



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Herman H. Jones
Executive Director

March 11, 1997

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Re: **Cathy E. Miller Booher v. Ravenswood
Aluminum Corp.
Docket No. ES-195-94**

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

A handwritten signature in black ink, appearing to read "Herman H. Jones".

HERMAN H. JONES
EXECUTIVE DIRECTOR

HHJ/jk
Enclosures
Certified Mail/Return
Receipt Requested
cc: The Honorable Ken Hechler
Secretary of State

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this Order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this Order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11 and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CATHY E. MILLER BOOHER,

Complainant,

v.

DOCKET NO. ES-195-94

RAVENSWOOD ALUMINUM CORP.,

Respondent.

FINAL ORDER

On June 8, 1995, this matter came on for public hearing before Administrative Law Judge Mike Kelly. On June 28, 1996, after consideration of the testimony and other evidence, as well as the proposed findings and other written submissions of the parties, the Administrative Law Judge issued his Final Decision. This Final Decision directed that the case be dismissed with prejudice and be closed.

No appeal having been filed pursuant to W. Va. Code § 5-11-8(d)(3), and the Rules of Practice and Procedure Before the West Virginia Human Rights Commission, 6 W. Va. C.S.R. § 77-2-10, the Final Decision of the Administrative Law Judge attached hereto is adopted, without modification or amendment, as the Final Order of the West Virginia Human Rights Commission, in accordance with § 77-2-10 of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission.

It is so ORDERED.

Entered for and at the direction of the West Virginia Human Rights Commission this 12th day of March, 1997, in Charleston, Kanawha County, West Virginia.



**HERMAN H. JONES
EXECUTIVE DIRECTOR**

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CATHY E. MILLER BOOHER,

Complainant,

v.

Docket No. ES-195-94

RAVENSWOOD ALUMINUM CORP.,

Respondent.

**FINAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

THIS MATTER matured for public hearing on 8 June 1995. By agreement of the parties, the hearing was held at the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, Kanawha County, West Virginia. The complainant appeared in person and her case was presented by the West Virginia Human Rights Commission and its counsel, Assistant Attorney General Leah Q. Griffin. Ms. Griffin was assisted by law student Ariana Kincaid. The respondent appeared by its designated representative, Jeffrey Carpenter, and its counsel, Ricklin Brown and Bowles, Rice, McDavid, Graff & Love.

In making this decision, I considered the following documents: the hearing transcript, the evidentiary deposition of Larry W. Wellman, all exhibits admitted into evidence, the post-hearing findings of fact and conclusions of law submitted by counsel and the argument of counsel.

I. ISSUES TO BE DECIDED

Whether respondent discriminated against complainant by creating or tolerating a work environment hostile to complainant because of her sex in violation of W. Va. Code §5-11-9(1) and 6 W. Va. C.S.R. §77-4-2.5.

II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the transcript of the proceedings, the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true*:

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

A. Stipulated Facts

The parties stipulated that the following facts are true:

1. Cathy E. Miller Booher is a female person and employee within the meaning of the West Virginia Human Rights Act.
2. Respondent Ravenswood Aluminum Corporation (RAC) is an employer within the meaning of the West Virginia Human Rights Act and is subject to the jurisdiction of the West Virginia Human Rights Act.
3. Complainant was hired by respondent on April 23, 1979. Following on-the-job training in 1980 and 1981, complainant was upgraded to the position of millwright in 1981.
4. Jeffrey Carpenter was employed by respondent as supervisor of carbon maintenance in the reduction plant and was the complainant's immediate supervisor during a period of time when she worked in the bake carbon/green carbon area of the plant. Jeff Carpenter became the foreman of this area on July 6, 1992, and the complainant worked under him from July 6, 1992, until she transferred to the hot line area of the plant in the fabrication west department on January 10, 1994.
5. On June 29, 1993, Ms. Booher formally complained to respondent regarding issues of sexual harassment.

6. On July 22, 1993, a meeting was held by the joint EEO Committee to further discuss the issue of sexual harassment.

7. In July 1993, respondent counseled Jeff Carpenter regarding his need to communicate appropriately with all employees and with regard to his distribution of paychecks.

B. Labor Dispute at RAC

8. Any realistic assessment of this matter must begin with the fact that the RAC plant in Jackson County, West Virginia was the site of a prolonged and bitter labor dispute from 1 November 1990 to 29 June 1992. The dispute, whether properly termed a strike (as RAC insists) or a lockout (as the union insists), gained local and national attention and feelings on both sides ran high.

9. Ms. Booher was, and remains, a member of the United Steel Workers (USW), the union which represented RAC's hourly employees during the labor dispute. The USW is still the bargaining agent for the rank-and-file at RAC. Ms. Booher participated in the labor dispute on the side of the USW and other similarly situated workers.

10. Jeffrey Carpenter was initially hired by RAC as an hourly replacement worker. During the labor dispute, he crossed the picket line at RAC in defiance of the USW and its members. This action did not win him any friends among the hourly employees.

11. Mr. Carpenter was fired by RAC when the labor dispute ended. However, one week later, on 6 July 1992, he was rehired as a supervisor.

12. At hearing, it was not disputed that Mr. Carpenter was viewed by union members as a "scab". Generally, the post-labor dispute atmosphere at RAC among management, the replacement workers remaining on the job and USW members was tense and strained. The conflict between complainant and Mr. Carpenter was due in some degree to the fact of the labor dispute and each individual's respective role in that matter.

C. Mr. Carpenter Enters an Established Work Situation

13. After the labor dispute, Ms. Booher resumed working with the same four person crew she had worked with previously: Janey Collins, Larry Wellman, Tom Cobb and herself. Complainant was usually assigned to work with Mr. Wellman, though she was occasionally paired with Ms. Collins or Mr. Cobb. It was unclear from the testimony, but it appeared generally accepted that, for the most part, Ms. Collins acted as an assistant to Mr Cobb and complainant assisted Mr. Wellman.

14. Shortly after the crew returned to work, Mr. Carpenter began supervising them. He took over from a supervisor generally liked by the crew. At the beginning of each work shift, he would make duty assignments for the entire work day. The primary responsibilities of the crew were to repair "down" machinery and perform preventive maintenance.

D. Allegations of Sexual Harassment

15. The Commission did not attempt to produce evidence that Mr. Carpenter engaged in any of the behaviors usually associated with allegations of sexual harassment. Thus, it is undisputed that Mr. Carpenter never engaged in unwelcome physical touching of Ms. Booher, never subjected her to unwelcome sexual jokes or language, never asked her to see him socially or to engage in a sexual act with him, never exposed himself, never showed her sexual pictures or drawings, and never engaged in behavior designed to create or sustain an overtly sexual and offensive work atmosphere. Similarly, it is undisputed that Mr. Carpenter did not regularly scream or yell at complainant, did not curse at her and did not attempt to physically or verbally intimidate her.

16. The particulars of the unlawful harassment sought to be established by the Commission can be summarized as follows:

- (a) Mr. Carpenter monitored the use of restroom facilities by females;
- (b) Mr. Carpenter characterized female use of the toilet as "that little procedure";
- (c) Mr. Carpenter hid and spied on females albeit not in a "peeping Tom" sexual manner;
- (d) Mr. Carpenter denied the women crew members equal access to coveralls and welding jackets;
- (e) Mr. Carpenter delayed issuance of paychecks to females;
- (f) Mr. Carpenter generally spoke only to the male crew about work assignments and ignored the women;

(g) Mr. Carpenter more closely supervised the females while they worked or were on break; and

(h) Mr. Carpenter verbally expressed to male coworkers of complainant an anti-female attitude and bias.

E. Restroom Use

17. Complainant and Ms. Collins testified that Mr. Carpenter would on occasion be in the area near the women's restroom while they were using that facility. The women's room is in the electrical shop. They alleged that he was monitoring their use of the restroom. There was no evidence that Mr. Carpenter attempted to peer into the restroom while it was in use, or that he positioned himself so he could see or hear use of the facility or otherwise invade their privacy.

18. Gary Roberts, an hourly employee and union member who I generally believe to have testified truthfully, recalled seeing Mr. Carpenter in the vicinity of the women's restroom in the electrical shop. However, he also testified that Mr. Carpenter regularly supervised the electricians working in that shop and, therefore, had work-related reasons to be in the vicinity of the women's room on a somewhat consistent basis.

