

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

LORI A. DILLON,

Complainant,

v.

DOCKET NOS. ES-304-86 &
REP-305-86

SABRATON CHRYSLER, PLYMOTH AND DODGE,

Respondent.

FINAL ORDER

On the 8th of April, 1987, the Commission reviewed the proposed order and decision of the Hearing Examiner. After consideration of the aforementioned, the Commission does hereby adopt said proposed order and decision encompassing proposed findings of fact and conclusions of law as its own with modifications and amendments set forth below.

The Commission strikes the language in finding of fact number 16 which reads "on March 3rd or 4th 1985," and substitutes, therefore, the following language: "on September 3rd or 4th 1985."

Finding of fact number 18 is amended as follows:

The Commission strikes the language in that finding which reads "on September 5, 1986" and substitutes, therefore, the language on "September 5, 1985."

Finding of fact number 23 is modified as follows:

After the word "restaurant" the following language is added: "and \$1,299.66 from Fashion Bug."

On page 10 of the Hearing Examiner's proposed order and decision after the words "sexual advances" the following language is added: "and for opposing a practice made unlawful under the WV Human Rights Act."

On page 12 of the proposed order and decision of the Hearing Examiner, the following enumerated provision is added:

"9. That respondent be ORDERED to cease and desist from engaging in or permitted reprisal actions against any of its employees in violation of the WV Human Rights Act 5-11-1 et. seq."

It is hereby ORDERED that the Hearing Examiner's findings of fact and conclusions of law be attached hereto and made a part of this order except as amended by this order.

By this order, copies of which shall be sent by certified mail to the parties, the parties are hereby notified that they have ten days to seek a reconsideration of this order.

Entered this 11th day of June, 1987.

RESPECTFULLY SUBMITTED,

BY *Deity A. Donnell*
CHAIR/VICE CHAIR

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

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W.V. HUMAN RIGHTS COMM.

LORI A. DILLON

Complainant,

v.

Docket Nos. ES-304-86
REP-305-86

SABRATON CHRYSLER, PLYMOUTH, DODGE

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on December 16, 1986 in Morgantown, West Virginia. The complaints were filed on February 18, 1986. The notice of hearing was served on June 18, 1986. Respondent filed an answer on July 2, 1986. A Status Conference was held on July 31, 1986. Subsequent to the hearing, respondent and complainant submitted written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views 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 issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

CONTENTIONS OF PARTIES

Complainant contends that respondent sexually harassed her while at work and fired her for causing a complaint about it. Respondent maintains that complainant was not harassed and that she was fired for hurting respondent's business by starting a rumor concerning sexual harassment.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, and in writing subsequent to the hearing, the Hearing Examiner has made the following findings of fact:

1. Complainant is a female and a resident of Morgantown, West Virginia.
2. Complainant began employment as a Title Clerk for Respondent, on April 16, 1985.
3. Complainant was awarded a pay increase after completing her initial thirty (30) days of employment.
4. At the time of her discharge, complainant's rate of pay was \$3.75 per hour.
5. During the period she was employed by respondent, respondent's President, Bonasso had no complaints about complainant's work performance. She was never disciplined about performance problems.
6. Complainant was discharged by respondent on September 5, 1985.
7. Complainant was discharged following complaints made on or about September 3 or 4, 1985 by her boyfriend, Satterfield, to Bonasso.

8. Satterfield accused Bonasso of subjecting complainant to offensive sexual comments and innuendo.

9. Respondent hired another employee to replace complainant on or about September 15, 1985.

10. Complainant's total earnings at The Fashion Bug during 1986 amounted to \$1,299.66.

Based upon a preponderance of the evidence the Hearing Examiner has made the following findings of fact:

11. On two occasions, Bonasso asked complainant extremely personal questions about her boyfriend Satterfield and her relationship with Satterfield. Among such questions was whether Satterfield was taking good care of complainant "...as a woman".

12. When complainant was given a raise, Bonasso asked her if she wanted to earn an extra \$50.00 per week by cleaning his apartment above the dealership. Bonasso told complainant that he would have to be present upstairs while she was there.

13. Bonasso once told complainant and her sister Shaffer that they could make real good money at a night job. Bonasso said he had friends that could take care of them. Bonasso mentioned the Holiday Inn at Fairmont and said he would make a "real good sugar daddy".

14. On another occasion, Bonasso offered to permit complainant to move into his apartment rent-free and utilities-free.

15. Complainant found the above-mentioned comments by Bonasso to be offensive and unwelcome. Complainant consistently refused Bonasso's advances and gave him the cold shoulder.

16. On March 3 or 4, 1985, complainant told Satterfield about Bonasso's most recent offensive comment of a sexual nature. As always Satterfield wanted to talk to Bonasso about the problem. Complainant had requested that Satterfield not talk to Bonasso in the past because she was afraid of losing her job. This time, complainant decided to permit Satterfield to confront Bonasso, but she requested that Satterfield be tactful.

17. Satterfield confronted Bonasso who admitted making the comments in question but claimed that he was joking. Bonasso apologized and promised that there would be no further comments of this nature.

18. When Bonasso fired complainant on September 5, 1986, he told her that he had to fire her because if his wife found out she would divorce him for all his money.

19. Hovatter, a female, began working for respondent in September, 1984. Her primary job duty was cleaning the dealership area but she also did some filing and cleaned Bonasso's apartment above the dealership.

20. On one occasion in approximately October 1984, Bonasso touched Hovatter on the buttocks. The touching was unwelcome, and it frightened Hovatter. After the touching Hovatter told Bean, a male employee of respondent, that Bonasso had made a pass at her and that she was scared.

21. At the time of her termination by respondent, complainant worked 40 hours per week.

22. The offensive sexual comments by Bonasso greatly upset complainant. She often cried and was a "bundle of nerves".

Complainant began to experience sleepless nights. During the four months that complainant worked for respondent her weight dropped from 145 pounds to 115 pounds. These effects of the sexually offensive comments were noticed by Satterfield and complainant's mother.

23. Subsequent to her termination by respondent, complainant earned \$1,232.61 from Dr. Casuccio and \$1,176.00 from Blue and Gold Restaurant.

24. Complainant's lawyer, Barbara Fleischauer, reasonably expended 76.80 hours of attorney time in litigating this matter.

25. \$75.00 per hour is a reasonable hourly rate for the services rendered by complainant's lawyer in this case.

26. Complainant expended \$265.25 for costs reasonably necessary to the litigation of this case.

CONCLUSIONS OF LAW

1. Lori A. Dillon is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act. West Virginia Code, §5-11-10.

2. Sabraton Chrysler, Plymouth, Dodge, Inc., is an employer as defined in West Virginia Code, §5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Respondent discriminated against complainant on the basis of her sex in violation of West Virginia Code, §5-11-9(a) by subjecting her to repeated unwelcome comments of a sexual

nature.

4. Respondent retaliated against complainant for causing a complaint to be made about the sexual harassment against her by firing her. West Virginia Code, §5-11-9 (i) (3).

DISCUSSION OF CONCLUSIONS

Sexual harassment in the workplace violates the provisions of Human Rights Act which prohibits discrimination on the basis of sex. Graves v. West Virginia Belt Sales and Repair Docket No. ES-373-81 (W.V.H.R.C. May 15, 1986). The West Virginia courts look to the federal anti-discrimination laws and decisions for guidance, although federal law is not binding upon the Human Rights Commission, in interpreting the West Virginia Human Rights Act. West Virginia Human Rights Commission v. United Transportation Union, Local 6551 280 S.E. 2d 653 (1981).

The Federal Equal Employment Opportunity Commission has adopted comprehensive findings which pertain to the topic of sexual harassment. The EEOC Guidelines are treated with deference by the courts because they constitute a body of experience and informed judgment. Griggs v. Duke Power 401 U.S. 424, 433-434 (1971).

The EEOC Guidelines on Discrimination Because of Sex define the parameters of sexual harassment as follows:

"... Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (or)

2. submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting

such individual, or

3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

29 CFR §1604.11(a) (1985).

The gravamen of any type of sexual harassment claim is that the alleged sexual advances are unwelcome. Meritor Saving Bank v. Vinson ___ U.S. ___, 106 S. Ct. 2339, 54 U.S.L.W. 4703, 4706 (June 19, 1986). The test for unwelcomeness is an objective test, and the proper inquiry involves the facts rather than plaintiff's frame of mind. Jennings v. DHL Airlines 34 F.E.P. 1423 (N.D. Ill. 1984).

The paradigm sexual harassment case involves an allegation that an employee was fired for refusing to submit to a supervisor's sexual advances. If such allegations are proven, unlawful sex discrimination has occurred. EEOC v. Domino's Pizza 34 F.E.P. 1075 (E.D. Mich. 1983); Koster v. Chase Manhattan Bank 554 F. Supp. 285 (S.D.N.Y. 1983); 29 CFR §1604.11(a) (1).

In sexual harassment cases the tripartite allocation of proof as set forth in Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E. 2d 342, 352-353 (W. Va. 1983) is usually not helpful. The issue is generally one of credibility, a swearing contest where one party accuses and the other denies. In such cases the prima facie case, legitimate reason, pretext analysis, which was designed to help prove more subtle types of discrimination, is often inappropriate. Rather than a tortured analysis, such cases should be decided primarily upon the credibility of the testimony of

the witnesses. Of course, in some cases the tripartite analysis may be helpful and should be employed, but where inappropriate, it should not become a hindrance. In the instant case, the testimony of complainant and her witnesses is more credible than the testimony of respondent's witnesses. Complainant's demeanor was very credible and believable. One factor which greatly enhances her credibility was that she candidly admitted on cross-examination that she was upset during the relevant time frame over a recent divorce. If, as respondent has suggested, complainant were only interested in money, she could have fabricated a calmness about her divorce and claimed that all of her emotional distress was attributable to Bonasso. Such a lie could have increased her potential incidental damages, but complainant did not attempt to lie under oath to make more money in this fashion.

The credibility of complainant's version of the facts is also bolstered by the testimony of Hovatter. The fact that another female employee of respondent was sexually harassed by Bonasso makes it more likely that complainant was also sexually harassed. Hovatter obviously found it difficult to testify as to these ugly facts in Bonasso's presence and she hedged slightly on cross-examination. Hovatter's testimony taken as a whole, however, makes it clear that she was subjected to unwelcome sexual conduct by Bonasso. Hovatter had no apparent motive to lie, and her demeanor was credible. Her testimony is bolstered by the testimony of Bean that Hovatter told him shortly after the incident that Bonasso had made a pass at her and that she was afraid.

Complainant's testimony as to the specifics of the sexual harassment is supported by the testimony of Satterfield. Their testimony as to the details of the sexual harassment was consistent.

The testimony of Bonasso, on the other hand, was not credible. Bonasso's demeanor was evasive and nervous. He often laughed during direct and cross examination, especially when asked about the specific allegations. Bonasso's credibility is also impaired by an internal contradiction in his testimony. He testified at first that he fired complainant because charges of sexual harassment could affect his reputation and harm his business. Later he testified that he fired complainant because he lost trust and confidence in her. This contradiction as to one of the most crucial facts in the case casts doubt upon the credibility of the entire testimony of Bonasso.

In view of the credibility analysis discussed above, the record evidence makes it clear that Bonasso subjected complainant to repeated unwelcome sexual advances and comments of a sexual nature which rendered complainant's work environment hostile, offensive and intimidating. When complainant refused she was fired. Such actions violate the Human Rights Act.

In addition, respondent's firing of complainant for complaining of, or for causing her boyfriend to complain of, the unlawful sexual harassment described above constitutes a violation of the reprisal provisions of the Human Rights Act. The extremely short interval between Satterfield's conversation with Bonasso and complainant's discharge, makes a retaliatory

motive the only possible explanation for complainant's discharge, other than reprisal for failing to submit to Bonasso's sexual advances.

RELIEF

In view of the extreme distress suffered by complainant as a result of respondent's discrimination against her, she should be awarded a relatively large sum of incidental damages for humiliation, distress and loss of personhood. As complainant candidly admitted, however, at least some of her distress was attributable to her recent divorce. It is recommended that complainant be awarded \$7,500.00 as incidental damages.

Back pay should be calculated at \$3.75 per hour for forty hours per week. Complainant's first back pay calculation seems accurate except that it appears to ignore the \$1,176.00 earned by complainant at the Blue and Gold Restaurant. The correct back pay figure through the end of 1986 would be \$6,491.73 ($=3.75 \times 40 = 150 \times 68 \text{ weeks} = 10,200 \text{ minus } 3,708.27 = 6,491.73$).

\$75 per hour is very reasonable for the skillful legal services rendered by complainant's attorney. From the detailed time records submitted by complainant's attorney, the time of .6 hour performed on 2/19 and 4/4 were deleted from the attorney's fee award because they relate to an unemployment hearing rather than the Human Rights Commission proceeding. Similarly the \$98 cost of the unemployment transcript should not be awarded in this discrimination case. In all other respects complainant's petition for attorney fees and costs appears reasonable and proper.

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner recommends the following:

1. That the complaint of Lori A. Dillon, Docket Nos. ES-304-86, REP-305-86, be sustained.
2. That respondent rehire complainant into her former position at a rate of pay comparable to what she would be receiving but for the discriminatory termination.
3. That respondent pay complainant a sum equal to the wages she would have earned but for the respondent's unlawful termination of complainant's employment. Such wages for the period from the date of complainant's discharge to December 31, 1986, would have been \$6,491.73. Thereafter, complainant should be awarded \$150.00 per week minus any mitigating income. Respondent should also be ordered to pay complainant interest on the amount of back pay owed her at the statutory rate of ten percent.
4. That respondent pay to complainant the sum of \$7,500.00 incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of the discriminatory treatment toward her by the agents and employees of respondent.
5. That respondent be ordered to pay complainant's reasonable attorney's fees in the amount of \$5,760.00.
6. That respondent be ordered to pay complainant the sum of \$265.25 for costs reasonably expended by complainant and reasonably necessary to the litigation of this matter;

7. That respondent be ordered to cease and desist from engaging in, or permitting **sexual harassment** of its employees in the work place.

8. That respondent report to the Commission within thirty days of the entry of the Commission's Order, the steps taken to comply with the Order.



James Gerl
Hearing Examiner

ENTERED: March 7, 1987

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served
the foregoing PROPOSED ORDER AND DECISION
by placing true and correct copies thereof in the United States
Mail, postage prepaid, addressed to the following:

Barbara Fleischauer, Esq.
346 Watts Street
Morgantown, WV 26505

Charles M. Surber, Esq.
Jackson, Kelly, Holt & O'Farrell
P. O. Box 619
Morgantown, WV 26507

on this 7th day of March, 1987.


James Gerl