



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Herman H. Jones
Executive Director

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

March 20, 1996

Richard L. Crouch
Rt. 2, Box 418
Milton, WV 25541

Lenscrafters, Inc.
Huntington Mall
Huntington, WV 25540

Mary M. Downey, Esq.
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Cheryl H. Wolfe, Esq.
Jackson & Kelly
PO Box 553
Charleston, WV 25322

Re: Crouch v. Lenscrafters, Inc.
REP-285-94

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;

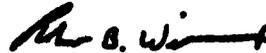
10.8.4. Supported by substantial evidence on the whole record; or

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

RICHARD L. CROUCH,

Complainant,

v.

DOCKET NUMBER: REP-285-94

LENSCRAFTERS, INC.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on September 11, 1995, in Kanawha County, at the Human Rights Commission, Conference Room-B, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Richard L. Crouch, appeared in person and by counsel, Mary M. Downey. The respondent, Lenscrafters, Inc., appeared by its representatives, Paul Porcino, the respondent's Human Relations Manager, in-house lawyer Dave McPherson and paralegal Kim Gerrard; and by counsel, Cheryl H. Wolfe.

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, Richard Crouch, is a white male, resident of West Virginia, who filed a complaint with the West Virginia Human Rights Commission, received on March 3, 1994, alleging that respondent, Lenscrafters, Inc., discharged him and engaged in acts of reprisal and retaliation against him because he agreed to testify on behalf of Valerie Anderson, a black female, who had filed Human Rights Commission complaints against the respondent alleging race discrimination and reprisal.

2. Respondent, Lenscrafters, Inc., is a company in the business of making eye glasses, and an employer, as defined under W. Va. Code §5-11-3(a) and (d).

3. The complainant was hired by respondent as a lab technician at Store No. 163 in the Huntington Mall at Barboursville, West Virginia on November 26, 1991, becoming a full time employee with Lenscrafters Inc. in August of 1992.

4. Valerie Anderson had been an employee of the respondent, who prior to complainant's being hired, had been terminated in January 1991 but reinstated following her filing of a Human Rights Commission complaint, ER-379-91. Thereafter, Ms. Anderson filed a Human Rights Commission complaint, EREP-500-92A, alleging ongoing racial harassment and disparate treatment in the terms of her employment. Thereafter, Ms. Anderson filed a Human Rights Commission complaint, EREP-374-93, alleging that she was forced to resign on January 22, 1993 in retaliation for the earlier actions. This termination in Ms. Anderson's employment with the respondent was the subject of Ms. Anderson's claim for unemployment benefits from the respondent before the West Virginia Department of Employment Security.

5. Complainant's employment with the respondent was terminated on September 8, 1993, by Mr. Paul Porcino, who was Associate Relations Manager for the Central Group with respondent, Lenscrafters, Inc. Mr. Porcino took over from Ms. Amber Whitfield in that position in June of 1993.

6. The complainant received a subpoena to testify in Valerie Anderson's unemployment hearing in July of 1993. The complainant was present at the hearing in July of 1993 as was Ms. Amber Whitfield for

the respondent, although no testimony was taken on that occasion. Mr. Porcino testified that he was aware that the complainant had been subpoenaed and would testify on behalf of Valerie Anderson by August 6, 1993 when he reviewed a phone message taken on that date by his assistant, Ms. Michele Benomini.

7. Although all of respondent's agents and witnesses deny that they were aware of what the complainant's testimony would be, their testimony to that effect is not remotely credible on this point given the ongoing nature of Ms. Anderson's race based discrimination claims leading to her constructive termination or voluntary resignation, as the case may be.

8. During the time that Mr. Crouch was employed by respondent, he reported to the Lab Manager and Assistant Lab Manager. For most of his employment, the Lab Manager was Rodney Elliott. The Assistant Lab Manager was Randall Sullivan, who became Lab Manager upon Mr. Elliott's termination in May of 1993. The Lab Manager reported to the General Manager for the store, a position occupied by Joy Rose and after her termination, by Carol Curry. The retail side of the operation was managed initially by Carol Curry, and upon her promotion to General Manager in August 1992, by Lynn Chapman.

9. During his employment with respondent, the complainant was a good worker who received satisfactory evaluations and regular pay increases. The complainant was known for his willingness to help others and his periodic work on store equipment outside the normal scope of his job duties to keep vital equipment operational. The only reprimand appearing of record prior to his receiving a subpoena in July 1993, was for smoking in a location where it was prohibited

under a newly promulgated store policy, a very minor offense. This occurred approximately one year prior to complainant's termination.

10. The complainant worked with Ms. Valerie Anderson.

11. The respondent's corporate headquarters sent a Ms. Amber Whitfield, to the store who spoke with the complainant. She inquired as to whether the complainant believed that Ms. Anderson had been harassed or mistreated to which the complainant answered in the affirmative.

