

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BETTY R. WENDLING,

Complainant,

DOCKET NO. EAS-84-95A

v.

WEST VIRGINIA REAL
ESTATE COMMISSION,

Respondent.

FINAL ORDER

On March 12, 1997, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Robert B. Wilson. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision as its own, except for such modifications and amendments as are set forth immediately hereinbelow:

On page 20, ¶ 6 is amended to read as follows:

6. The respondent shall promote the complainant to the next available professional position with the respondent for which she is qualified with salary and wages comparable to that of Deputy Director and shall pay front pay at that rate until such time as complainant is promoted to a professional position.

On page 21, ¶ 8 is amended to read as follows:

8. The respondent shall not make employment decisions based upon discriminatory criteria and shall adopt and implement a policy which prohibits the use of sexually hostile language in the workplace.

It is, therefore, the order of the Commission that the Administrative Law Judge's Final Decision be attached hereto and made a part of this Final Order, except as amended by this Final Order hereinabove.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 4th day of April 1997, in Charleston, Kanawha County, West Virginia.



HERMAN H. JONES, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

Gaston Caperton
Governor

TELEPHONE (304) 558-2616
FAX (304) 558-0085
TDD - (304) 558-2976

Herman H. Jones
Executive Director

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

August 21, 1996

Betty R. Wendling
3708 Noyes Ave. SE
Charleston, WV 25304

WV Real Estate Commission
1033 Quarrier St.
Charleston, WV 25304

David L. Stuart, Esq.
Masters & Taylor, L.C.
4th Floor - Peoples Bldg.
179 Summers St.
Charleston, WV 25301-2177

John S. Dalporto, Esq.
Bldg. 1, RM W-435
1900 Kanawha Blvd. E.
Charleston, WV 25305

Re: Wendling v. WV Real Estate Commission
EAS-84-95A

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with

the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

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

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

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

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

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

10.8.2. Within the commission's statutory jurisdiction or authority;

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

10.8.4. Supported by substantial evidence on the whole record; or

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

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

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BETTY R. WENDLING,

Complainant,

v.

DOCKET NUMBER: EAS-84-95A

WEST VIRGINIA REAL ESTATE
COMMISSION,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on February 8, 1996, in Kanawha County, at the West Virginia Human Rights Commission, Conference Room B, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Betty R. Wendling, appeared in person and by counsel, David L. Stuart. The respondent, West Virginia Real Estate Commission, appeared by its representative Richard E. Strader, Executive Director and by counsel, John S. Dalporto, Senior Assistant Attorney General.

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

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

A.

FINDINGS OF FACT

1. The complainant, Betty R. Wendling, is a female resident of West Virginia.

2. The complainant was born January 22, 1948, and at the time of the adverse employment action she was 46 years of age.

3. The respondent, West Virginia Real Estate Commission, is and was at all relevant times herein, a person and employer, within the meaning of West Virginia Code §§5-11-39(a) and 5-11-3(d).

4. The complainant was initially employed by respondent as a Secretary I/Receptionist on March 1, 1986, and worked in that position until July 1, 1989, when she was promoted to her present position as Secretary III/Licensing Clerk.

5. Stuart Ellis, the person promoted to the position of Deputy Director, is a male. Mr. Ellis was born November 11, 1964, and was 29 years of age at the time of the adverse employment action.

6. The complainant filed a timely complaint with the West Virginia Human Rights Commission alleging that on or about March 21, 1994 she was denied a promotion to administrative assistant because of her sex and her age.

7. The respondent hired Mr. Ellis to fill the position of Deputy Director, position number 2, effective March 15, 1994. Complainant's Exhibit No. 8.

8. The failure to hire the complainant for the position of Administrative Assistant relates to the hiring of Mr. Ellis as Deputy Director, as the position of Deputy Director was not new but merely a change in title from Administrative Assistant, the previous designation for the number 2 position. Complainant's Exhibit No. 9; Tr. page 92.

9. At the time of the adverse employment action, Mr. Ellis had been employed by the respondent for just over two years; while complainant had been employed by the respondent for just over eight years.