19. RAC employees are generally free to use the restroom as needed. It was undisputed that Mr. Carpenter never disciplined his female crew members for unauthorized or excessive use of

the facility, never disciplined them for taking restroom breaks simultaneously and never attempted to restrict their use of the restroom.

20. Mr. Carpenter testified that he would periodically have to search for Ms. Booher and Ms. Collins after failing to find them in their assigned work area. He sometimes found them in the vicinity of the women's room. He recalled one incident when he found them in the lunchroom and became irritated when they said that not only had they not fixed the gas leak which he had sent them to repair, but they had not even identified the source of the leak yet.

21. Viewing the evidence as a whole, I find as fact that Mr. Carpenter did not, as a regular and consistent practice and with the intent of harassing or discriminating against Ms. Booher and Ms. Collins, monitor their use of the restroom. Mr. Carpenter did, however, keep a closer watch on their whereabouts than he did on the male employees, though it appeared that he did so for legitimate reasons unrelated to their sex.

22. On one occasion, Mr. Carpenter, upon seeing the women exiting the restroom, said to Ms. Booher and Ms. Collins "Just how long does this little procedure take?", meaning or suggesting that they had been in the restroom for an excessive period of time. I find as fact that this event did take place as described in the testimony of Ms. Booher and Ms. Collins and that a reasonable woman would find such a comment to be somewhat offensive when coming from a boss with whom she did not generally enjoy a good working relationship.

F. Hiding and Spying

23. I find as fact that Mr. Carpenter did not hide and spy on the female crew members with the intent of harassing them, nor did he hide and spy (regardless of intent) on a regular and consistent basis. I do find as fact that he would occasionally search for the women when he could not find them in their assigned area and that his search sometimes took him to the general area of the women's room. When he did hide and spy, it was not accompanied by any insult, ridicule or attempt at verbal or physical intimidation.

G. Welding Jackets and Coveralls

24. It is undisputed that for at least a three week period, Ms. Booher and Ms. Collins did not have access to new welding jackets, while new jackets were provided to Mr. Wellman and Mr. Cobb (two jackets each). While the male crew members actually did welding, as part of their duties, the women assisted on those jobs and also had need for protective jackets. The testimony as to why the women were not provided jackets at the same time as the men was conflicting, with the Commission asserting intentional discrimination on the part of Mr. Carpenter and RAC alleging that while the jackets were ordered at the same time, the jackets for Mr. Wellman and Mr. Cobb (sizes small and XX-large, respectively) arrived before the women's jackets (both size X-large). Both sides agreed that the women were eventually issued welding jackets. I find as fact that Mr. Carpenter did

not fail to issue welding jackets to Ms. Booher and Ms. Collins with the intent of unlawfully harassing or discriminating against them, and that more likely than not his version of this event is true.

25. In the beginning of his tenure as foreman, Mr. Carpenter on several occasions issued coveralls only to the males and not to the women. When Ms. Collins chastised him for this omission, Mr. Carpenter began issuing coveralls to all. RAC eventually made coveralls available to all four crew members without involvement of a dispensing foreman. I find that more likely than not Mr. Carpenter intentionally overlooked Ms. Booher and Ms. Collins, because of their sex, when he issued coveralls. I also find that he corrected his behavior when challenged by Ms. Collins.

H. Paychecks

26. I find no reason to believe that Mr. Carpenter purposely withheld or delayed the issuance of paychecks to Ms. Booher and Ms. Collins on two or three occasions and the Commission's evidence on this point was unconvincing. Mr. Carpenter was new to a supervisor's duties and, in some instances, the "I simply forgot" defense may be credible when coming from a relatively inexperienced foreman. Here, I find it to be more likely than not that Mr. Carpenter, in fact, became preoccupied with other duties and, under the circumstances, neglected to issue the paychecks in a timely fashion. One of the paychecks due Ms. Booher was late by only 10 or 15 minutes. On at least one of the occasions, a male also received his check late. The fact that RAC counseled Mr.

Carpenter on this point is not proof of discrimination, but merely indicates that timely issuance of paychecks is a management responsibility that a foreman should not neglect.

I. Assignments and Close Supervision

27. Ms. Collins and Ms. Booher testified credibly that Mr. Carpenter tended to issue work assignments directly and exclusively to the males, even when the women were present in person and waiting assignment. The women would learn of their assignment only by listening to Mr. Carpenter give direction to Mr. Cobb and Mr. Wellman. Based on the whole record, and based specifically on Mr. Carpenter's poor opinion of the women workers as discussed below, I find this allegation to be more likely true than not.

28. The evidence tended to show that Mr. Carpenter closely supervised the work of all crew members, male and female. The testimony of Mr. Wellman made clear that the entire crew was subjected to closer supervision than occurred under previous foremen. To the extent that Mr. Carpenter occasionally "timed" the women's breaks or use of the restroom, I find that he was motivated more likely by a desire to be a strict supervisor than by a discriminatory animus against women. It must be recalled that Mr. Carpenter never attempted to discipline the female crew and never acted in a crude or boorish fashion in their presence.

J. Poor Attitude

29. Both Mr. Roberts and Mr. Wellman testified credibly that Mr. Carpenter expressed a belief that Ms. Booher and Ms. Collins were not competent millwrights and were not as skilled as the male employees. Mr. Roberts, in particular, persuasively testified that Mr. Carpenter simply did not like working with women whom he believed had not been properly trained and were not capable of performing all of the duties normally required of a millwright. It was unclear if Mr. Carpenter had a general bias against women in the workplace or if he simply disliked Ms. Booher and Ms. Collins on a more personal basis. His comments appeared directed at these women, rather than all women. Regardless, his attitude seeped into his supervisory duties and, undoubtedly, played some role in this action being filed.

K. Totality of Circumstances

30. In summary, the Commission established, and I find as fact, the following indicia of a discriminatory animus against Ms. Booher because she is a woman:

- (a) Mr. Carpenter made a moderately offensive comment by asking complainant and Ms. Collins "Just how long does this little procedure take?" upon observing them leaving the restroom;
- (b) Mr. Carpenter failed for a period a period of time to provide coveralls to the female crew members, but corrected this behavior upon challenge by Ms. Collins;

(c) Mr. Carpenter at times ignored the women's presence when giving work assignments and spoke directly and exclusively to the men; and

(d) Mr. Carpenter articulated a belief that Ms. Booher and Ms. Collins had not been properly trained and were not competent millwrights.

L. Report of the Harassment and Its Aftermath

31. In June 1993, eleven months after the alleged harassment began, Ms. Booher filed a formal complaint through the joint company-union EEO committee.

32. Cindy Fairbanks, RAC's manager of personnel, met with complainant and Ms. Collins. After getting their side of the story, she and the reduction plant manager met with Mr. Carpenter. At the end of the meeting, Mr. Carpenter was counseled to improve his communication skills and to make sure that paychecks were timely distributed. No other form of discipline was taken against Mr. Carpenter.

33. Ms. Fairbanks reported her action against Mr Carpenter to the joint EEO committee. The union representatives objected, believing more severe discipline was warranted.

34. Both Ms. Booher and Ms. Collins eventually transferred out of Mr. Carpenter's supervision, complainant transferring on 10 January 1994. He was transferred to a different

department shortly thereafter. Ms. Collins subsequently quit RAC for other opportunities, while complainant remains an employee.

35. Complainant alleges that as a result of Mr. Carpenter's harassment she suffered extreme emotional distress and sought medical attention. Her doctor prescribed Buspar, an anti-anxiety drug, and Zantac, a medication for stomach ulcers. Ms. Booher had taken Buspar for a period of time before working with Mr. Carpenter. I decline to find as fact that complainant's medical problems were caused by the conduct of Mr. Carpenter.

M. Credibility

36. I found the testimony of complainant and Ms. Collins to be vague, somewhat exaggerated and extremely general in regard to many of the allegations. I found the testimony of Mr. Carpenter to be credible in part and unworthy of belief in part.

N. Summary of Findings of Fact

37. I find as fact that Mr. Carpenter's actions were, in part, manifestations of a discriminatory and hostile environment against complainant because of her sex.

38. I find as fact that under the totality of the circumstances Mr. Carpenter's discriminatory actions were not so severe, regular or pervasive to affect the terms and conditions of Ms. Booher's employment.

39. I find as fact that respondent did not discriminate against Ms. Booher in violation of the West Virginia Human Rights Act.

III. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

This case, at its core, raises two issues:

(1) Does the West Virginia Human Rights Act encompass a cause of action for "non-sexual" sexual harassment?; and

(2) If yes, was Mr. Carpenter's conduct in this case so severe or pervasive as to effect the terms and conditions of Ms. Booher's employment and, thus, violate the HRA?

That hostile, albeit not overly sexual, conduct directed to a person because of her gender may constitute a valid cause of action has long been recognized under Title VII. In the leading case on point, *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985), the circuit court held that in cases involving harassment because of sex:

The relevant legal question is whether such harassment compromised a "condition of employment." If it does -- that is, if it is sufficiently patterned or pervasive to comprise a condition [citation omitted] . . . and if it is apparently caused by the sex of the harassed employee -- that is, if "but for her womanhood" [citation omitted] the harassment would not have occurred, then such harassment violates Title VII.

765 F.2d at 1138.

The *McKinney* definition of sexual harassment has been adopted by the Third Circuit (*Andrews v. City of Philadelphia*, 895 F.2d 1469 (1990)), the Eighth Circuit (*Hall v. Gus Construction Co.*, 842 F.2d 1010 (1988)), the Tenth Circuit (*Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (1987)), and the Eleventh Circuit (*Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497 (1985)).

As succinctly stated in *Hall*, under the *McKinney* definition, "predicate acts underlying a sexual harassment claim need not be clearly sexual in nature." 842 F.2d at 1014. "Intimidation and hostility toward women because they are women," said the court "can obviously result from conduct other than explicit sexual advances." *Ibid.* Since Title VII "evinces a congressional intention to define discrimination in the broadest possible terms" [citation omitted], non-sexual conduct which is "sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment" gives an employee a cause of action for unlawful sex discrimination. 842 F.2d 1014-1015.

The Eleventh Circuit in *Bell* held that an employee is "under no obligation to adduce proof of sexual advances, requests for sexual favors [or] other verbal or physical conduct of a sexual

nature." 777 F.2d at 1503. Harassment is actionable if the objectionable conduct consists of "threatening, bellicose, demeaning, hostile or offensive conduct by a supervisor in the workplace because of the sex of the victim of such conduct." Ibid.

I do not need to address the issue of whether the HRA should be interpreted so as to conform to *McKinney* and its progeny since the standards enunciated in the cited federal cases are already reflected in the HRC's legislative rule regarding sexual harassment, 6 W.Va. C.S.R. §77-4-1 et seq., which states, in part, that:

Harassment is not necessarily confined to unwanted sexual conduct. Hostile or physically aggressive behavior may also constitute sexual harassment, as long as the disparate treatment is based on gender.

§77-4-2.5.

Given that the Commission's regulation on sexual harassment is a legislative rule, it has the force equivalent to the statute itself and is entitled to controlling weight. *Appalachian Power Co. v. State Tax Department of West Virginia*, ___ W.Va. ___, 466 S.E.2d 424 (1995); *WVHCCRA v. Boone Memorial Hospital*, ___ W.Va. ___, ___ S.E.2d ___ (Slip Opinion, 17 May 1996).

Recognizing that a *McKinney*-type cause of action is afforded by the HRA, the question now becomes whether Mr. Carpenter's actions which were found to be motivated by a discriminatory animus amounted to a violation of law.

We begin by recognizing, as the U.S. Supreme Court made clear in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986), and *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), that the civil rights laws were not intended to make unlawful words or conduct which merely generate hurt or offended feelings. To be actionable, the harassment must affect the terms or conditions of employment, or, in other words, must be "severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive." *Harris*, at 370. See, *Hanlon v. Chambers*, ___ W.Va. ___, 464 S.E.2d 741 (1995); 6 W.Va. C.S.R. §77-4-2.3

Moreover, in determining whether the challenged harassment is "sufficiently severe or pervasive," 6 W.Va. C.S.R. §77-4-2.4, to be considered a violation of law the factfinder must look "at the totality of the circumstances," *Id.* at §77-4-2.3, including whether the questioned conduct involved unwelcome physical touching or verbal abuse of a threatening or offensive manner, and the frequency of the offensive encounters. §77-4-2.4. As nicely summarized by the Third Circuit in *Andrews*:

[A] decision regarding hostile work environment should be made viewing the totality of the circumstances Particularly in the discrimination area, it is often difficult to determine the motivations of an action and any analysis is filled with pitfalls and ambiguities. A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario. . . . the factfinder in this type of case should not necessarily examine each alleged incident of harassment in a vacuum. What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents. The factfinder must not only look to the

frequency of the incidents but to their gravity as well. [Citation omitted].

895 F.2d at 1484.

Here, of course, the totality of the circumstances includes no unwelcome physical touching (sexual or otherwise), no verbal abuse of a threatening nature, no verbal abuse of an offensive nature and no unfair disciplinary action. There is no single incident that could fairly be called "grave", nor any series of related incidents that together could be considered "grave".

My research has found three cases with factual scenario somewhat similar to those at bar. In *Delgado v. Lehman*, 665 F.Supp. 460 (E.D. Va. 1987), the court found unlawful harassment when the behavior of the supervisor included deliberate interference with the performance of Ms. Delgado's duties, refusal of access to critical material necessary for her job, yelling, screaming and verbal threats, and loud and abusive language. The supervisor also kicked in Ms. Delgado's office door on one occasion and on another occasion physically prevented her from leaving a room. He also blew cigar smoke in her face after she expressed a dislike for its odor. Finally, he recommended, if not engineered, her dismissal and she was fired.

Clearly, Mr. Carpenter's behavior here does not approach that of the boss in *Delgado* (who, by the way, was the supervisor in charge of EEO matters).

In the second case, *Muench v. Township of Haddon*, 255 N.J. Super. 288, 605 A.2d 242 (N.J. Superior Court, Appellate Division, 1992), the court found the harasser's conduct to be pervasive and severe when he made disparaging remarks about Ms. Muench to strangers, belittled her over a police radio, refused to train her, smeared her work window knowing that she is a fastidious person, blew cigar smoke into her work area knowing that she had an allergy, bragged to her of his sexual prowess and often told her in the presence of others that she was doing a "lousy" job. Again, the behavior of Mr. Carpenter does not reach the level of the obnoxious boss in *Muench*

Finally, in *Payne v. Children's Home Society*, 77 Wash. App. 507, 892 P. 2d 1102 (Wash. Ct. of Appeals 1995), the court upheld the dismissal of a case where the evidence indicated that a male boss had a "communication" problem that included occasional angry outbursts when he would "get red in the face", "pace back and forth" and "use a tone of voice that was very demeaning and degrading." 892 P.2d at 1104. Such behavior, the court held, did not rise to the level of unlawful harassment, but, at best, was a "casual, isolated or trivial manifestation of a discriminatory environment" that did "not affect the terms or conditions of employment to a sufficiently significant degree to violate the law." At 1107.

The Court's reasoning in *Payne* is applicable here. While aspects of Mr. Carpenter's behavior cannot be excused or condoned, especially his tendency to "talk past" Ms. Booher and speak directly to the males, the complete absence of screaming, yelling, cussing, threats and attempted disciplinary action against Ms. Booher prevent me from viewing his behavior as more than a relatively insignificant manifestation of a discriminatory environment that does not cross the line into illegality.

Mr. Carpenter's sexist behavior would not have affected the terms and conditions of employment of a reasonable person (or a reasonable woman) to any significant degree.

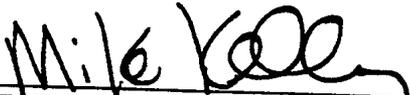
IV. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W.Va. Code §5-11-3(d), and a person within the meaning of §5-11-3(a) and is subject to the jurisdiction of the West Virginia Human Rights Commission.
2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W.Va. Code §5-11-3(a).
3. The West Virginia Human Rights Act is violated when an employer or its management employees engage in threatening, bellicose, demeaning, hostile or offensive conduct towards an employee because of her sex, even if such conduct does not include sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature.
4. In proceedings under the West Virginia Human Rights Act, the burden is on the Commission to prove that the alleged unlawful harassment was sufficiently severe or pervasive as to the effect the terms or conditions of employment and that the manifestations of a discriminatory environment were more than casual, isolated, trivial or, on the whole, insignificant.

5. In this case, the Commission failed to show by a preponderance of the evidence that the particular conduct of Mr. Carpenter that exhibited a discriminatory animus was so severe, pervasive or regular as to effect the terms or conditions of employment of a reasonable woman.

6. The complaint filed against the respondent is DISMISSED.

Decided this 28th day of June, 1996.


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