12. Shortly after this incident, the complainant testified that the General Manager Carol Curry and the Retail Manager Lynn Chapman-Moore called him a turncoat. Ms. Curry and Ms. Chapman-Moore deny making this statement.

13. The complainant was subpoenaed to testify in Ms. Anderson's unemployment case while at work. The complainant received more than one subpoena, one of which was dated July 21, 1993. Within minutes of receiving the subpoena he was asked by Todd Cremeans if he had been subpoenaed, to which he responded yes. Also within minutes of being subpoenaed Dave Mallert asked if he knew what he was getting into. Also within minutes of receiving the subpoena at work, Ms. Curry the General Manager asked to talk to him. They went into the break room and Ms. Curry asked the complainant what did he mean by testifying for the black bitch after the hell she had put her through. The complainant was so upset by this remark that he told his wife of this statement. After being subpoenaed at work, about one or two days, the complainant overheard Lynn Chapman-Moore and Michele Prout discussing something about Ms. Anderson's case and heard the statement, "Well let him testify for the bitch and he'll be

sorry that he did." These events are according to the complainant's testimony which is denied by Ms. Curry, Lynn Chapman-Moore and Michele Prout. Notwithstanding the fact that the complainant was contradictory and unsure in regards to the exact date of receiving the subpoena at work, his testimony is deemed credible as to the gist of the events which transpired after receiving the subpoena.

14. After the subpoenas were served at work, Carol DeJarnett, a Lab Technician at the store, overheard Carol Curry, the General Manager, say that the complainant should never have testified for Ms. Anderson.

15. Janet Perkins, an employee of the respondent's, heard Lynn Chapman-Moore, Retail Manager and Carol Curry, General Manager say that they did not know why the complainant testified for Ms. Anderson after all the hell she had put them through.

16. Soon after Ms. Curry became General Manager, she was approached by sales associate, Sheila Chapman, who complained that complainant's conduct toward her made her feel uncomfortable, particularly referring to his looking at her. Sheila Chapman said she did not want to pursue the matter and the complainant was never given any notice that there was any problem in this regard, nor did management respond in any fashion, thereafter.

17. In February 1993, the complainant complained that he was being scheduled to work nights more often than other lab employees. Ms. Curry asked his Managers in the lab, Mr. Elliot and Mr. Sullivan, to determine its validity. Mr. Sullivan reported that the other employees had worked more evenings than the complainant. The complainant was upset, because that calculation had been made

including complainant's vacation days off in the calculation. He stated that Mr. Elliot had brought the discrepancy to the complainant's attention and that if Mr. Elliot denied it that complainant would knock his head through the wall. Notwithstanding testimony from those who opined this indicated a tendency toward violence, said representations are not found credible.

18. On his last formal evaluation, the complainant was rated below standards for following company policy and demonstrating positive behavior by Mr. Sullivan ostensibly because of failure to wear safety glasses and constant complaining about associates. The complainant testified that Mr. Sullivan resented his opinion that Mr. Sullivan did not have great proficiency in the lens making skills, which he had heard the complainant express to another lab technician.

19. In May 1993 the complainant made Ms. Curry aware of certain comments being made about her by Mr. Elliott. Mr. Elliott was later terminated ostensibly for violation of the respondent's sexual harassment policy, based upon his admission that he had said that he hoped Ms. Curry would go home to find her husband in bed with their daughter. Mr. Elliott testified that he did not believe this was the real reason behind his termination. The evidence shows that rumors would spread through the store prior to a visit from the respondent's Cincinnati Office and what can only be described as a feeding frenzy atmosphere would develop, leading to the gathering of statements regarding the intended target. Upon his termination, Mr. Elliott had words with the complainant over his playing what was called the termination song. No physical violence ensued, and notwithstanding the testimony of certain witnesses to the contrary, no reasonable

fear of this demonstrating a tendency of violence on the part of complainant was demonstrated.

20. On July 17, 1993, the complainant was bitten by a brown recluse spider. His doctor gave him injections of steroids, tetanus booster, pain medications and anti-biotics. The complainant missed many days of work in July 1993 and did not work after August 14, 1993. The complainant was put on medical disability status effective August 18, 1993 as a result of complications from the infection and blood clot, which developed subsequent to the spider bite. The complainant ultimately underwent five surgeries as a result. The complainant was prescribed Prednisone, with side effects of headache and mood changes; Amoxicillin and Amoxil, with side effects of nausea, vomiting, mild diarrhea, or irritation of mouth or throat; Hydrocodone, with side effects of confusion, delirium, short term memory problems, disorientation, and impaired attention; Bactroban and Talwin NX and Naloxone, which cause confusion in addition to relieving pain; Vicodin ES; and Oxycodone or Percocet, with side effects of dizziness, drowsiness, light-headedness, constipation, nausea or vomiting. Respondent's management personnel were aware that complainant was on medication.

21. A store investigation was conducted by Mr. Paul Porcino, Associate Relations Manager for the Central Group from corporate headquarters for the respondent.

22. On August 6, 1993 Mr. Porcino received a call from Michelle Benomini his assistant, regarding a conversation with Mr. Sullivan regarding complainant's disruptive behavior, consisting of complaints that management was not enforcing company policies, which was

upsetting other employees. Mr. Porcino indicated that management at that time was not enforcing policies consistently. Mr. Porcino and Ms. Benomini were apprised that complainant was going to testify on behalf of Ms. Anderson and had received a subpoena at this time.

23. On August 12, 1993, Carol Curry called Ms. Benomini with concerns that complainant had accused Mr. Dave Mallert of throwing away SKU tags, first through channels of management at the store than on the alert line. Ms. Curry conducted an investigation and statements were taken from Mr. Todd Cremeans and Mr. Dave Mallert.

24. On August 13, 1993 a further telephone conversation took place and a statement from Mr. Cremeans was faxed to Mr. Porcino claiming that complainant was making accusations against managers and employees which made people not want to work with him. A more detailed set of accusations was leveled at complainant in a document prepared by Mr. Cremeans and Mr. Mallert. They alleged that complainant was off work yet was in the parking lot telling employees what had transpired in Ms. Anderson's hearing, that he had complained about a stock person receiving a lab bonus, that he threatened to destroy lab equipment, that he brought his bible to work and would preach one moment and turn around and curse or tell dirty jokes the next, that he had threatened to shoot his family or commit suicide when he went to Mr. Cremeans home on one occasion and was drunk, that he made racial slurs against Mr. Marvin Layne, that he smoked in the bathroom, that John Kelly was a SOB fat posterioed fellow, that Sheila Chapman had been offended by sexual remarks around her, that complainant had confided that he would kill the man accused of raping his little girl, that if complainant did not get certain days off his

doctor would give him a medical excuse, that complainant had raised the roof about scheduling, while it turned out he had not worked more evenings than Dave Mallert and he Todd Cremeans, that complainant told Marvin Layne that he Mr. Cremeans had tried to get everyone to walk out with him the day, he Mr. Cremeans had walked out of the store for personal reasons, that he made several sexually explicit comments to various people including "did you get any", "did you lick any butt hole lately" etc., that he reported that god had spoken to him, that he would run management in circles before they fired him, and that the complainant told Mr. Cremeans that he should masturbate in front of his mother in law to get even with her. Also notes were faxed from Mr. Sullivan's personal notebook and from Ms. Curry's. It should be noted that the entirety of Mr. Sullivan's records these purported to be from were not produced because respondent and their agents could not locate the remainder of the documents from which they came. Mr. Porcino contacted Ms. Curry to get clarification of issues and Ms. Curry spoke to the complainant about the SKU tag investigation.

25. On August 16, 1993, Ms. Curry was called by Michele Benomini and Mr. Porcino, at which time Mr. Porcino was informed that the complainant was seen picking up his wife at work in the evening after stating that his car was broke down earlier that day when he was scheduled to work. Mr. Porcino also was informed that Carolyn DeJarnett had told Ms. Curry that she had seen Ms. Prout grabbing the complainant's private parts and patting the behinds of the complainant and Mr. Layne. Mr. Porcino was also informed that the complainant had called the home of Mr. Layne and told him that he was

just being used and that he would probably be terminated. Mr. Porcino states that he decided to undertake a store investigation at that point.

26. On August 20, 1993, Mr. Porcino and Paulette Crutchfield arrived at the store and spoke with Carol Curry, Lynn Chapman, Randall Sullivan, Michele Prout, Carolyn DeJarnett, Marvin Layne, Dave Mallert and Bob Fields. Ms. Curry had no complaints about complainant except his strong opinions during store meetings; Ms. Chapman-Moore indicated that complainant overstepped the boundaries in the area of joking and would say things which were sexually offensive and that Ms. Prout had expressed her concern that complainant stop showing her any attention, she further indicated a paranoia that complainant was out to get her; Mr. Sullivan made several accusations that complainant had drawn offensive pictures although he did not see this, that other techs had objected to working with him because of his negative comments and related further hearsay regarding others accusations; Ms. Prout indicated that complainant had said things of a sexual nature to her but that she had not told him to stop because she was flattered, that she did tell him to stop and he did, she alleged that complainant was trying to get everyone fired, that he told dirty jokes, and that he said, "that 'N-word' is not going to teach me anything" when he learned that Mr. Layne was to be made QMP coach; Ms. DeJarnett indicated that she had seen Ms. Prout feeling complainant's groin area and touching Mr. Layne's behind, that she had reason to believe SKU tags were being thrown away; Mr. Layne indicated offensive things of a sexual nature which he speculated were done by the complainant, he related

complainant had told his wife that Mr. Sullivan and Mr. Cremeans were racists out to get complainant and he, Mr. Layne, fired; Mr. Mallert indicated that complainant had accused him of throwing away SKU tags and had criticized his abilities as a lab tech, he stated complainant had drawn body parts on equipment, that he heard complainant tell Mr. Cremeans that "if he wanted to get even with his mother in law he should fall down on the floor in front of her and start jacking off", he complained that they all got along well except for complainant who was disruptive and said things of a sexual nature; Mr. Fields had nothing to relate except that he also confirmed Ms. DeJarnett's concern that nothing said to Ms. Chapman-Moore was ever kept confidential.

27. On August 24, 1993 Mr. Cremeans wrote a memo to Ms. Curry requesting the position of lab tech, a position held by the complainant.

28. On August 30, 1993 Mr. Porcino received a telephone call from Carol Curry who related that complainant had made a telephone call to Mr. Cremeans' wife and told her that he had run off to Florida to have an affair with another woman, and obtained a statement from Ms. Cremeans.

29. Mr. Porcino testified that after September 1, 1993 complainant had stopped Mr. Layne in the parking lot to warn him that respondent planned to fire him.

30. Mr. Porcino went down to the store again on September 7, 1993 to continue his investigation. He spoke first with Sheila Chapman, who indicated that she found complainant to be physically intimidating and was concerned with sexual harassment and that she

was so afraid of complainant that she carried a gun. Mr. Porcino perceived her to be extremely frightened and nervous. Based upon observation of the complainant and Ms. Sheila Chapman it is not credible that any casual observer would find her allegations credible, as the average observer would undoubtedly find her demeanor and behavior far more threatening than complainant's; and indeed, Mr. Porcino's demeanor and reaction toward her testimony at hearing indicated that he did not take Ms. Chapman's representations as to the dangerousness of the complainant seriously. Nevertheless, Mr. Porcino has testified that the things he heard were "grounds for immediate termination." Ms. Sheila Chapman also complained about complainant's bringing in religious matter.

31. Mr. Porcino also spoke to the complainant on September 7, 1993, who was told to come in for something very important, although he was off of work due to his medical condition. Complainant indicated that Ms. Prout had grabbed his testicles in a hurtful fashion and that there was no adequate SKU tag response. Complainant discussed the failure of management to follow store policy. Complainant admitted that he joked around but indicated that joking of that nature was prevalent in the lab. As to all other allegations of a more serious nature he denied those. In light of Mr. Porcino's overall testimony, his characterization of these denials as "evasive" is not credible.

32. On September 7, 1993, Mr. Porcino talked to Ms. Prout again, this time he levelled the allegations of grabbing the complainant's crotch and rubbing other men's buttocks. This time she understood that complainant had made these allegations at which time

she leveled the charge that complainant had grabbed her crotch and had brought in a picture of his wife performing oral sex upon him. Mr. Porcino also talked to Ms. DeJarnett again and informed her that Ms. Prout would not be fired. Ms. DeJarnett expressed her concerns that there was no management confidentiality and that she was being treated coldly.

33. On September 7, 1993 Mr. Porcino also again spoke with Mr. Cremeans, Mr. Sullivan and Mr. Layne. They were confronted with allegations of inappropriate comments and behavior in the lab. Mr. Cremeans denied ever saying anything offensive and reinforced that complainant was disruptive. Mr. Layne confirmed that some other lab techs made offensive comments but that complainant was the main problem. Mr. Sullivan also was aware of the comments that Richard and others had made but indicated that it was primarily complainant who made those comments.

34. A document prepared by Paulette Crutchfield stated that the objective of the investigation at store 163 was to, "terminate Richard (complainant) if possible. Determine if there are enough issues to terminate Carolyn DeJarnett. Discredit sexual harassment claim against Carolyn DeJarnett." Although the document had no date on it, the document did refer to complainant's spider bite as one month old. The complainant was bitten by the spider on July 17, 1993, and one month later would make the date of this document August 17, 1993, days before Mr. Porcino's first trip to the store and a few weeks after having been subpoenaed. The document further mentions events related prior to Mr. Porcino's initial trip to the store for his investigation and not those raised thereafter.

35. Prior to August 6, 1993, Ms. Benomini and Mr. Porcino had received no phone calls or statements about the complainant. Shortly after management and Mr. Porcino himself became aware of complainant's anticipated testimony on behalf of Ms. Anderson in her unemployment case arising from the same incident which is alleged as a constructive discharge in a Human Rights complaint for retaliation for filing earlier race based discrimination complaints, they received five to ten calls or statements concerning complainant; yet Mr. Porcino never mentions the possibility of retaliatory motivation for these sudden allegations in his investigation.

36. Mr. Porcino was aware that Mr. Cremeans had walked off the job on one occasion and that Mr. Mallert was accused of throwing away SKU tags, prior to his in store investigation.

37. Mr. Porcino was aware that complainant had a serious medical condition and was taking strong medications during this period but made no mention of complaints to complainant, nor did he seek any explanation regarding those incidents alleged to occur while he was off work until September 7, 1993. Mr. Porcino did not mention the employee assistance program to complainant at any time.

38. Mr. Porcino testified that the investigation was conducted with an open mind and that individuals were not quizzed directly about specifics but were asked to respond to generic questions. The evidence indicates however, that those having made the accusations against the complainant were quizzed more directly about specific allegations they had made earlier. The evidence was that Mr. Porcino was aware of the behavior complainant admitted to regarding sexual joking being widespread in the lab and not confined to complainant.

When other people were questioned regarding allegations levelled against them, they seemed inevitably to be aware of the fact that complainant was making those allegations against them, yet complainant was never told what he was accused of doing, by whom or when. Unsubstantiated comments regarding others were discounted, yet those same representations would be taken much more seriously against complainant. Serious allegations of significantly improper behavior by Ms. Prout were ignored, while a second statement was taken from Ms. Prout after she was informed that complainant had said that she had grabbed his privates, and her unsubstantiated story allegedly given great weight by Mr. Porcino who was purportedly "shocked" by what he learned on September 7, 1993. His testimony is not found to be credible, regarding the timing of the decision to terminate the complainant or as to the motivation for that termination. Although there is nothing about conducting a slipshod investigation, or reaching untenable conclusions, which violates the West Virginia Human Rights Act, these factors do tend to cast doubt as to the purpose of the investigation, given Mr. Porcino's obvious competence and ability as an investigator.

39. Mr. Porcino consulted with in house and retained local counsel regarding the outcome of his investigation, but made the decision to terminate the complainant on his own and was not directed to terminate the complainant by counsel.

40. The complainant was hurt, embarrassed and humiliated by his termination from employment and the reasons attributed thereto.

41. Upon his termination, the complainant lost his medical and disability insurance.

42. Complainant began looking for work in January 1994 and found work at Bell Optical where he earned \$243.00 but had to quit because he could not elevate his leg.

43. Complainant next worked for T-shirt International in August 1994 for five weeks until he sustained a compensable back injury. He made \$326.00.

44. Complainant worked approximately 30 days in December 1994 at Lowe's where he earned \$980.00 but left because he could not stay on his feet as required.

45. Complainant applied for other jobs but on at least one occasion, Ms. Curry told one potential employer, Pearle Vision, not to hire the complainant.

46. The complainant has earned less than \$1,000.00 from assorted odd jobs since leaving Lowe's.

47. For the year 1993 complainant had medical bills of \$14,812.67. Taking into account that the deductible had been met for this year at the time of his termination, and that his plan paid 80% thereafter, his lost medical benefits from respondent for the 1993 year were \$11,850.13.

48. For the year 1994 complainant had medical bills of \$1,684.20. Taking into account his \$300.00 deductible and that his plan paid 80% thereafter, his lost medical benefits from respondent for the 1994 year were \$1,107.36.

49. For the year 1995 complainant had medical bills of \$1,079.78. Taking into account his \$300.00 deductible and that his plan paid 80% thereafter, his lost medical benefits from respondent for the 1995 year were \$623.24.

50. The complainant also participated in a dental plan, while his son was receiving orthodontia services at the time he was terminated and the deductible had already been met in that year. The amount due after the complainant was fired was \$390.00 and 60% of that is \$234.00 of lost dental benefits from respondent.

51. The total lost medical and dental benefits is \$13,814.73.

52. At the time the complainant was terminated he was earning \$278.00 per week or \$14,456.00 per year.

53. The complainant has lost back pay comprised of 24 weeks of short term disability and the difference between what he earned in wages for the periods during which he subsequently worked and what he would have earned while employed with respondent, totalling \$4,807.00; with interest of \$1,133.09 through March 30, 1996, for a total of \$5,940.09.

B.

DISCUSSION

The issue in this case is whether the respondent violated W. Va. Code §5-11-9(7)(c), which makes it an unlawful discriminatory practice 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." 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. A complainant may show discriminatory motive on the part of the respondent through circumstantial evidence.

A complainant may show 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 Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E. 2d 342 (W. Va. 1983). The McDonnell Douglas method requires that the complainant first establish a prima facia case of discrimination. The burden of production then shifts to the respondent to articulate a nondiscriminatory reason for its action. Finally, the complainant may show that the reason proffered by the respondent was not the true reason for the employment decision, but rather a pretext for discrimination.

In order to establish a prima facia case of retaliatory conduct under the West Virginia Human Rights Act, the burden is on the complainant to prove by a preponderance of the evidence that:

1. That the complainant was engaged in a protected activity, i.e. opposing acts that are unlawful under the Human Rights Act;
2. That the respondent was aware of the protected activity;
3. That an adverse action was taken against the complainant;
4. That the adverse action was retaliatory in nature or, in the absence of such evidence, was sufficiently temporally related to the protected activity to allow an inference of retaliatory motive on the part of the employer. Frank's Shoe Store v. West Virginia Human Rights Commission, 365 S.E. 2d 251 (W.Va. 1986); Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W.Va. 1988);

Brammer v. West Virginia Human Rights Commission,
394 S.E.2d 340 (W.Va. 1990).

The West Virginia Supreme Court held that the prima facia case is simply, "designed to smoke out a defendant--who is in control of most of the facts--and force it to come forward with some explanation for its action." Barefoot v. Sundale Nursing Home, 457 S.E.2d 152 (W.Va. 1995).

Once a complainant has established a prima facia case of discrimination, the burden shifts to the respondent to articulate a legitimate nondiscriminatory reason for its actions. Dobson v. Eastern Associated Coal Corp., 422 S.E.2d 494 (W.Va. 1992). This burden, however, is merely one of production, not persuasion. Montgomery General Hospital v. West Virginia Human Rights Commission, 34 S.E.2d 557 (W.Va. 1986). At that point the complainant must prove by a preponderance of the evidence that the articulated reason is pretextual. Shepherdstown, supra.

The term "pretext" as used in the McDonnell Douglas, formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance, pretense." West Virginia Institute of Technology v. West Virginia Human Rights Commission, 383 S.E.2d 490 (W.Va. 1989). A proffered reason is pretext if it is not "the true reason for the decision." Conway v. Eastern Associated Coal Corporation, 358 S.E. 2d 423 (W.Va. 1986). Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Barefoot v. Sundale Nursing Home, 457 S.E.2d 152 (W.Va. 1995). Where pretext is shown discrimination may be inferred. Barefoot, supra. The ultimate burden on the complainant in a reprisal case, is to prove by a

preponderance of the evidence that a retaliatory motive played a part in the adverse employment decision. The complainant is not required to show that the respondent's reasons were false or that they played no part in the termination, but only that they were not the only reason and that the prohibited factor was at least one of the motivating reasons. Barefoot, supra.

Respondent contends that complainant has failed to make a prima facia case of retaliatory discharge because he was not engaged in a protected activity in agreeing to testify for Valerie Anderson at her unemployment hearing, and because respondent's agents were not aware of what complainant would be testifying about. To the extent that each of the respondent's managerial people testified that they did not know what complainant would be testifying about, their testimony is deemed blatantly incredible. Ms. Anderson had filed two Human Rights complaints prior to being constructively discharged or resigning on January 22, 1993, which was also the subject of its own Human Rights complaint by Ms. Anderson. Ms. Curry was certainly aware of the nature of Ms. Anderson's allegations as was Mr. Porcino's predecessor, and he. The fact that the complainant had not testified at the time he was fired or did not ever testify concerning alleged racial discrimination at the unemployment hearing, or that respondent's agents did not know the substance of his anticipated testimony is irrelevant given the fact that Ms. Anderson's complaints of racial discrimination were well known to respondent's agents and given the likelihood that the issues would be expected to be raised at the unemployment hearing. Thus, it is held that the complainant has made out a prima facia case of retaliatory discharge. The

complainant was engaged in a protected activity in testifying for Valerie Anderson at her unemployment hearing, the respondent was aware of the protected activity because they understood the history of Ms. Anderson's race based discrimination complaints and could reasonably conclude that his testimony on her behalf at the unemployment hearing would relate to her claims, and within a short period of time after the subpoena was received at work he was terminated from his position.

The respondent has proffered a legitimate nondiscriminatory motive in discharging the complainant. The respondent contends that complainant was discharged for sexual harassment, disruptive behavior and because he displayed disturbing signs of potentially violent behavior. The complainant contends that these reasons were pretextual and that retaliation for expected testimony on behalf of Ms. Anderson in her unemployment and Human Rights hearings was one of the motivating factors in complainant's dismissal. What makes this case so difficult is the apparent standard practices of the respondent in conducting store investigations, which creates a general atmosphere of back biting among employees and management at the respondent's store, which the evidence is clear is not and never has been a situation of "everyone gets along good except for Richard." It would appear that employees and managers are routinely subjected to periodic "investigations" during which the subjects of these confidential investigations are known to the entire store in advance. The subsequent evidence upon which termination results is sometimes quite dubious. These factors however are not to be taken into account in deciding whether there is pretext involved, as

whether the evidence was sufficient or the process fair is not relevant to the inquiry as to whether the decision maker believes the accusations to be true.

The respondent has "papered the file" and "documented" complainant's termination to the point that a cold reading of the transcript and the exhibits admitted into evidence would perhaps compel a ruling in favor of the respondent were it not for the credibility and demeanor of the key witnesses. First, it must be noted that Mr. Porcino, who made the termination decision, denies that he was aware of the nature of complainant's anticipated testimony at Ms. Anderson's unemployment hearing. Mr. Porcino's credibility on this point is nonexistent. The entire store was well aware of Ms. Anderson's history of racial discrimination complaints against respondent; and his predecessor in his position, Amber Whitfield was in attendance at Ms. Anderson's unemployment hearing in July 1993 at the same time as was the complainant. Notwithstanding Mr. Porcino's testimony regarding allegations of feared physical violence on the part of complainant, Mr. Porcino's demeanor during that testimony was indicative that he did not believe that complainant posed any threat of physical violence. The allegations of fear of such violence were never based upon any actions which would indicate any reasonable fear of potential violence by the complainant and Mr. Porcino's demeanor both while testifying and at counsel table during others' testimony indicated that he felt that no such threat existed.

There was testimony and documentary evidence that complainant was terminated due to disruptive behavior and for sexual harassment.

It is clear that Mr. Porcino did believe many of the allegations raised in this respect. That complainant made certain comments and jokes of a sexual nature is not denied by the complainant. It is important to note that sexual harassment is unlawful only if it is unwelcome. Clearly the allegations of unwelcome sexual comments or behavior were never communicated as being objectionable to complainant. Mr. Porcino was aware of the fact that complainant had never been informed by those claiming he was a problem that any particular behavior was unwanted and that when informed that it was unwanted he would cease such behavior. There is evidence that complainant's behavior was disruptive because of his complaints about fellow workers. That such complaints were encouraged under employers "open-door" policy and then held against complainant and confidentiality not respected in contravention of the avowed policy is irrelevant. The widespread nature of complaints against other employees and management beside those about or by complainant belies the contention that complainant's disruptive behavior was a motivating factor in his dismissal, however.

The fact that the lab was an environment where sexual innuendo, behavior and joking occurred was well known by Mr. Porcino. Mr. Elliot had been terminated for this type of behavior when he made offensive remarks concerning Ms. Curry. Mr. Layne, Mr. Mallert and Mr. Sullivan were all questioned regarding these types of comments and for the most part admitted that the comments were made by others as well as by complainant. Mr. Sullivan was later demoted for failure to report or follow through on reports of sexual harassment and for making racial comments. So the ultimate question is not

whether the complainant should be terminated for his conduct but whether the allegations raised were the ones that actually motivated Mr. Porcino in making his decision to terminate the complainant.

There are several factors that indicate that Mr. Porcino did not in fact rely on these allegations in deciding to terminate the complainant but that these reasons were pretextually offered as grounds for termination, when in fact retaliation was the motivating factor. The most glaring is of course the undated memorandum or notes of Paulette Crutchfield who assisted Mr. Porcino in his investigation. That memorandum stated that the objective of the investigation was to terminate the complainant and see if they could terminate Ms. DeJarnett or discredit her allegations of serious sexual behavior involving Ms. Prout's grabbing the complainant's privates. The evidence strongly suggests that this memorandum was prepared prior to the store visit on September 7, 1993 and likely prior to the store visit on August 20, 1993. Mr. Porcino emphatically stated that he was conducting a fair and impartial investigation at that point in his investigation, while the memorandum clearly indicates that this is not so. From this simple fact it may be inferred that the purported allegations were merely pretextual for the real reason he was terminated, i.e. retaliation for testimony in favor of Valerie Anderson. The timing of the complaints coming in regarding complainant's behavior within such close proximity to his being subpoenaed is sufficient to meet the complainant's burden of showing retaliatory motivation for the discharge once pretextuality has been found.

Pretextuality is also supported by a comparison of the action taken against complainant versus that taken against others based on similar evidence and allegations. Ms. Prout was accused of far more damaging and inappropriate behavior than that of any complainant had been accused of prior to September 8, 1993 when Ms. Prout's serious allegation of complainant's having grabbed her crotch was leveled. This new allegation was leveled under circumstances which also tend to show pretextuality as to how they were solicited. Ms. Prout's allegation in this regard was unsubstantiated, while there was an actual witness to the actions alleged against Ms. Prout. Ms. Prout was not terminated, complainant was. Subsequent to complainant's termination but under the same management from Mr. Porcino, Mr. Sullivan has been demoted for failure to report sexual harassment situations and for racial comments, while complainant was terminated for these similar allegations. Mr. Porcino repeatedly claimed that this was an unbiased investigation without a preset determination to terminate the complainant, yet he never investigated the possibility that the complainant was being targeted for retaliation by the store management when the initial complaints by Mr. Mallert and Mr. Cremeans forwarded by Mr. Sullivan were explicit that complainant's behavior was connected with his testimony for Ms. Anderson. Mr. Porcino knew that Mr. Mallert was accused of throwing away Sku tags by complainant and that Mr. Cremeans was angry about complainant telling others he, Mr. Cremeans, had attempted to get others to walk out of the store one day when he, Mr. Cremeans, had walked out, yet his investigation never mentioned the questionability of their motivation in setting forth their litany of allegations. Those

allegations were instead the basis of the more closely conducted questioning in the purportedly nonspecific store interviews. Furthermore, the respondent was aware of complainant's medical condition and his being on strong medications, yet this was not considered in the investigation, nor was complainant informed of the employee assistance program by Mr. Porcino. The overall testimony of Mr. Porcino was found not to be credible. Meanwhile, similarly situated employees were treated differently from complainant. From these facts, it is concluded that complainant was dismissed as a result of his anticipated testimony in favor of Ms. Anderson regarding her termination for alleged racial reasons.

The complainant was embarrassed and humiliated by the allegations that were leveled against him. The charges angered him; what happened to him angered him. Complainant and his family suffered immediate financial hardships and deprivations as a result of being terminated. The West Virginia Supreme Court of Appeals has held that the complainant may be awarded incidental damages for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity in a hearing before the Human Rights Commission. Bishop Coal Co. v. Salyers, 181 W.Va. 71, 380 S.E.2d 238 (1989); State Human Rights Commission v. Pearlman, 161 W.Va. 1, 239 S.E.2d 145 (1977). As currently adjusted for inflation, the maximum amount of such an award is \$2,950.00. See generally, Morris Convalescent Nursing Home, Inc. v. West Virginia Human Rights Commission, 189 W.Va. 314, 431 S.E.2d 353 (1993). Complainant is entitled to the maximum award of \$2,950.00 for incidental damages for humiliation,

embarrassment and emotional and mental distress resulting from his unlawful termination.

The complainant is entitled to an award of lost medical and dental benefits in the amount of \$13,814.73. The complainant had 26 weeks of short term disability, when he was off sick at the time he was terminated. It is assumed that complainant received benefits for the two weeks while off prior to termination. Since the reliable evidence indicates that the complainant was only able to work sporadically thereafter, back wages have been calculated at 24 weeks of short term disability benefits at 50% of his wage, plus the difference between what he earned in alternate employment and what he would have earned with respondent for those periods for which he was employed and working at Bell Optical, T-shirt International and Lowe's; which totals \$4,807.00. Although complainant testified that he is able to work at this time and has had \$1,000.00 earnings from odd jobs after February of 1995, and although he presented evidence tending to show that respondent had interfered with his attempts to secure employment with other optical companies, the complainant has not demonstrated that he is able to resume full time employment at this time; and, therefore, award of further back pay would be speculative for periods after his last documented work.

C.

CONCLUSIONS OF LAW

1. The complainant, Richard L. Crouch, 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, Lenscrafters, Inc., 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 established a prima facie case of discrimination.

6. 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 discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of \$5,940.09 through March 30, 1996, plus statutory interest.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to lost medical and dental benefits in the amount of \$13,814.73, 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 \$2,950.00 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 \$48,309.00.

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 backpay in the amount of \$5,940.09, and lost medical and dental benefits in the amount of \$13,814.73.

3. Within 31 days of receipt of this decision, the respondent shall pay to the complainant attorney fees and costs in the amount of \$48,309.00.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,950.00 for humiliation, embarrassment, emotional distress and loss

of personal dignity suffered as a result of respondent's unlawful discrimination.

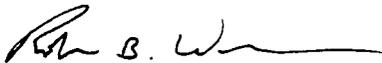
5. The respondent shall pay ten percent per annum interest on all monetary relief.

6. 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 March, 1996.

WV HUMAN RIGHTS COMMISSION

BY: 
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

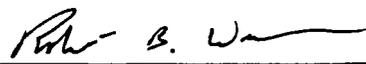
I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 20th day of March, 1996, to the following:

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ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE