employer in such situation to place restrictions on an eight month pregnant woman; Dr. Humphrey indicated that he would not. Humphrey did agree that pregnancy would effect a woman's balance but that such changes were gradual and that the body tended to accommodate for this change. Nor did Humphries believe a fall from a ladder would increase the possibility of injury to a pregnant as opposed to a non-pregnant person or to the fetus. [T.9-13].

Dr. Humphrey did testify that a pregnant lady would have more difficulty getting up and down, climbing a ladder, and crawling out into a shoe window. Dr. Humphrey testified that the difficulty in these areas related to awkwardness but that such activities would not be more harmful to a pregnant as opposed to a nonpregnant person.

The Complainant, Kathy Varney, testified that she was a resident of Ashland, Kentucky at the time of the hearing, but at the time of her filing of her complaint with the West Virginia Human Rights Commission she had been employed by respondent as cashier and sales person and had performed minor bookkeeping duties since June of 1975, and that she continued working for the Respondent until December 31, 1976. She further testified that she continued her normal hours of work which was from 9:00 a.m. to 5:30 p.m. Tuesday through Saturday and every other Monday from 9 a.m. to 9:30 p.m. Sometime shortly after being advised of her pregnancy, Complainant testified that she advised her

employer of this fact and indicated that she wished to continue her employment. [T.25]. In November, 1976, when Complainant was in her sixth or seventh month of pregnancy without any prior notice from her employer, her work days were reduced from five (5) to four (4) and she was informed that she would not be permitted to continue in the salesperson capacity. In December Complainant testimony was that her work was again reduced from four (4) to tree (3) days. During this period of employment, Complainant's compensation was Two Dollars and Fifty-Five Cents (\$2.55) per hour and it was her testimony that the reduction in work days substantially reduced her income. [T.32-33].

Complainant further testified that she was never contacted relative to her desire or physical ability to continue in her normal duties prior to either the work days reduction of November or December, nor was she asked for any physician's statement concerning her condition. [T.35-36].

Complainant further indicated that around the middle of November, 1976, while accompanied by her husband, she talked with Frank Peters, Jr., in an attempt to regain her lost work days at which time Mr. Peters first informed her that her hours were cut due to a lack of work although the later in this conversation indcated that he did not want her working on the floor (as salesperson) since she was big and pregnant. Complainant stated that Mr. Peters, Jr. then advised, "if you don't like it, sue me". [T.37-38]. Again in December and subsequent to the second reduction in work days Complainant's testimony was that

she and her husband sought to discuss the reductions with Peters, Jr., who informed them that he did not wish to discuss the matter and stated to her husband, "have you ever thought of getting a second job for the earning and making her quit work." [T.38-39].

Complainant indicated that during the same period, November through December 31, 1976, no other employees of the Respondent, whether full time or part time, to her knowledge, had their days or hours of work reduced [T.39-42]. Complainant stated that on Wednesday, December 28, 1976, she asked Frank Peters, Sr. about certain holiday wages she had not received at which time she was told that she was fired and that he, Peters, Sr., didn't like being told that a suit had been filed against him. Complainant stated that she was then told by Peters, Sr., that her last day of employment would be the following Friday, December 31, 1976. [T43-45].

Complainant stated that she received no complaints either from her employers or Respondent's customers regarding performance of her duties and that she was physically able, and never refused, to perform her normal duties. Complainant stated that her child was born February 1, 1977, and that her doctor released her from his care five (5) weeks from the date of the child's birth. Testimony was, also, given by the Complainant concerning employment since her alleged termination including income received from state unemployment compensation. [T.46-51].

On cross-examination the Complainant indicated that her normal weight was 110 pounds; that she was 5 feet 10 inches tall and that at the time of the child's birth she weighed 132 pounds, or a weight gain of twenty-two (22) pounds. She further admitted that there was no contract between her and the Respondent. [T.72]. It was also, admitted that selespersons were responsible for climbing, stooping and carrying as part of their normal routine but the Complainant stated she had no physical problem with any of these duties or activities. [T.74-75].

Mr. Leonard Varney testified that he was the Complainant's husband, that he was upset by the reduction in his wife's work hours, and that his recollection of the conversation with Frank Peter's was consistent with those of his wife. On cross-examination Mr. Varney indicated that he had accompanied his wife to the meetings with Frank Peters, Jr. because he felt that he should be with her.

Mr. Ronald Bills testified that he was a former employee of Frank's Shoe Store, Inc. and that he was employed during part of the Complainant's tenure with the Respondent. His testimony was basically a substantiation of Complainant's testimony relative to her duties, hours and areas of work. Mr. Bill's further testified that based upon his three years of full time experience with the Respondent there was a substantial increase in business and sales from Thanksgiving through the Christmas Holidays and that this season was a peak business season based on his experience.

Daryl Pullin testified that he had been employed by the Respondent from the summer of 1973 until December of 1977. In November and December of 1976 Pullin was a full time employee of the Respondent. He too substantiated the testimony of Complainant as to her duties, hours and areas of work. Pullin also testified that he never heard any customers complain concerning Complainant's performance. Pullins stated that he was present at the store on the date of one of the conversations between Complainant, her husband, and Frank Peters, Jr. He observed that Complainant's husband was angry by his demeanor, but that he heard no shouting although Complainant's husband also appeared angry upon leaving the office. [T. 112].

Pullin also indicated that during the period of November through December, 1976, he had overheard Frank Peters, Jr. state that he felt Complainant was too big to be on the sales floor and that she was an eyesore. On one occasion Peters, Jr. stated that Complainant's dress was too short because of her pregnancy. [t.113-114].

On cross-examination Pullin admitted that the Complainant was large in size doing her pregnancy, but that this caused, from his observation, no problem as to her work.

MOTION TO DISMISS:

At the conclusion of the Complainant's evidence counsel for the

Respondent made a motion to dismiss the complaints of November 13, 1976, and December 21, 1976. With regard to the first motion counsel for the respondent indicated that the Complainant had failed to show harassment on her job. In addition, Respondent, by counsel, moved to dismiss the complaint of December 21, 1976, also upon the basis that she failed to prove that her physical appearance had been criticized or that she had proved that she was discharged because of an act of reprisal and finally that there was no evidence concerning disparate pay scales between male and female employees.

With regard to the Respondent's motions it is the determination of the Commission as recommended by the Hearing Examiner that evidence presented by the Complainant failed to show or otherwise prove that there were disparate pay scales between male and female employees as alleged in her complaint of December 31, 1976. With regard to all other matters raised in the motion to dismiss, the Commission concludes in accordance with the Hearing Examiner that they should have been overruled.

The Respondent's first witness was Frank Peters, Sr., founder and manager of Frank's Shoe Store, Inc., the Respondent. His sole testimony was that he never had a conversation with Complainant in which he fired her and otherwise denying that the conversation alleged by the Complainant to have taken place on December 28, 1976, between herself and Peters, Sr. was untrue.

Phyllis Burdette testified that she had been employed by the Respondent for twenty-seven years, that she had been store manager since 1977, and that she was acquainted with the Complainant during the time of her employment. Burdette further indicated that she had overheard customers say Complainant should not be on the floor (in sale capacity) and that she had observed customers fitting their own shoes to help Complainant. She further stated that on occasion other employees would assist Complainant in getting shoes from the store's stockroom or from the shoe window, and that she was fearful of Complainant climbing the ladder to obtain shoes from the stockroom.

Ms. Burdette further stated that she was outside the door when one of the conversations between Complainant, her husband and Frank Peters, Jr. occurred and that Mr. Varney was loud and drew attention to the conversation.

On cross-examination Ms. Burdette admitted that Complainant had never asked anyone for assistance, although she remembered one occasion when Complainant asked her to get shoes from the store window.

Respondent by its counsel sought to qualify Mr. Luke B. Ross as an expert witness in the vocational field. Mr. Ross indicated that he was retired but that he had been certified by the United States Department of Health, Education and Welfare as a vocational expert; that he had forty (40) years of experience in this area; and that he had testified as an expert witness on appeals before the Social Security Admini-

stration. Mr. Ross indicated that as a part of his duties he determined whether persons were qualified for positions for which they had applied and that with the Social Security Administration whether individuals were qualified for any type of work after review of their medical records. In his testimony, Ross indicated that he had inspected the premises of Frank's Shoe Store, Inc. and he identified Respondent's Exhibits 1 through 5 and Exhibits 7 and 9 as accurately depicting the Respondent's store layout. Ross further stated that he had observed shoe clerks in Respondent's store performing various duties including stooping, bending, climbing, etc. Based upon his personal observation Mr. Ross was asked the following hypothetical question

"If a woman was eight months pregnant and she was a rather small, petite woman, so that pregnancy was very pronounced, do you have an opinion as to whether she should be climbing the ladder and stooping and bending and fitting these shoes and crawling in the window from a vocational standpoint."
[T.163].

Mr. Ross first qualified his response by indicating that he was not a physician but stated (a) that it would be awkward to do that type of work and (b) that as a vocational consultant with the West Virginia Department of Employment Security he would not place an eight and a half month pregnant female in the position of shoe clerk. [T.163].

On cross-examination, Mr. Ross indicated that his specialty was to

give opinions in Social Security Hearings on individual's extent of disability and ability to work in determining eligibility for Social Security Disability Benefits.

Frank Peters, Jr. is president of Frnk's Shoe Store, Inc. with duties of buying and merchandising shoes and operating (supervising) the sales force. [T.167]. Peters, Jr. indicated that most hiring was done by his manager although he participated to some extent and that it was he who made assignments of employees as to their locations, positions, and tasks. [T.167-168].

Peters, Jr. agreed that Complainant was employed from June, 1975, through December 31, 1976, and that fifty percent (50%) of her time involved selling shoes. [T.169]. Peters, Jr. further testified that none of Respondent's employees entered contracts of employment, were provided paid sick leaves, or permitted five or six weeks paid vacation. Peters, Jr. admitted that Complainant had indicated to him that she was pregnant and that he agreed that she could continue until a month or two weeks prior to the child's birth and return to work after the birth of the child which he believed would be the middle of January, 1977. [T.171].

Peters, Jr. stated that as Complainant got larger, he began to fear for her safety, that he stopped her from selling (shoes) on the floor, "because I didn't think it was really the thing to do". [T.171-172]. He, also, indicated that pressure from friends and cus-

tomers influenced his decision concerning terminating Complainant's selling duties. Complainant voiced no immediate objections, according to Peters, Jr. when her work days were first reduced, but did discuss the matter with him during the middle or late November of 1976, when the conversation between Peters, Jr. and Complainant and her husband occurred. [T.177]. Peters, Jr. further indicated that he had never criticized Complainant although he may have made a remark concerning the length of her clothes. [T.179].

Peters, Jr. indicated that his store staff makeup showed, and he believed, that he favored the female sex and that he did not discriminate against women. He had never had prior or subsequent to the complainant any other pregnant employees. [T.182-183].

Peters, Jr. admitted on cross-examination that Complainant was willing to continue her normal duties, that he had not discussed reduction of her work days with either her or her physician prior to the reductions. Peters also indicated that he did not recall a meeting occurring between Kathy Varney and his father, Mr. Frank Peters, Sr.

Mr. Peters, Jr. also indicated that he had gone out of his way to insure that Kathy Varney, the Complainant, continue working at the store and, in fact, made work for her during the later part of November and December, 1976.

REBUTTAL:

On rebuttal Complainant indicated that the conversation between herself and Frank Peters, Sr. had occurred on December 29 and it was a Wednesday because she was told by Peters, Sr. on the following Friday December 31st would be her last work day. She further stated that while some individuals, not indicating whether employees or customers, had asked to assist her in getting shoes that she had always indicated that she did not need help. [T.191]. She further indicated that in her original conversation with Mr. Frank Peters, Jr. upon learning of her pregnancy she had asked and he had agreed to allow her to work until the doctor instructed otherwise; although it was her intention to work as long as she felt like it or until instructed by the doctor otherwise.

The Complainant further indicated on rebuttal that after the reduction in her work days she continued her normal duties except for sales. Complainant admitted that Mr. Peters and her fellow employees were concerned about her pregnant condition and that customers often asked about her condition.

HEARING EXAMINERS SUMMARY OF THE EVIDENCE

The Claimant, Kathy Varney was employed at Frank's Shoe Store located in Huntington, Cabell County, West Virginia. The defendant, Frank's Shoe Store, Inc. is owned and operated by Frank Peters, Sr. and Frank Peters, Jr., although most of the day to day operations and supervision is the responsibility of Frank Peters, Jr.

Claimant's duties during her period of employment at Frank's Shoe Store consisted of general office work, minimal bookkeeping services, and floor sales work with daily contact with customers who came to the store. As part of her duties it was necessary that she stoop to fit customers with shoes, climb step ladders to obtain shoes, and occasionally maneuver in and out of the store's show window. For her work complainant was paid Two Dollars and Fifty-five Cents (\$2.55) per hour and worked from forty-two (42) to forty-three (43) hours per week.

Based upon complainant's Exhibit No. 9, designated Plaintiffs Exhibit No. 9, it is apparent that the duties of the claimant were reduced on or about November 16, 1976, as were the total number of work days, there for hours, during her work week. While it was suggested by the employer such reductions resulted from a lack of work, the record herein shows that this was not the case and that the motivating factor was an alleged embarrassment to the employer, particularly Frank Peters, Jr., as a result of remarks made by friends and customers relative to the complainant's selling of shoes to the public.

In addition, Peters, Jr. indicated that in his opinion the claimant was in a condition of health resulting solely from the pregnancy which he believed created for her hazardous working conditions and that because of her condition of pregnancy her dresses tended to be too short; all of which he believed inhibited her continued duties as sales person; Peters, Jr. stated that claimant had indicated to him that she was pregnant early on and that he had agreed upon her request that she could keep her employment until a specified date. Throughout the term of Claimant's regular employment, her performance was of satisfactory quality and apparently she received no reprimands regarding her performance. Again, on December 14, 1976, Complainant's work days were reduced from four (4) days per week to three (3).

In her Complaint of February 14, 1977, the Complainant alleged therein that the Respondent had terminated her from their employment as a direct result of her having filed the original complaint of December 21, 1976. There is a conflict relating to whether in addition to the hours and job responsibilities reductions, Claimant was also terminated from her employment. Claimant indicates that the alleged termination was the result of her having filed a complaint against Frank's Shoe Store in December, 1976, because of the mentioned reductions. Since the evidence is in direct conflict a review of the testimony relating to the alleged terminations when considered with the other evidence in this matter supports the Complainant's testimony. Specifically, a review of the testimony regarding conversations between Complainant, Leonard Varney, her husband, and Frank Peters, Jr. The Hearings Examiner

finds that the termination alleged by the Complainant to have occurred on December 31, 1976, was the direct result of her having filed her previous Complainant with the West Virginia Human Rights Commission.

After her termination Complainant made a reasonable and good faith effort to seek other employment in order to mitigate her loss of income, and, from the time of her discharge to the date of hearing she did earn a total amount including Unemployment Compensation of Three Thousand Two-Hundred Eighteen Dollars and No Cents (\$3,218.00); which she would not have earned any income during her five (5) week recuperative period after the birth of her child.

FINDINGS OF FACT

Based upon the evidence the following facts are established:

1. The Complainant, Kathy Varney, is a female.
2. On or about June 1, 1975, Kathy Varney was employed by the Respondent, Frank's Shoe Store, Inc., at its Huntington, WV, store.
3. Respondent is a West Virginia Corporation engaged in the retail shoe business in the State of West Virginia with a store located in Huntington, WV.
4. As an employee of Respondent, Complainant's duties included minor records keeping, temporary cashier, and general sales duties. Her duties as a salesperson occupied approximately fifty percent (50%) of her normal workday.

5. Sometime in May, 1976, Complainant was advised that she was pregnant; she notified the Respondent through Frank Peters, Jr., its President, and asked that she be continued in her employment. She further requested that she be permitted to return to her employment after the birth of her child, to all of which Frank Peters, Jr. agreed.
6. On or about November 16, 1976, without prior notice to or consent from Complainant, Respondent, through Frank Peters, Jr., reduced Complainant's work week by one day to a total of four (4) days per week.
7. On November 21, 1976, Complainant filed with the West Virginia Human Rights Commission a complaint alleging therein that she had been discriminated against by the Respondent as the result of her sex and her pregnancy.
8. On or about December 14, 1976, Complainant's work week was again reduced by the Respondent, by and through Frank Peters, Jr. from four (4) days per week to three (3) days per week.
9. During the period of November 16, 1976, up to and including December 31, 1976, Complainant was compensated on an hourly basis and the reduction in work days substantially reduced the total pay of Complainant.
10. During the period of her employment, Complainant was never criticized by either Respondent's supervisory personnel or Respondent's customers and she competently performed her duties and responsibilities as Respondent's employee.

11. Complainant's work days resulted from Respondent's action removing Complainant from Respondent's sales force and limiting her duties to those of minor record keeping and temporary cashier.
12. On or about December 29, 1976, Complainant was notified of her termination from employment by the Respondent, effective December 31, 1976, through Frank Peters, Sr. This termination was a direct result of Complainant's having filed her November 21, 1976, complaint with the WV Human Rights Commission. While there is direct conflict as to whether Complainant was terminated from or voluntarily quit her employment with Respondent, the overall testimony and circumstantial evidence herein supports and it is held that Complainant was terminated from her employment.
13. On February 14, 1977, Complainant filed a second complaint with the WV Human Rights Commission charging that she had been unlawfully terminated from Respondent's employment in retaliation for having filed her previous complaint with the Human Rights Commission and further charging sex discrimination and disparate pay between male and female employees of Respondent.
14. Prior or subsequent to the Complainant, Respondent has had no pregnant employees.
15. Complainant was physically capable of performing the duties and responsibilities of her employment with Respondent including her duties as salesperson. Between the date of learning of her pregnancy and the date of her termination Complainant performed her duties and responsibilities in a competent and satisfactory manner and without criticism by her immediate supervisor.

16. That Complainant was removed from the sales floor of Respondent's store as a result of her pregnant condition, Frank Peters, Jr.'s fears for her safety because of that condition, and criticism and harassment of Frank Peters, Jr., by friends relative to Complainant's pregnant condition.
17. Respondent's decisions to reduce Complainant's workdays from five (5) to four (4) and from four (4) to three (3) was substantially influenced and primarily motivated by bias against her because of her pregnant condition, and alleged subsequent lack of mobility, and appearance.
18. Complainant's termination from employment was substantially motivated by the filing of her December 21, 1976, complaint with the WV Human Rights Commission.
19. At the time of her termination from employment Complainant was employed three (3) days per week or twenty-four (24) hours per week at a pay rate of \$2.55 per hour or a total monthly gross wage of \$257.04.
20. Complainant received unemployment compensation from March 7, 1977, to December 31, 1977, or forty-two (42) weeks at a rate of forty-eight dollars (\$48.00) per week; she received additional income from the date of her termination to January 1, 1978, in total amount of \$3,266.00; and since December 1, 1978, she has been gainfully employed at a rate of compensation above that received by her from Respondent.

III.
ISSUES PRESENTED

1. Whether the Complainant was discriminated against in her employment as compared to other employees on account of her sex?
2. Whether the Respondent discriminated against the Complainant by paying her disparate wages compared to male employees engaged in equal work?
3. Whether Complainant's employment was terminated by Respondent in retaliation of her filing of the December 21, 1976, discrimination complaint with the WV Human Rights Commission?
4. If any of the issues above are proved, to what damages, if any, is the Complainant entitled?

IV.
DISCUSSION

Section 5-11-9 of the WV Code makes it an unlawful discriminatory practice unless based upon a bona fide occupational qualification:

(a) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required.

Section 5-11-3 defines the various terms used in the WV Human Rights Act including:

(h) The term "discriminate" or "discrimination" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age or blindness and includes to separate or segregate.

Clearly, discrimination based on sex is prohibited by the WV Human Rights Act. The threshold question then regarding Kathy

Varney's December 21, 1976, complaint is whether sex discrimination as defined in the Act, contemplates discrimination resulting from pregnancy. The Commission reasons that it does at the outset and agrees as put succinctly by Mr. Justice Brennan in his dissenting opinion in General Electric Company v. Gilbert, 429 U.S. 125 (1976) who observed:

" . . .By definition such a practice discriminates on the basis of sex because it is the capacity to become pregnant which primarily differentiates the male from the female. . . ."

Under the instant facts the practice at issue by Respondent predicated the risk of adverse employment consequences; namely, a reduction of hours on the basis of Kathy Varney's pregnant condition, in spite of the fact that she was competent to perform her normal duties. The analysis would be the same were the rationale to relate to other employment practices; an employer may not refuse to hire a woman because she is or may become pregnant; an employer may not refuse to promote a woman because she is or may become pregnant; an employer may not fire or lay off a woman because she is or may become pregnant, and so on.

We appreciate the precedent for such an analysis in the Equal Employment Opportunity Commission's guidelines¹, previous federal decisions² and fairly recent Congressional legislation amending Title VII to specifically include pregnancy as a condition to which that Federal Act applies.³ However, we also recognize as pointed out in the Hearing Examiner's recommended decision that our Supreme Court of Appeals has long established that the responsibility of enacting legislation belongs solely to the State legislature, Walter v. Richie, WV 191, S.E. 2d. 275.

In this case we acknowledge that the WV Human Rights Act does not expressly delineate pregnancy as a grounds upon which unlawful sex discrimination can be based. However, as reflected by many decisions of the WV Supreme Court of Appeals, an administrative agency possesses, in addition to the powers expressly conferred by statute, such powers as are reasonably and necessarily implied in the exercise of its duties in accomplishing the purpose of the Act. (State of WV Human Rights Commission v. Pauley, 212 S.E. 2d80 1975)

1/ The 1972 guidelines of the Equal Employment Opportunity Commission implement the sex discrimination prohibition of Title VII. These guidelines state that:

Any written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII. 29 CFR §1604.10(a)

2/ General Electric Company v. Gilbert, supra. Nashville Gas Co. v. Satty, 434 U.S. 136 (1976)

3/ On October 31, 1978, Public Law 95-555 became effective. This law amended Title VII of the Civil Rights Act of 1964 by adding Section 701(k) which defines sex discrimination to specifically include discrimination on the basis of pregnancy, childbirth or related medical conditions. The new subsection (k) states:

The terms "because of sex" or "on the basis of sex" include but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes,

As will be seen, on the basis of statutory interpretation and legislative intent, the Commission reaches an opposite conclusion than that arrived at by the Hearing Examiner, and argues that the condition of being pregnant can be reasonably classified as sex based and is reasonably implied in the definition of "sex" discrimination under the

Act. As reinforced by the Court in its dissenting opinion in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974):

" . . . it offends common sense to suggest that a classification revolving around pregnancy is not at the minimum strongly sex related. . . ."

The Commission's determination above further, is certainly consistent with the Commission's exercise of its duties in accomplishing the purposes of the Act.

The legislative declaration of policy sets forth at 5-11-2:

It is the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment,Equal opportunity in the areas of employment. . . is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age or blindness. . .

The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age or blindness is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

In enacting the WV Human Rights Act, our legislature intended to eliminate all discriminatory practices including discriminatory treatment of men and women. The effect of the statute should not be diluted because discrimination adversely affects only a portion of a protected class thereby setting up an artificial barrier of non-pregnant females and males versus pregnant females. A logical extension of this barrier could allow race discrimination on the basis of the presence of a sickle cell trait. Immutable characteristics should be given no more deference than the right of a female to reproduce; and we therefore conclude that under the WV Human Rights Act consistent with the legislative mandate that the guarantee of equal opportunity for employment is extended to

prohibit the condition of being pregnant, a sexual classification, as a grounds for discrimination. In the instant case, Kathy Varney has demonstrated that she is a member of a protected class; that she was competent to perform her normal duties; that her duties were reduced because of her pregnant condition and that no males actually or potentially could be similarly treated on the same basis.

The Respondent claims that "there was a valid justification for treating Petitioner herein differently than all of its other employees, both male and female, and that this reason was based on a valid business decision." (Respondent's brief pp. 4-5)

The WV Human Rights Act, Section 5-11-9 allows for an unlawful discriminatory practice to be excused if based upon a bona fide occupational qualification. There also exists the judicially created "business necessity" doctrine which can be used to justify an otherwise discriminatory employment practice. Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971). These reasons become important after the Complainant has proven her prima facie case of discrimination. McDonnell-Douglas Corp. v. Green, 411 U. S. 729 (1973). At this point the burden shifts to the respondent to give a reason to defend its act of discrimination.

Respondent's reasons do not suffice as a legitimate defense. There can exist such a legitimate business purpose or bona fide occupational qualification, only if the practice complained of is absolutely necessary to the safe and efficient operation of the business, that is, the necessity for the practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the

business purpose advanced with less discriminatory effect. Robinson v. Lorillard, supra, at page 795; U.S. v. C & O Railroad, 471 F. 2d 582 (4th Cir. 1972); Rock v. N & W Railway, 483 F. 2d 1344 (4th Cir. 1973), cert. den. 412 U. S. 933 (1973). Since reasons such as "strenuousness" of the job, seniority systems and higher costs Weeks v. Southern Bell Telephone & Telegraph Co., 408 F. 2d 228 (C.A. 5, 1969); United States v. Bethlehem Steel Corp., 446 F. 2d 652 (C.A. 2, 1971); Wetzel v. Liberty Mutual Insurance Company, 511 F. 2d 199 (3rd Cir. 1975) have been rejected by the courts, it seems absurd to believe that the courts would accept the discomfort of an employer and of fellow workers as a legitimate reason for allowing sex discrimination.

As for Respondent's defense of customer preference, this reason carries no more weight here than it did in the lunch counter and other public accommodations cases of the 1960's. This view is supported by the EEOC Guidelines which state that the employment decision ought not to be based on the "preferences of coworkers, the employer, client or customers." 29 C.F.R. §1601.4 (iii).

Diaz v. Pan American World Airways, Inc., 442 F. 2d 385 (5th Cir. 1971) rev'g 311 F. Supp. 559 (S.D. Fla. 1970), disposes of the customer preference defense expeditiously. In a case involving airline stewardesses, the court in Diaz stated that:

. . . , it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function of service it offers." Diaz, supra, at page 389

It would seem that the selling of shoes would be the "primary function of service" offered by the Respondent store. Obviously, Frank's Shoe Store was not prevented from selling shoes because of customer reaction to Kathy Varney's "delicate" condition.

Therefore, Respondent's alleged business justifications are found to be of no utility.

RETALIATION

The Commission further concludes that the Complainant Kathy Varney was discharged in retaliation for filing a complaint with the West Virginia Human Rights Commission.

§5-11-9(i)(3) of the WV Code states that it is unlawful for any person or employer to:

Engage in any form of reprisal or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article;

It is essential to the analysis of 5-11-9(i)(3) to recognize its two different clauses: discrimination by a person or employer is forbidden against a specified type of individual

(1) "because s[he] has opposed any practices or acts forbidden under this Act" (the opposition clause); or

(2) "because s[he] has filed a complaint, testified or assisted in any proceeding under this Act" (the participation clause).

The burden of proof considerations set down in McDonnell Douglas Corporation v. Green apply to a case of retaliation. In the instant action the Complainant must show that first, she participated in a

protected activity; second, that the employer was aware of Complainant's participation; third, that Complainant received adverse treatment from the employer, contemporaneous with or subsequent to the participation; and finally, that there is evidence of a causal connection between the participation and the issue, namely that a retaliating motive played a part in the adverse treatment. There should be no argument that Complainant filed a sexual discrimination complaint against Respondent and that the Respondent was aware of the Complainant's charge, imputed or actual, no later than December 28, 1976, and that the Complainant has sustained her burden by showing that she was adversely affected, namely discharged, contemporaneously with her filing a charge of sex discrimination with the WV Human Rights Commission.

The evidence at hearing substantiated a causal connection between the participation and the issue, namely that a retaliating motive played a part in the adverse treatment. Complainant's termination was substantially, if not wholly, motivated by the fact that she filed her December 21, 1976, sex discrimination complaint and under the remedies provided by the Act, Complainant is entitled to the full relief provided. It is elementary that the protection afforded citizens under Code, §15-11-9(i) is an absolute if the Commission is to fulfill its purpose of providing all state citizens equal opportunity for employment equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. To hold otherwise would be to jeopardize the legitimate and laudable purposes of the Act.

CONCLUSIONS OF LAW

1. Frank's Shoe Store, Inc., is an "employer" within the meaning of Section 3(d), Article 11, Chapter 5 of the West Virginia Code.
2. Complainant, Kathy Varney, was an "employee" within the meaning of section 3(e), Article 11, Chapter 5 of the West Virginia Code.
3. On December 21, 1976, Complainant filed a verified complaint alleging that Respondent had engaged in unlawful discriminatory practices prohibited under Section 9, Article 11, Chapter 5, of the West Virginia Code.
4. The complaint of December 21, 1976, was timely filed within 90 days of the alleged act of discrimination. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to Sections 8, 9, and 10, Article 11, Chapter 5 of the West Virginia Code.
5. On February 14, 1977, Complainant filed another verified complaint alleging that respondent had terminated her employment in retaliation for her having filed the complaint of December 21, 1976, alleging disparate pay between male and female employees, and alleging sex discrimination all prohibited conduct under Section 8, 9, and 10, Article 11, Chapter 5 of the West Virginia Code.
6. The complaint of February 14, 1977, was timely filed within 90 days of the alleged acts of discrimination.
7. The WV Human Rights Act prohibits discrimination because of the sex of a person unless based on a bona fide occupational qualification.

8. The WV Human Rights Act prohibits conduct which unlawfully discriminates against females and discrimination because of pregnancy is determined to be sex based within the meaning of the WV Human Rights Act.

9. The WV Human Rights Act is violated when the basis of discriminatory treatment arises from the pregnant condition of females.

10. Respondent's reduction in Complainant's work days was the direct result of Complainant's pregnancy and was sex discrimination within the meaning of the WV Human Rights Act as it treated Complainant differently than males.

11. Complainant is entitled by Section 10, Article 11, Chapter 5 of the WV Code to backpay as a result of Respondent's unlawful discrimination.

a) In computing backpay, Complainant shall be entitled to an award representing the amount she lost as a result of the reduction in her work week by one day from 5 days to 4 days a week over a one month period, November 16, 1976 to December 14, 1976.

\$2.55 per hour x 8½ hour day	= \$21.675
\$21.675 x 4 weeks	= \$86.70

b) Complainant is further entitled to an additional award of backpay representing the amount she lost as a result of the further reduction in her work week from four days to three days per week over a two-week period, December 14 to December 28.

\$2.55 per hour x 8½ hour day x 2 days	= \$43.35
\$43.35 x 2 weeks	= \$86.70

12. The WV Human Rights Act, 5-11-9(i) (3) provides that it shall be an unlawful discriminatory practice to: Engage in any form of reprisal or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article.

13. Respondent's action in terminating Complainant was reprisal within the meaning of the WV Human Rights Act as it was a direct result of the charge filed by Complainant, November 21, 1976.

14. Complainant is entitled by 5-11-10 WV Code to backpay as a result of Respondent's retaliation in discharging her for filing a sex discrimination charge with the Commission.

15. In computing this award Complainant shall be reimbursed at the rate of \$2.55 per hour for 176 hours per month for one year and 11 months commencing December 31, 1976, the date of her termination and ending November 30, 1978, the date she became subsequently employed. Such award being \$10,322.40, plus interest.

16. Such award will be offset by Complainant's part-time employment during this period which resulted in wages amounting to \$1,142.00.

17. Complainant's unemployment benefits of \$48 per week for 42 weeks representing a total of \$1,976.00 shall not offset her backpay award, as it is a collateral benefit.

18. Complainant failed to show the effect if any her post partum recuperation period should have on the assessment of damages when compared with recuperation for non-pregnant employees. Accordingly,

Complainant child was born on February 1, 1977 and her recuperation period was five (5) weeks, reducing her award by \$541.75.

19. Complainant failed to show that there was disparate pay scales between male and female employees as alleged in her complaints of December 1976 or February 1977.

ORDER

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

1. The Respondent, Frank's Shoe Store, their agents, employees, successors, and all persons and organizations in active concert or participation with it, are hereby permanently ORDERED TO CEASE and DESIST at its place or places of business or operation located in West Virginia, from engaging in any employment practices which discriminate against persons on account of their sex, race, color, national origin, religion, age, blindness or handicap, or which perpetuate the effects of past discrimination.

SPECIFIC RELIEF

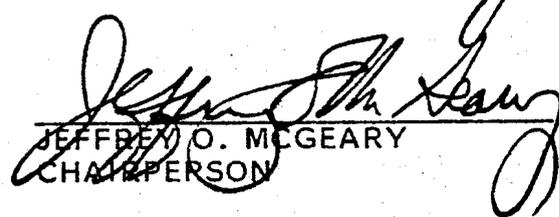
It is further ORDERED that the Respondent, Frank's Shoe Store pay to the complainant backpay based on the following formula:

\$2.55 per hour x 8½ hours per week = \$21.67		
\$21.67 x 4 weeks	=	\$ 86.70
(1 day reduction per week - period 11/16/76 to 12/14/76.) [See Conclusion of Law 11 (a)]		
\$2.55 per hour x 17 hours per week = \$43.35		
\$43.35 x 2 weeks	=	\$ 86.70
(2 day reduction per week, period 12/14 to 12/28 \$174.16 [See Conclusion of Law 11 (b)].		
\$2.55 per hour for 176 hours per month = \$448.80		
\$448.80 x 23 months		\$10,322.40
6% interest from 11/30/78 to 11/30/79		\$ 619.34
	=	<u>\$10,941.74</u>
	Total	\$11,115.14
Offset by Complainant's part-time wages		- \$1,142.00
Offset by Complainant's lack of availability (5 weeks post partum)	=	<u>\$ 541.75</u>
		<u>\$ 9,431.39</u>

The total amount due Complainant by Respondent shall be paid to the Complainant by issue of a check by respondent payable to the Complainant Kathy Varney for \$9,431.39.

Said check shall be submitted to the Commission for disbursement to Complainant within 45 days of entry of this ORDER.

ENTERED THIS 10th DAY OF March, 1982


JEFFREY O. MCGEARY
CHAIRPERSON