10. Richard Strader is the Executive Director of the respondent having been appointed to that position, formerly designated Executive Secretary, in December, 1990. Tr. page 24. Mr. Strader made decisions regarding employment actions on behalf of the respondent at all times relevant herein. Tr. pages 52, 54 and 94 etc.

11. Mr. Strader had been previously employed by respondent as an investigator since 1978.

12. The positions of Executive Director/Executive Secretary, Education Director, Investigator and Deputy Director/Administrative Assistant are considered to be professional positions; while

Secretary I/Receptionist and Secretary III/Licensing Clerk are considered to be clerical positions. Mr. Strader has made four decisions regarding employment actions filling professional positions and has selected a male in each instance. Tr. pages 49, 59, 92, 120, 121, 124 and 125.

13. For the hiring of Investigator in 1992, Mr. Stader had 43 applicants of whom nine were women. Mr. Strader interviewed four for the position, perhaps three, all of whom were male. Tr. pages 1025 and 1029. For the position of Education Director, Mr. Strader interviewed five individuals, three males and two females. Tr. page 1040. The job was offered to Mr. Levy a male. Tr. page 1042. Mr. Strader did not consider the application of Karen Potesta, a very qualified female applicant for the position. Tr. page 1038. For the position of Investigator in 1995, Mr. Strader interviewed two applicants for the position, both males. Tr. page 1105. In filling that position, Mr. Strader did not send applications to, or interview two women applicants who met the minimum job qualifications, yet aggressively pursued two male applicants for the position who did not meet those minimum requirements listed for the position. Tr. pages 1117 and 1118. In no instance has Mr. Strader ever offered any position considered professional to any woman applicant.

14. The prior practice at the respondent Commission had been that the position of Administrative Assistant had been filled by the Secretary III/Licensing Clerk, whose position would be filled by the Secretary I/Receptionist under the prior Executive Secretary, Mr. Portis. Tr. pages 141, 144 and 145.

15. Mr. Strader became aware that Lois Chapman was planning to retire from her position as Administrative Assistant in September of 1993. Tr. page 62.

16. Mr. Strader was aware of the complainant's interest in assuming the Administrative Assistant position in October, 1993 when the complainant asked Mr. Strader if she should be learning Ms. Chapman's job. At that time Mr. Strader informed her that it would not be necessary. Tr. pages 66, 67 and 73.

17. Mr. Strader was aware of Mr. Ellis's interest in the position also by the time Ms. Chapman retired at the end of October, 1993. Tr. page 72.

18. Final approval of Mr. Ellis's hiring as Deputy Director was obtained on March 7, 1994. Tr. page 97.

19. The Deputy Director position was the same as the Administrative Assistant position. There was, no written job description for the position of Deputy Director, no minimum requirements for the position, and the position was not advertised as were other professional positions with the respondent. Tr. pages 98 and 99.

20. Mr. Strader did not tell the complainant that he had changed the name of the position or discuss what the anticipated duties for the position would be. Tr. pages 100 and 1153.

21. In April of 1994, directly after the adverse employment action, Mr. Strader authored a memorandum in response to the complainant's grievance, which stated, "The position of Deputy Director was filled with the most qualified individual, based upon the relevant education and experience possessed by each candidate."

Comp. Exhibit No. 9; Tr. page 103. Relevant education referred to an accounting degree and investigative experience, as well as experience with computers. Tr. pages 103, 104, 984 and 985.

22. Mr. Strader was not familiar with the complainant's work history beyond past general conversations with her. Tr. page 982.

23. Mr. Strader believed that the complainant's strong points were her tenure with respondent; her experience in license issuance, congeniality and secretarial experience. Tr. page 985. Mr. Strader did not seem aware that the complainant's past work history included experience with the school systems and work as Office Manager for the Republican State Executive Committee reporting directly to Kent Hall, the State Republican Party Executive Director at the time. Tr. page 362.

24. Mr. Strader was familiar with Mr. Ellis's representations of his work history, and had discussed what he purported to do at Redwing and IGA. Tr. page 981.

25. Mr. Strader did not ask Ms. Daniels a female applicant for the number 2 position about her background, her education, whether she had an accounting degree, or whether she had professional accounting or auditing experience. Tr. 1150.

26. Mr. Ellis did not program computers. Mr. Ellis's only accomplishment was to install a lotus accounting package on the office PC's to automate the daily balance of all receipts and disbursements on a current basis, as Ms. Chapman had prepared and kept by hand previously. Tr. pages 156, 715, 716 and 717.

27. Mr. Strader never told either complainant or Mr. Ellis that an accounting degree was required or that he was looking for someone who had been an Investigator. Tr. page 107.

28. Three people applied for the position of Administrative Assistant/Deputy Director including, the complainant, Mr. Ellis and Margaret Daniels, a woman. Ms. Daniels was informed in October of 1993 that Mr. Strader would be filling the position from within. Tr. page 89. Mr. Strader never interviewed either Ms. Daniels or complainant for the position. Tr. pages 90 and 72.

29. Mr. Strader knew the complainant had a college degree and was enrolled in a Masters program; but never asked her for her transcripts. Tr. page 68.

30. Mr. Strader hired Mr. Ellis as an Investigator without asking for a transcript of his grades or enquiring into his grade point average in his accounting courses; and did not enquire prior to the employment action promoting Mr. Ellis to the number 2 position in March 1993. Tr. page 51. Mr. Strader also took Mr. Ellis's word as gospel truth regarding his listed work as Comptroller for his previous employer when making the decision to hire him for Deputy Director. Tr. page 104.

31. Mr. Ellis's testimony is deemed to be non credible in any respect. Mr. Ellis testified that he had been Comptroller for his prior employer Redwing. Tr. page 640. He testified that he had prepared income statements and balance sheets for Redwing. Tr. page 652. He testified that he developed tax strategies, developed the operating budget, supervised payroll, payables and accounts receivable, forecasted the cash flow, compiled and presented reports;

and that he had the MAS-90 computer system up and running for Redwing. Tr. pages 749 and 750. However, Mr. Travis, the owner and chief executive officer for Redwing, testified very credibly that Mr. Ellis did none of the above. Tr. pages 827, 828, 829, and 832. Although respondents counsel tried to impeach Mr. Travis's testimony on the basis of a magistrates office suit against Mr. Ellis, Mr. Travis's testimony is deemed credible based upon those aspects of his testimony which indicated that Mr. Ellis had done favorable work getting accounts receivables entered and up and running on the MAS-90 program. Tr. pages 833, 837, 842. The general responsibilities of that position with Redwing were clearly not as represented by Mr. Ellis in either his resume or his testimony, which asserted that he performed functions he had nothing to do with. Furthermore, the demeanor of Mr. Strader when confronted with this obvious lack of candor on the part of Mr. Ellis, indicated that Mr. Strader was not troubled by it in the least.

32. Mr. Ellis's testimony that he often consults with the new investigator, Mr. Hypes, is not deemed credible. Tr. page 740. Mr. Hypes testified credibly that he rarely went to Mr. Ellis with investigative questions, doing so only when Mr. Strader was not available. Tr. pages 588 and 589. Mr. Ellis did not ever accompany Mr. Hypes on investigations. Tr. page 761.

33. Mr. Strader's testimony that he redesigned the position (Tr. p. 965), or made massive shifts, (Tr. p. 970) in the number 2 position is simply not credible.

34. At no time did Mr. Strader ever explain what those particular changes were. He did not inform the complainant what

those changes he planned would be. Tr. page 1183. When asked to specifically explain what Mr. Ellis's duties were in the period of time immediately following his promotion, Mr. Strader indicated that Mr. Ellis performed the duties of Ms. Chapman, installed an internal accounting system on the respondent's PCs, answered license law questions, and prepared the new examinations for brokers and salesmen. Tr. page 987. However, Mr. Ellis didn't prepare the whole exams. Tr. page 989. The complaint calls were handled by Mr. Strader. Tr. page 989. Furthermore, Mr. Strader streamlined the renewal process with a two stroke system, not Mr. Ellis. Tr. page 991.

35. Complainant had vastly greater experience in performing the job duties of Ms. Chapman, than did Mr. Ellis, because she had worked closely with her for several years. Tr. page 277 and 279. Complainant had a greater understanding of the licensing law, than did Mr. Ellis. Tr. pages 302 and 303.

36. Mr. Hypes testified credibly that Mr. Strader never criticized his grammar. Tr. page 579. Although it would appear that Mr. Hype's grammar is sometimes in need of such correction. Tr. page 583.

37. Ms. Chapman, the Assistant Director, testified credibly that Mr. Strader always put down women in any position they held by frequent remarks which indicated that Mr. Strader did not feel women were capable of doing a job as well as men. Tr. page 183. Mr. Strader frequently demeaned Ms. Fauber Smith, the receptionist for incorrect English, for her dress and her mannerisms. Tr. page 185. Mr. Strader would say women could not do this. He would state that

he did not think Ms. Mooney the prior Administrative Assistant could do her job. Tr. Page 186. Mr. Strader had commented in Ms. Chapman's presence that he did not let his wife handle bookkeeping at the house. Tr. page 251.

38. Ms. Fauber-Smith, a former Receptionist, testified credibly that Mr. Strader would criticize her outfits, her grammar and that there was no sense in her going to school because she would not do anything anyway. Ev. Depo. page 16. She testified credibly that Mr. Strader was a chauvinist, in that he would downgrade women and talk down to them. Ev. Depo. page 18.

39. Complainant testified credibly, that Mr. Strader made remarks that indicated Mr. Strader valued women's opinions less than men's opinions. Mr. Strader would comment that, "Now, you know a man can do this better," or "a woman can't possibly do this as well." Tr. pages 326 and 327. Mr. Strader had a discussion with complainant indicating that surely her husband would have better judgement than to let her take care of home finances or those of other persons'; indicating that she should not be handling her aunt's finances as guardian because of her aunt's Alzheimer's; and commenting, "she shouldn't be doing that" or "doesn't Herb take care of that." Tr. pages 329 and 330. Mr. Strader on other occasions commented that complainant did not need to work or asked, "Why do you work?" Tr. pages 332 and 333.

40. Mr. Strader caused the name of the Executive Secretary for respondent to be changed by statute to Executive Director because he considered the designation of secretary to be effeminate. This finding is based on observing Mr. Strader's veins bulge in his neck

and facial features register extreme displeasure and anger at one point during his initial testimony, when referred to as Executive Secretary. Notwithstanding his testimony that other considerations led to this initiative for a change in title, it is apparent that Mr. Strader considers the title effeminate (i.e. suited to clerical types). An example of testimony reflecting this attitude; A. "Well, if the administrator's title was no longer specified as being Executive Secretary, that would have certainly afforded the Commission the opportunity to have someone else in the office with the title of Executive Secretary." Q. "Such as a clerical position that reported directly to the Executive Director?" A. " Sure." Tr. page 951.

41. Mr. Strader told Ms. Fauber-Smith that he would like to replace her with a real secretary; that he would like to replace her with a blond. Tr. pages 964, 965 and 1078.

42. Based upon the preponderance of the evidence, Mr. Strader acting for the respondent, discriminated against complainant on the basis of her sex, when he promoted Mr. Ellis to the Deputy Director position effective March 15, 1994.

43. Complainant was devastated upon finding out that she would not receive the promotion. It made her sick to her stomach; she was surprised, disappointed and frustrated. Tr. page 294. Complainant was hurt and upset; she welled up and did not want to sit there and cry. Tr. pages 324 and 325.

44. Complainant's current salary is \$22,608.00 with the across the board pay raise in July 1994. Tr. page 283.

45. Mr. Ellis's salary with the across the board pay raise in July 1994 is \$31,620.00. Tr. pages 92-93.

B.

DISCUSSION

To make a prima facia case of employment discrimination under the West Virginia Human Rights Act, a complainant must offer proof that:

1. The complainant is a member of a protected class;

2. the employer made an adverse decision concerning the complainant; and,

3. but for the complainant's protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

The "but for" test of discriminatory motive making up the third prong of the Conaway test is merely a threshold inquiry, requiring only that a complainant show an inference of discrimination. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995).

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by the three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula the complainant must first establish a

prima facia case of discrimination; the respondent then has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by the respondent was not the true reason for the employment decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real motive; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway, supra. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Barefoot, supra. Where pretext is shown discrimination may be inferred, Barefoot, supra, though discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. , 113 S.Ct. 2742, 125 L.Ed.2d. 407 (1993).

There is also the "mixed motive" analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. "Mixed motive" applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the "mixed motive" analysis, the complainant need only show that gender played some roll in the decision, and the employer can avoid liability only by proving that it would have made

the same decision even if it had not considered the complainant's gender. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

In this case the employer has attempted to establish that its nonselection of the complainant and its selection of Mr. Ellis was motivated by Mr. Ellis's superior education, his accounting degree, his experience as an investigator, and his computer skills. Yet, Mr. Strader admitted that computer skills were not a requirement. Tr. pages 1151 and 1152. Mr. Ellis merely loaded an accounting program on the respondent's personnel computers, a task that complainant appeared as capable of as was Mr. Ellis. When the two key stroke license renewal process was initiated on the computer system, Mr. Strader assumed the credit for it. Thus computer knowledge does not appear to be a true requirement for the position of Deputy Director. Similarly, respondent has failed to demonstrate that Mr. Ellis's experience as an Investigator is utilized in any respect, as he does not supervise the other Investigator and is not utilized to conduct field audits. Field audits simply involve monitoring trust accounts by running trial traces of specific deposits through the trust accounts and verifying that funds are not commingled.

The complainant has demonstrated that she possesses an intimate knowledge of the West Virginia licensing laws for Real Estate Agents, that she has handled complaints and questions of the public and that she has an appreciation and knowledge of the activities of the Investigators in the field. The functions that are the core of Mr. Ellis's work involve answering licensing questions and performing the functions formerly performed by Ms. Chapman. Those activities were not accounting duties so much as bookkeeping and administrative

functions and activities which the complainant was much more familiar with than was Mr. Ellis at the time when the promotion to Deputy Director was being contemplated by Mr. Strader. Similarly the knowledge complainant demonstrated of licensing law for responding to the public, as well as of all other aspects of the operations previously performed by Ms. Chapman, was greatly superior to that of Mr. Ellis. Thus the reasons advanced by the respondent for its decision to hire Mr. Ellis are found to be pretextual. They are a pretense for justifying a course of action, which it may be inferred, was instead motivated by gender based discrimination.

Direct evidence of impermissible gender based discrimination has been provided by the complainant as well. Mr. Strader was shown to have made comments that were derogatory of women's abilities in general. He indicated that he wanted the women in the office to depart from employment there, and that he wanted to replace his secretary with a blond. Furthermore, it was apparent that Mr. Strader did not like being referred to by the title Executive Secretary because he considered the title effeminate and caused the title to be changed by the Legislature for that reason. Further direct evidence of Mr. Strader's discriminatory intent toward women in general comes from an examination of his past hiring and personnel actions in regard to filling four professional level positions with the respondent.

Mr. Strader has filled four positions of a professional nature with the respondent in his tenure as Executive Director. In each instance, the position has been filled by a man. None of the four positions was ever offered to a female. For the hiring of the

Investigator in 1992 and the Investigator hired in 1995, no female applicants were even interviewed. In hiring the Education Director, although Mr. Strader interviewed two women, it was offered to a man. In the interview process, Karen Potesta, who appeared highly qualified was not even considered. Although such evidence may not be statistically significant, it nonetheless is probative of Mr. Strader's conscious or unconscious motivation in the decision to hire a Deputy Director, and suggests a negative stereotype of women as not suited to professional positions. Complainant's attempt to show disparate impact of the respondent's criteria in selecting a Deputy Director is confusing as each of the qualifications and criteria cited as reasons for its actions do not impact upon any protected class. Similarly, the complainant has not presented the preponderance of evidence necessary to show that the respondent acted on the basis of age in hiring Mr. Ellis for the Deputy Director position.

Under the "mixed motive" analysis of Price Waterhouse, supra, and West Virginia Institute of Technology, supra, the complainant has demonstrated that gender played a part in the decision to fill the Deputy Director post with Mr. Ellis instead of the complainant. This was demonstrated by the fact that Mr. Strader never told the complainant what skills were necessary for the "newly created" position of Deputy Director and by the fact that he never bothered to find out what complainant's qualifications might be in the way of former work experience or knowledge of licensing law, etc. Nor did he even find out any educational or experience qualifications for the one other female applicant for that post. Having been proven to be

motivated by a discriminatory intent at least in part, the respondent has certainly failed to prove that it would have made the same decision even absent consideration of the fact that the complainant was a woman as required under Barefoot, supra. To the extent that Mr. Strader relied upon Mr. Ellis's representations of his abilities at face value, in ascribing administrative capabilities based on his past experience as Comptroller, or computer literacy, subjective and stereotypical thinking motivated him not to even enquire regarding women applicants' abilities in this vein.

The respondent's theories for why Mr. Strader hired Mr. Ellis for the Deputy Director position are found to be pretextual. Past practice with the respondent Real Estate Commission, had been that the Administrative Assistant would come from the Secretary III/Licensing Clerk position. The duties of the Deputy Director are primarily those of the former Administrative Assistant and answering licensing questions, a skill that complainant had to a greater degree than does Mr. Ellis. Since the complainant was much more familiar with the Administrative Assistants duties, while those other duties asserted as reasons for Mr. Ellis's being hired, did not in fact seem to be utilized in the Deputy Director position, together with the fact that Mr. Strader deviated from past practice in filling the number two slot, all would indicate that the reasons advanced, although ostensibly legitimate on their face, are nonetheless pretense and color for a discriminatory intent on the part of Mr. Strader.

The West Virginia Supreme Court has held that a complainant is entitled to recover incidental damages for humiliation,

and loss of personal dignity as a result of the ...
discrimination in the filling of the Deputy Director position, and is
accordingly entitled to the maximum award of \$3,277.45.

C.

CONCLUSIONS OF LAW

1. The complainant, Betty R. Wendling, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, West Virginia Real Estate Commission, is an employer as defined by WV Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

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

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. Complainant has not established, by a preponderance of the evidence, that she was subjected to unlawful age discrimination.

6. Complainant has established a prima facie case of sex discrimination.

7. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful sex discrimination.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of \$25,958.22 through September 30, 1996, plus statutory interest.

9. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

10. As a result of the unlawful discriminatory action of the respondent, complainant is entitled to an award of reasonable attorneys fees and cost in the aggregate amount of \$28,583.09.

11. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to front pay until promoted to a professional position with respondent, all at a rate equal to that paid the successful applicant for the Deputy Director position.

D.

RELIEF AND ORDER

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

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

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant \$25,958.22 through September 30, 1996 for back wages.

3. Within 31 days of receipt of this decision, the respondent shall pay to the complainant attorney fees and costs in the amount of \$28,583.09.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

5. The respondent shall pay ten percent per annum interest on all monetary relief.

6. The respondent shall promote the complainant to the next available professional position with the respondent with a salary equal to that paid to the successful applicant for the Deputy Director position and shall pay front pay at that rate until such time as complainant is promoted to a professional position.

7. The respondent shall prepare an Equal Employment Opportunity Program and submit it to the Governor's Equal Employment Opportunity Office.

8. Any future hiring decisions by the respondent shall be monitored by the West Virginia Human Rights Commission during the application process to assure non-discriminatory practices are utilized.

9. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 20th day of August, 1996.

WV HUMAN RIGHTS COMMISSION

BY: Robert B. Wilson

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 21st day of August, 1996, to the following:

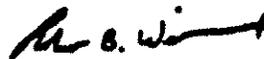
Betty R. Wendling
3708 Noyes Ave. SE
Charleston, WV 25304

WV Real Estate Commission
1033 Quarrier St.
Charleston, WV 25304

David L. Stuart, Esq.
Masters & Taylor, L.C.
4th Floor - Peoples Bldg.
179 Summers St.
Charleston, WV 25301-2177

John S. Dalporto, Esq.
Bldg. 1, RM W-435
1900 Kanawha Blvd. E.
Charleston, WV 25305

Mary C. Buchmelter
Deputy Attorney General
812 Quarrier St.
Charleston, WV 25301



ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE