



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

TELEPHONE (304) 348-2616

FAX (304) 348-2248

Quewanncoi C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

March 5, 1993

Barbara C. Edmonds
PO Box 47
123 Academy Dr.
Institute, WV 25112

WV Dept. of Health/
Behavioral Health Services
State Capitol Bldg. 3, RM 454
Charleston, WV 25305

Charlene Vaughn
Assistant Attorney General
State Capitol Bldg. 3, RM 210
Charleston, WV 25305

Kathleen Mansheim
Assistant Attorney General
Paul R. Sheridan
Senior Asst. Attorney General
812 Quarrier St.
Charleston, WV 25301

Re: Edmonds v. WV Dept. of Health/Behavioral Health Services
ER-100-92

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;

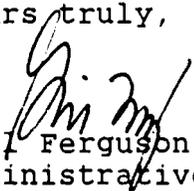
10.8.4. Supported by substantial evidence on the whole record; or

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,


Gail Ferguson
Administrative Law Judge

GF/mst

Enclosure

cc: Quewanncoii C. Stephens, Executive Director
Glenda S. Gooden, Legal Unit Manager
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BARBARA C. EDMONDS,

Complainant,

v.

DOCKET NUMBER(S): ER-100-92

WV DEPARTMENT OF HEALTH/
BEHAVIORAL HEALTH SERVICES,

Respondent.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on November 5 and 6, 1992, in Kanawha County, West Virginia, before Gail Ferguson, Administrative Law Judge.

The complainant, Barbara C. Edmonds, appeared in person and by counsel, Paul R. Sheridan, Senior Assistant Attorney General and Kathleen Mansheim, Assistant Attorney General. The respondent, West Virginia Department of Health/Behavioral Health Services, appeared by its representative Ruth Ware, formerly the director of the Medicaid unit, Office of Behavioral Health Services and currently an employee in the Office of Medical Services and by counsel, Charlene Vaughan, Senior Assistant Attorney General.

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

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

FINDINGS OF FACT

1. Complainant, Barbara C. Edmonds, is an African American woman. She currently resides in Kanawha County, Institute, West Virginia. She has been married for sixteen years and is the mother of three children.

2. On or about March 31, 1991, the respondent, West Virginia Department of Health/Behavioral Health Services, advertised a job opening for the position of Medicaid monitor and/or field activities coordinator. The advertisement in the Charleston Gazette described the position as follows:

POSITION vacancy to monitor providers of case management, personal care, and behavioral health clinic services, provide technical assistance, other related duties as assigned, 50-75% state wide travel required. Bachelor's degree and 6 years full time professional employment in a behavioral health-human services field are minimum requirements. Contact, before April 3, Ruth Ware, Medicaid Division, 348-0427.

3. Complainant saw the advertisement in the Charleston Gazette, contacted respondent in response to this advertisement, and an interview was scheduled for April 11, 1991. In accordance with Beverly Darnold's directions, the complainant later submitted a formal written application for the position. Complainant also submitted a resume, list of enrichment courses, two letters of reference and the names of individuals to contact for additional references.

4. Beverly Darnold was the Administrative Assistant in the Medicaid Unit at all times relevant to this action, and in this capacity was an agent of respondent and was acting within the scope of her employment with respondent.

5. Ruth Ware was the Director of the Medicaid Unit at all times relevant to this action, and in this capacity was an agent of respondent and was acting within the scope of her employment with respondent.

6. On April 11, 1991, the complainant went to the offices of the respondent to be interviewed. While waiting to be interviewed for the position, Ruth Ware, respondent's Director of the Medicaid Unit, introduced herself to complainant, informed complainant that the interviewer's current interview was running over and chatted with complainant for fifteen to twenty minutes.

7. After chatting with Ruth Ware, complainant was formally interviewed by Beverly Darnold for approximately one to one and one-half hours. Ms. Darnold informed complainant that she supervised the Medicaid monitors. She also informed complainant that the position was referred to as "Medicaid monitor," and that central

function of the position was to monitor mental health service providers to assure that documentation supports services billed and to provide technical expertise (defined by Ms. Darnold as assisting employees in properly documenting services). The position involved statewide travel, and independent work.

8. During the interview, complainant asked Ms. Darnold for a job description but was informed that Ms. Darnold did not have one. A Civil Service job description for the position of field activities coordinator, which respondent acknowledges is the same position complainant applied for, generally described the position as being responsible for program and record reviews of all Medicaid reimbursable services provided by behavioral health centers and other agencies. Ms. Darnold told complainant that the Medicaid monitor position was not a Civil Service position but that complainant must meet Civil Service criteria.

9. Although the position was referred to by Civil Service as a field activities coordinator, it was informally referred to as a Medicaid monitor.

10. During the interview, complainant told Ms. Darnold of her extensive work experience in detail.

11. The complainant was well qualified for the position. She received a Bachelor of Science degree from West Virginia Institute of technology in Montgomery, West Virginia in 1972. Complainant majored in health, physical education and recreation, and minored in social studies. As part of complainant's major, she attended classes in psychology, sociology, anatomy, physiology and biology. She also has attended extensive professional enrichment courses.

12. The complainant has extensive relevant work experience, well beyond the minimum requirements for the position. From July 1988 to March 1991, complainant worked for the Zeph Center in Toledo, Ohio as an intensive case manager. The Zeph Center was a community mental health center which served approximately 1,500 severely mentally disabled clients. Approximately 60% to 75% of the clients served were Medicaid eligible. At Zeph Center, complainant provided Medicaid eligible services, including treatment planning, coordination with other social service and community agencies, independent living activities, vocational planning, financial planning and housing planning. Complainant documented the services she provided for purposes of Medicaid billing. She received ongoing training on Medicaid regulations (i.e., how to document services, how to change treatment codes, what services are and are not Medicaid billable). Complainant traveled extensively, both in and out of Ohio and worked independently with back-up supervision. She worked with other agencies, including the state mental hospital (to develop treatment plans), community health centers, vocational programs, Social Security Administration, and food service banks. Complainant also developed patient treatment plans, which is a medical billable service, provided day programming (a day treatment program provides activities related to independent living) and was involved in public relations. She also prepared monthly reports on each client. While complainant worked at Zeph Center, the facility was monitored to ensure that it was in compliance with Medicaid regulations and documentation procedures. Complainant was involved in preparing for this monitoring.

13. In 1986, Toledo, Ohio was one of the four Ohio cities to receive a grant from the Robert Wood Johnson Foundation to provide innovative intensive case management services to the severely mentally disabled. The Ohio programs, and the Zeph Center in particular, had a reputation nationally for the provision of innovative, creative and effective community support programs.

14. From January 1985 to July 1988, complainant worked at Merit Industries as a supervisor of the work adjustment program and the vocational program. These programs helped the severely mentally disabled to develop work skills. Merit Industries received grant funding from outside sources but was administered by the Zeph Center. At Merit Industries, complainant supervised four to five employees. In this capacity she hired staff, trained staff and conducted performance evaluations. She also coordinated work with other agencies and conducted training with other agencies, compiled data and prepared reports (on program goals, budget, funding sources, and statistics) and was involved in public relations.

15. Complainant worked at Tri-City Community Health Center in Indiana from November 1980 to July 1984 as an activity therapist I and later as an activity therapist II. At Tri-City, complainant developed and implemented therapeutic activities for the severely mentally disabled. These services were Medicaid billable. She provided day programming, and complainant was required to document the direct services she provided in order to bill Medicaid for reimbursement. At Tri-City, complainant received periodic training on what services were Medicaid billable, Medicaid regulations and how to document. Her position required her to travel. At Tri-City,

complainant worked independently and coordinated work with other programs and agencies. While complainant was employed by Tri-City, the facility was monitored in order to assure compliance with Medicaid regulations. Complainant was involved in preparing for this monitoring.

16. Complainant worked at Gary Neighborhood Services in Indiana from October 1978 to October 1979 as a lead program worker. Gary Neighborhood Services is a program that provided youth leadership training for economically disadvantaged inner-city youths. At Gary Neighborhood Services, complainant supervised four to five employees.

17. Complainant worked at the Charleston YWCA as a health, physical education and recreation director from June 1978 to August 1978. At the YWCA, complainant hired, trained, and supervised at least seven employees. She also compiled data and prepared reports.

18. Complainant also previously worked as a bank teller and school teacher.

19. Complainant's ten years of prior work experience as an activity therapist and intensive case manager gave complainant relevant experience for documenting services for Medicaid billing and for providing technical expertise as a Medicaid monitor.

20. Complainant told Ms. Darnold that she was available for work immediately because she was unemployed.

21. Four of the applicants who applied for the Medicaid monitor position were originally certified by Civil Service: Sandra Daugherty, Barbara Edmonds, Judy Roycroft and Frederick Young.

Complainant and Sandra Daugherty were the two finalist applicants for the position of Medicaid monitor.

22. Sandra Daugherty is a caucasian woman.

23. Although she had a master's degree, Sandra Daugherty had no knowledge of Medicaid, a fact which she admitted to Ms. Darnold and which Ms. Darnold recorded in her notes. Ms. Ware claimed that she reviewed these notes before deciding to hire Ms. Daugherty.

24. It was Beverly Darnold who also interviewed the other candidates, including the candidate who was selected, Sandra Daugherty. She also contacted the references for the various candidates and discussed with them the experiences and qualifications of the candidates.

25. The record reflects that Sandra Daugherty had prior experience dealing with only six of the sixty-six or more Medicaid "providers" services by the Medicaid Unit. Her prior experience consisted of going to these agencies in reference to transfers, placement and/or referrals of children to the Children's Home Society or Job Corps.

26. Sandra Daugherty's primary work experience was providing direct services to children and the elderly, as opposed to mental health services.

27. John Marks, Jr. was qualified as an expert in the functioning of the Medicaid Unit, Office of Behavioral Health Services. He was the former Director of the Office of Medical Services, West Virginia Office of Health and Human Resources, at all times relevant to this action. The Office of Medical Services is the designated state agency responsible for administering the state

Medicaid program. The function of the Medicaid unit is to perform a delegated portion of the responsibility of the Office of Medical Services. In his capacity as Director of the Office of Medical Services, John Marks worked closely with the Medicaid unit and had some oversight of the program. He frequently met with Ruth Ware and her supervisors, and was kept informed and advised of monitoring activities of the Medicaid unit. Mr. Marks received regular reports from Ruth Ware and the monitors.

28. The Medicaid unit is primarily involved in monitoring of Medicaid services by providers to assure compliance with Medicaid program regulations. The Medicaid unit services three types of behavioral health centers. However, community mental health centers received a significant amount of time, attention and money.

29. Medicaid is a federal program, established by federal statute, federal rules and regulations. State agencies administer the program. Someone who acquired knowledge of Medicaid in another state would have skills which would be transferable to working with the Medicaid program in West Virginia because Medicaid is a federal program.

30. The Medicaid unit has three primary functions: training and program development; administering the program to ensure the unit and providers were complying with Medicaid rules and regulations; and the monitoring oversight responsibility to ensure that the Medicaid program is administered consistently. The monitoring function is the major responsibility of the Medicaid unit. A goal of the Medicaid unit is to encourage utilization of Medicaid-covered services.

31. John Marks testified that knowledge of Medicaid is the most critical element for the Medicaid monitor position, and that knowledge of West Virginia providers and services, although helpful, is not required for the Medicaid monitor position. Marks explained convincingly that it would take significantly less time for a new employee to become familiar with West Virginia providers and services as compared to the amount of time required to obtain a working familiarity with Medicaid rules and regulations. He testified that in his opinion, an individual who was familiar with Medicaid who was given a list of West Virginia providers could go to work immediately as a Medicaid monitor. Ruth Ware's testimony to the contrary is not convincing.

32. The Medicaid monitors are primarily responsible for onsite review of provider records to ensure compliance with Medicaid guidelines.

33. Complainant received four excellent job recommendations from persons contacted by respondent by telephone and via letter. It was reported to Ms. Darnold that complainant "had no difficulty relating to a wide variety of people," "works well with other agencies and resources," "was the 'spark plug' that made [the Zeph Center] program work," and that she was "well respected" and "serious about her work." One former manager reported to Ms. Darnold that the complainant "developed, implemented and followed through on the best Employee Performance Plan I have seen in my eight years as a manager."

34. Sandra Daugherty's job recommendations were mediocre compared to complainant's references. One of Ms. Daugherty's job

references was from Randy Clifford, who knew Ms. Daugherty in her employment at Shawnee Hills, but who was not her supervisor. Mr. Clifford reported to Ms. Darnold that Sandra Daugherty did direct services with 50% of her time, but that he "doesn't know what else she did." Without elaborating, his comments referred to her job as an "odddity." He indicated that she had no management experience, and he expressed skepticism about whether she was "right" for state employment.

35. As reflected in Beverly Darnold's interview notes, complainant impressed Beverly Darnold as a "very sharp gal," with "good work experience," who was "pleasant," "articulate," someone who "doesn't mind the travel," "had a lot of recent independent work experience," and who "has a lot of post-grad training."

36. Ms. Darnold's notes from her interview with Sandra Daugherty contain no comparable positive impressions. Most pointedly, the notes indicate that Sandra Daugherty admitted that she "knows nothing much about Medicaid."

37. Beverly Darnold recommended to Ruth Ware that complainant be hired, rather than hiring Sandra Daugherty, because complainant had better references, had good work experience (all candidates had good work experience) and because complainant had experience working in community mental health.

38. Ruth Ware testified that she declined to follow Beverly Darnold's recommendation because, she claimed, Ms. Darnold preferred the complainant because she was black.

39. While Ruth Ware met and talked to both candidates, it was more in the nature of an informal conversation. Ms. Ware took no

notes of her conversation and did not personally contact any references. Ruth Ware testified that she independently reviewed the applications of each candidate, including Ms. Darnold's notes from the interviews and the notes from her contacts with references and discussed applicants with Ms. Darnold, before making her final decision. However, Ms. Ware seemed completely unfamiliar or unconcerned with several important facts which were clearly reflected in Ms. Darnold's notes, which should have been important considerations in weighing the relative qualifications of the two women. For example, Ms. Ware appears to have totally disregarded Ms. Daugherty's own statement, made in her interview and reflected in Ms. Darnold's notes, that she [Ms. Daugherty] "knows nothing much about Medicaid." Likewise, Ms. Ware indicated that she was not aware that Sandra Daugherty's reference from Randall Clifford was mediocre, and that he did not even know what Sandra Daugherty did with half of her time. Ms. Ware said that she thought Ms. Daugherty was someone "who knew about Medicaid in West Virginia." These misunderstandings would not survive a review of Ms. Darnold's notes. Furthermore, Ms. Ware testified that she did not realize that Beverly Darnold had taken some favorable references on behalf of the complainant, despite the fact that these references are clearly reflected in the notes which Ruth Ware claims she reviewed.

40. Ruth Ware repeatedly contradicted herself. For example, she originally indicated that she was not aware of the contents of the applications because she did not see the applications, but later claimed that she independently reviewed the applications and Ms. Darnold's notes before making her decision. Similarly, Ruth Ware

originally testified that the complainant's references were negative. However, she later admitted that, in fact, complainant's references found her to be a "very capable employee."

41. Ruth Ware's testimony that the Medicaid monitor position required someone with knowledge of West Virginia providers and programs was internally inconsistent.

42. Ruth Ware testified that the Medicaid monitor position was an "enforcer" type position requiring someone who was assertive and confident. Ms. Ware's later testimony that complainant did not fit this criteria because she was unenthusiastic, distant, reserved and stiff is not credible based on complainant's appearance and demeanor at the hearing.

43. Respondent, by and through its agent Ruth Ware, refused to hire the complainant, and instead hired Sandra Daugherty, a caucasian female, on July 1, 1991.

44. Sandra Daugherty was hired at an annual salary of \$18,420. Her salary was increased to \$19,040 on January 1, 1992.

45. If complainant had been hired by respondent, she would have signed up for medical benefits for herself, her spouse and her three children.

46. The cost to respondent to provide medical benefits to complainant and her family is \$381.00 per month. This is a reasonable estimate of the value of medical benefits since if they are not worth at least this much to the complainant, it would not be a rational benefit for an employer to provide.

47. Through her diligent efforts, complainant has mitigated her damages. However, as a result of respondent's discriminatory

conduct, complainant suffered lost wages, benefits and interest in the amount of \$5,604.88 as of January 31, 1993. (See Appendix A).

48. Complainant suffered emotional distress as a result of respondent's refusal to hire complainant, and the evidence established that just compensation for such injury is no less than \$2,950.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. WV Code §5-11-1 et seq. and §5-11-9(a)(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...." (Emphasis supplied)

The term "discriminate" or "discrimination" as defined in WV Code §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race...."

Given this statutory framework, to recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful race discrimination, or the commission acting on her behalf, must ultimately show by a preponderance of the evidence that:

- (1) the employer excluded her from, or failed or refused to extend to her, an equal opportunity;
- (2) race was a motivating or substantial factor causing the employer to exclude the

complainant from, or fail or refuse to extend to her, an equal opportunity, Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed.2d 268, 109 S. Ct. 1775 (1989); and

- (3) the equal opportunity denied a complainant is related to any one of the following employment factors: compensation, hire, tenure, terms, conditions or privileges of employment.

There are three different analyses which may be applied in evaluating the evidence in a discrimination case. The first, and the one most applicable to the case at bar, uses circumstantial evidence to prove discriminatory motive. Since discriminating employers usually hide their bias and stereotypes, making direct evidence unavailable, a complainant may show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), and adopted by our supreme court in Shepherdstown Volunteer Fire Department v. State Human Rights Commission, 172 WV 627, 309 S.E.2d 342 (1983). The McDonnell Douglas method requires that the complainant or commission first establish a prima facie case of discrimination. The burden of production then shifts to respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the complainant or commission must show that the reason proffered by respondent was not the true reason for the employment decision, but rather a pretext for discrimination. 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. Human Rights Commission, 181 WV 525, 383 S.E.2d 490, 496 (1989), citing Black's Law Dictionary,

1069 (5th ed. 1979). A proffered reason is a pretext if it is not "the true reason for the decision." Conaway v. Eastern Associated Coal, 174 WV 164, 358 S.E.2d 423, 430 (1986).

Second, there is the "mixed motive" analysis. Even where an articulated legitimate, nondiscriminatory motive is shown by the respondent to be nonpretextual, but in fact a true motivating factor in an adverse action, a complainant may still prevail under the "mixed motive" analysis. This analysis was established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed.2d 268, 109 S.Ct. 1775 (1989), and recognized by the West Virginia Supreme Court of Appeals in West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 WV 525, 383 S.E.2d 490, 496-97, n.11 (1989). If the complainant proves that her race played some role in the decision, the employer can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant's race.

Finally, if it is available, a complainant or the commission may prove a case by direct evidence of discriminatory intent. Proof of this type shifts the burden to the respondent to prove by a preponderance of the evidence that it would have rejected the complainant even if it had not considered the illicit reason. Trans World Airlines v. Thurston, 469 U.S. 111, 36 F.E.P Cases 977 (1975). This analysis is similar to that used in mixed motive cases.

Complainant has established, through circumstantial evidence, a prima facie case of race discrimination. Establishment of a prima facie case raises an inference that respondent has discriminated against complainant on the basis of her race.

In Conaway v. Eastern Associated Coal Corp., 178 WV 164, 358 S.E.2d 423 (1986), the West Virginia Supreme Court of Appeals articulated a general, three-part prima facie test for employment discrimination.

In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, WV Code §5-11-1 et seq. (1979), the plaintiff must offer proof of the following:

(1) That the plaintiff is a member of a protected class;

(2) That the employer made an adverse decision concerning the plaintiff; and

(3) But for the plaintiff's protected status, the adverse decision would not have been made.

Conaway v. Eastern Associated Coal Corp., 178 WV 164, 358 S.E.2d 423, 429 (1986); Kanawha Valley Regional Transportation Authority v. West Virginia Human Rights Commission, 181 WV 675, 383 S.E.2d 857, 860 (1989).

Criteria number three of this formulation has engendered some confusion because of the use of the words "but for," whereas other formulations have required a showing that other similarly situated individuals not in the protected class have been treated differently. But it is clear that it was not intent of the West Virginia Court to tighten the standard. In Kanawha Valley Regional Transportation Authority v. West Virginia Human Rights Commission, 181 WV 675, 383 S.E.2d 857, 860 (1989), the Court said:

However, it is clear that our formulation in Conaway was not intended to create a more narrow standard of analysis in discrimination cases than is undertaken in the federal courts. This is manifested by our reliance on applicable

federal cases as illustrated by West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 WV 525, 383 S.E.2d 490, 495 (1989), where we cited a number of federal cases and described the type of evidence required to make a Conaway prima facie case:

[B]ecause discrimination is essentially an element of the mind, there will normally be very little, if any, direct evidence available. Direct evidence is not, however, necessary. What is required of the complainant is to show some circumstantial evidence which would sufficiently link the employer's decision and the complainant's status as a member of a protected class so as to give rise to an inference that the employment related decision was based upon an unlawful discriminatory criterion.

KVRTA 383 S.E.2d 860 (Emphasis supplied). See also, Holbrook v. Poole Associates, Inc., 184 WV 428, 400 S.E.2d 863 (1990); West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 WV 525, 383 S.E.2d 490, 494-495 (1989).

This requirement that there be evidence of a "link" between the employer's decision and the employee's status may be satisfied by circumstantial evidence of various kinds, including evidence that other similarly qualified individuals not in the protected class were treated differently.^{1/}

Subsequent to Conaway, in O.J. White Transfer v. West Virginia Human Rights Commission, 181 WV 519, 383 S.E.2d 323 (1989), the West Virginia Supreme Court of Appeals outlined a prima facie test specifically tailored to the failure to hire situation. In such a case, the prima facie burden:

^{1/} See also, Powell v. Wyoming Cablevision, Inc. 184 WV 700, 403 S.E.2d 717, 721-722 (1991), for further discussion of the type of evidentiary link required to make a prima facie case in discrimination cases.

is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination, which burden may be carried by showing (1) that the complainant belongs to a protected group under the statute; (2) that he or she applied and was qualified for the position or opening; (3) that he or she was rejected despite his or her qualifications; and (4) that after the rejection, the respondent continued to accept applications of similarly qualified persons.

O.J. White Transfer, 383 S.E.2d at 324, syl. pt. 1 (1986); see also Pride v. West Virginia Human Rights Commission, 176 WV 565, 346 S.E.2d 356 (1986).

Complainant has clearly established a prima facie case of race discrimination. There is no dispute that complainant is a member of a protected class in that she is an African American. Nor is it disputed that the complainant suffered an adverse employment decision by respondent. Thus, under either theory of the prima facie burden, the complainant has met these two parts of the test. Furthermore, there was no dispute regarding the remaining two parts of the O.J. White test. It was admitted that complainant applied for and was considered for the Medicaid monitor position and that she was qualified. It was likewise admitted that respondent accepted other applications from similarly qualified candidates^{2/} and eventually hired a caucasian woman.

Furthermore, in addition to parts (3) and (4) in the O.J. White test, there is ample additional evidence of the "but for"

^{2/} It should be noted that this part of the test is not intended to require that there be a sequential acceptance of new applications. It is sufficient to show that the complainant was passed over in favor of other applicants.

nexus required by the Conaway test. Respondent answered the complainant by alleging that race had nothing to do with its decision. Respondent alleged that its decision was instead based upon the relative qualifications of the candidates, its perception that the complainant could not stand up well to the agency administrators whom she would be required to monitor, and its need for someone who could start immediately. The evidence both eliminated the proffered reasons and established that race was indeed a consideration.

The evidence reveals that none of these alleged reasons given by respondent for its decision is credible. In fact, the complainant possessed more extensive relevant experience, strong references, and familiarity with Medicaid. The other candidate had less relevant experience, mediocre job reference and admitted in her interview that she "knows nothing much about Medicaid." In fact, Beverly Darnold, the only representative of the respondent to formally interview the candidates, recognized the complainant's superior qualifications and recommended that she be hired!

Likewise, the respondent's claim that it perceived the complainant as less likely to be able to "stand-up" to agencies is not credible. Not only was her demeanor at the hearing an impressive reflection of her ability to be assertive and confident, but she obviously impressed Ms. Darnold that she possess this ability. Ms. Darnold's notes from her interview of complainant indicate that she found her "a very sharp gal, articulate, someone with a lot of recent work experience and a lot of post-grad training." Indeed, Ms. Darnold indicated in her testimony that she found complainant to be

the more qualified of these two applicants and recommended that the complainant be hired over the other candidate. It was only Ruth Ware, whose only contact with the complainant was a brief, informal encounter, who asserted that complainant was less likely to be able to stand up to agency administrators.

Finally, it is clear from the conflicting testimony of respondent's witnesses that race was indeed a factor. Beverly Darnold, who interviewed the candidates, recommended that the complainant be hired over the white candidate who was hired. Ruth Ware admits that this was Ms. Darnold's recommendation, but testified that she rejected the recommendation because it reflected Ms. Darnold's preference for complainant solely because she was a black candidate. Ms. Darnold disputed that her recommendation was in any way influenced by race.

Clearly, under any articulation of the test, the complainant has exceeded her burden of proving a prima facie case.

The establishment of a prima facie case creates a "presumption that the employe unlawfully discriminated against" the complainant. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981); Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 WV 627, 309 S.E.2d 342, 352 (1983). The circumstantial evidence of a "link" was sufficient that "the burden then shifted to the defendant...to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254. Though the burden on respondent under this test is only one of

production, not persuasion, to accomplish it a respondent "must clearly set forth through the introduction of admissible evidence the reason for the [complainant's] rejection." Burdine, 450 U.S. at 254. The explanation provided "must be clearly and reasonably specific," Burdine, 450 U.S. at 258, "must be legally sufficient to justify a judgment for the defendant," and it must be both legitimate and nondiscriminatory. Burdine, 450 U.S. at 254.

If the respondent (1) clearly articulates a legitimate, nondiscriminatory reason for rejecting the complainant, "then the complainant [or the commission] has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for unlawful discrimination." Shepherdstown, 309 S.E.2d at 352. The commission "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. See also, O.J. White Transfer v. West Virginia Human Rights Commission, 181 WV 519, 383 S.E.2d 323, 327 (1989).

In the case at bar, respondent articulated that it did not hire complainant because Sandra Daugherty had a better educational background and knew West Virginia providers, that respondent needed someone to begin work immediately, and that complainant did not have the confidence and assertiveness required for the position.

Respondent articulated several legitimate, nondiscriminatory reasons for its actions at various points in its defense. However,

such reasons were not the true reason for respondent's decision not to hire complainant, but rather a pretext for discrimination.

Ruth Ware stated that she ultimately hired Sandra Daugherty over complainant because she was more qualified than complainant. A comparison of the two applicants reveals that complainant's qualifications for a job monitoring community behavioral health services for compliance with Medicaid regulations are actually superior to Ms. Daugherty's. Thus, respondent's argument to the contrary is pretext.

Complainant was more experienced, with eleven and one-half years of work in the field, compared with Ms. Daugherty's six and one-half years of experience, and much of complainant's experience was of the kind which would give her a feel for Medicaid providers. Furthermore, complainant has attended extensive enrichment courses. She had supervised staff, including case management workers and counselors, and had extensive work experience with regard to Medicaid regulations and documents applicable to community mental health services.

In contrast, Sandra Daugherty knew nothing much about Medicaid. Although she had prior experience to some West Virginia services, it amounted to only six of the sixty-six Medicaid providers. Her work had not been in the community mental health area, but in providing direct services to children and the elderly.

Ruth Ware asserted that Sandra Daugherty was better qualified than complainant because of her education. However, a review of the Medicaid monitor position reveals that work experience, rather than education, was preferred. The job description for the position

clearly indicates that graduate education will be given some weight, but only as a substitute for experience. The job description calls for a bachelor's degree and six years' experience. Below this, the job description clearly indicates that graduate education may be substituted, on a year-by-year basis, for the job experience requirement.

Both candidates have the education and experience required for the Medicaid monitor position. However, complainant had almost twice as much experience. Even if you count Ms. Daugherty's years of graduate experience with her years of experience, complainant will come out ahead. Complainant also has supplemented her college education with frequent professional seminars. Beverly Darnold acknowledged these seminars in her interview notes.

Ruth Ware clearly overplays the value of Sandra Daugherty's educational background as a rationalization for her decision. This is particularly true in light of Ms. Ware's testimony that she needed someone who knew all the details of how and what Medicaid in West Virginia is about and Sandra Daugherty's admission that she knew nothing about Medicaid.

Respondent's assertion that Sandra Daugherty was more qualified than complainant because of her master's degree in social work is not supported by the evidence and is pretext.

Additionally, Ruth Ware asserted that knowledge of West Virginia providers and services was a requirement for the Medicaid monitor position. She testified that Sandra Daugherty was better qualified with West Virginia providers and services. However, this is not a convincing explanation for the hiring decision.

Ms. Daugherty had experience dealing with only six of sixty-six Medicaid contacts, and respondent had more than sixty-six providers. Ruth Ware clearly exaggerated the value of Sandra Daugherty's knowledge of West Virginia providers and services.

Furthermore, Ruth Ware's testimony about knowledge of West Virginia providers and services was internally inconsistent. Ms. Ware initially testified that the job description assumes a knowledge of Medicaid is required. Then Ms. Ware testified that familiarity with West Virginia providers was her personal requirement for the job. After reviewing the Medicaid monitor newspaper advertisement, Ms. Ware then testified that knowledge of West Virginia providers and services was not required, but that she wanted someone with knowledge of it. Next, Ms. Ware wavered over whether it was or was not a requirement. Finally, Ms. Ware testified that familiarity with West Virginia programs was a requirement for the job and that applicants without this experience would be disqualified.

John Marks convincingly testified that knowledge of West Virginia providers was helpful but it is not a requirement for the Medicaid monitor position. Mr. Marks further testified that knowledge of Medicaid was significantly more important than knowledge of West Virginia providers and services. Ruth Ware corroborated this when she testified that she needed someone who knew all the details of how and what Medicaid in West Virginia is all about. Sandra Daugherty knew nothing about Medicaid.

Respondent's assertion that knowledge of West Virginia providers and services was a requirement for the Medicaid monitor position is simply not supported by the evidence.

Finally, Ruth Ware testified that part of her reason for rejecting the complainant was that she lacked the assertiveness and confidence to be an effective Medicaid monitor. Complainant's demeanor at the hearing, along with the evidence in the record, including Ms. Darnold's interview notes, clearly demonstrate the contrary. Thus, respondent's argument is pretext.

Ruth Ware testified that the Medicaid monitor position was an "enforcer" type position requiring someone who was assertive and confident. Ms. Ware later testified that (based on her brief conversation with complainant) complainant did not fit this criteria because she was unenthusiastic, distant, reserved and stiff. Ruth Ware's testimony is not convincing. First, Beverly Darnold's interview notes indicate quite a contrasting and favorable view of complainant. Second, Ms. Darnold was clearly in a better position to evaluate complainant because she formally interviewed complainant and, in fact, recommended her for hire. Third, complainant's job references characterized her as someone who worked well with other people and various agencies, was disciplined, had supervisory experience and was a very capable employee.

Respondent's characterization of complainant is contradicted by complainant's demeanor at the hearing, Beverly Darnold's interview notes, and complainant's job references.

Accordingly, respondent's argument that Sandra Daugherty was more qualified than complainant is obviously pretext.

Ruth Ware originally characterized complainant's job references as "OK" and/or negative. Ms. Ware testified that she was not struck (impressed) by complainant's references. A comparison of the two

applicant's job references reveals that complainant's references are clearly superior. Respondent's argument to the contrary is pretext.

Complainant's references state that complainant worked well with other people and with various agencies, was disciplined, had supervisory experience, and was a very capable employee. In fact, one of complainant's references went so far as to characterize complainant as "the spark plug that made our organization work."

Saundra Daugherty's job recommendations were mediocre compared to complainant's references. One of Ms. Daugherty's job references was from Randy Clifford, who knew Ms. Daugherty in her employment at Shawnee Hills, but who was not her supervisor. Mr. Clifford reported to Ms. Darnold that Saundra Daugherty did direct services with 50% of her time, but that he "doesn't know what else she did." Without elaborating, his comments referred to her job as an "oddity." He indicated that she had no management experience, and he expressed skepticism about whether she was "right" for state employment.

Accordingly, respondent's assertion that complainant's job references were "OK," negative or comparable to Ms. Daugherty's is simply not supported by the evidence and is obviously pretext.

Ruth Ware originally testified that she needed to hire someone to go to work immediately. However, the evidence clearly established that complainant was available for work immediately because she was unemployed. On Cross examination, Ruth Ware admitted complainant was available for work immediately.

Ms. Ware then attempted to explain that what she actually meant was that she needed someone off and running immediately in the field. However, this explanation is not a persuasive explanation for

hiring Sandra Daugherty, since she knew nothing about Medicaid, and Ruth Ware testified that she needed someone who knew the details of Medicaid in West Virginia. Clearly, Sandra Daugherty would not be off and running immediately in the field.

Accordingly, respondent's assertion that Sandra Daugherty was hired because respondent needed someone to go to work immediately is pretext.

Ruth Ware denied that race played any role in the decision not to hire the complainant. However, Ms. Ware's own testimony reveals that race was, in fact, a consideration. Furthermore, the contradictory testimony of respondent's witnesses on this matter is a powerful indication of a failed attempt to conceal racial discrimination.

Ruth Ware testified that Beverly Darnold recommended that the respondent hire the complainant, and that this recommendation was made because the complainant was an African American and for no other reason. Ms. Ware declined to follow that recommendation. Ms. Darnold testified that she recommended the complainant be hired over Sandra Daugherty because the complainant was better qualified: she had better references, good work experience and experience working in community mental health. She explicitly and convincingly denied that her recommendation to hire the complainant was based on the complainant's race.

Ms. Ware's testimony implicitly, if not explicitly, implies that complainant's race was adversely considered. Ms. Ware's statements and demeanor reflected a failed attempt to conceal racial discrimination. Respondent's assertion that complainant's race had

nothing to do with its decision not to hire complainant is not supported by the evidence and is pretextual.

Courts have been extremely skeptical of stated reasons which are not asserted until "late in the game." Foster v. Simon, 467 F.Supp. 533 (W.D. N.C. 1979); Johnson v. University of Pittsburgh, 359 F. Supp 1002 (W.D. PA 1973). Likewise, shifting reasons for defenses between the time of the adverse action and the time of the hearing is strong evidence of pretext. Smith v. American Service Co., 611 F. Supp. 321, F.E.P. Cases 1552 (N.D. GA 1984); Townsend v. Grey Line Bus Co., 597 F. Supp. 1287, 36 F.E.P. Cases 463 (1st Cir. 1985). Respondent's asserted defenses have the unavoidable look and feel of a "product of hindsight."

Respondent originally argued that criteria to hire included criteria on the Civil Service job specification and job description form, knowledge of the record keeping system Medicaid utilized, and working knowledge of services provided by mental health centers and staff the candidate would be working with.

In respondent's position statement to the West Virginia Human Rights Commission, respondent added as additional criteria familiarity with West Virginia programs and requirements and previous experience working with West Virginia agencies and facilities served. Respondent specifically denied that any other criteria were used in the decision to hire Ms. Daugherty.

In response to the commission's interrogatory numbers 6 and 7, respondent added several additional reasons for its decision to hire Sandra Daugherty: respondent needed to fill the position immediately; Sandra Daugherty is a certified and licensed social

worker with a master's degree and would have more credibility with providers; and complainant was not qualified for the job because she would not be able to "stand-up" to providers when directing them to come into compliance with regulations.

Subsequently, Ruth Ware testified that she wanted someone who knew all the details about how and what Medicaid in West Virginia is about.

Finally, Ruth Ware testified that she hired Sandra Daugherty because she had a master's degree in social work, was a licensed social worker in West Virginia, and belongs to the National Association of Social Workers. Ms. Ware emphatically stated "that's what my final decision was based on."

Accordingly, respondent's assertion that complainant did not fulfill the criteria for the position is simply not supported by the evidence. Respondent has repeatedly shifted its position regarding the criteria used to select the successful candidate.

"[I]t is incumbent upon [the factfinder] to make the ultimate determination whether there was intentional discrimination on the part of respondent." Shepherdstown, 309 S.E.2d at 353. In short, the factfinder "must decide which party's explanation of the employer's motivation it believes." United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 75 L.Ed.2d 403, 103 S.Ct. 1478, 1482 (1983). "In this regard, the trier of fact should consider all the evidence, giving it whatever weight and credence it deserves," 103 S.Ct. at 1481, n.3, and decide whether, in the final analysis, respondent treated complainant "less favorably than others"

because of her race. Furnco Construction Corporation v. Waters, 438 U.S. 567, 577, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978).

In determining which side to believe, it is up to the factfinder to assess the credibility of witnesses and the persuasiveness of the evidence. Westmoreland Coal Co. v. Human Rights Commission, 181 WV 368, 382 S.E.2d 562, 567, n.6 (1989).

The complainant, John Marks and Beverly Darnold testified credibly, consistently and convincingly as to the function of the Medicaid unit and the Medicaid monitors, and the qualifications of complainant and Sandra Daugherty. In contrast, the testimony of respondent's witness, Ruth Ware, was not convincing, and moreover, was not consistent nor credible. In particular, Ms. Ware's testimony that Beverly Darnold recommended that complainant be hired solely because complainant was an African American candidate and it would be politically expedient to hire her was contradicted by Beverly Darnold's testimony that complainant was preferred because of her qualifications and not because of her race. It is obvious, however, that complainant's race was a factor considered by Ruth Ware in her decision not to hire complainant. Likewise, Ms. Ware's testimony concerning complainant's availability for work was contradicted by the evidence, her testimony about the value of Sandra Daugherty's knowledge of West Virginia providers and services was clearly exaggerated and her testimony that complainant would not be able to "stand-up" to service providers was contradicted by the evidence and by complainant's demeanor at the hearing.

The complainant has established by an overwhelming preponderance of the evidence that she was the victim of unlawful race discrimination by respondent.

CONCLUSIONS OF LAW

1. The complainant, Barbara C. Edmonds, is an individual claiming to be aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-3(a) and §5-11-10.

2. The respondent, West Virginia Department of Health/Behavioral Health Services, is an employer as defined by WV Code §5-11-3(d) and a proper respondent in this action.

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 the complaint.

5. Complainant has established a prima facie case of race discrimination by proving that she was qualified and applied for employment as a field activities coordinator and/or Medicaid monitor, that she was denied employment as a field activities coordinator and/or Medicaid monitor because of her race, African American, and by proving that respondent thereafter continued to seek similarly qualified candidates, and ultimately hired a candidate who was white.

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 race discrimination.

7. As a result of respondent's discriminatory conduct, complainant suffered lost wages and benefits, as well as humiliation, embarrassment and emotional distress.

8. The complainant made diligent efforts to mitigate her damages, found other work and did partially mitigate.

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 lost wages, benefits and interest in the amount of \$5,604.88.

3. 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.

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

It is so **ORDERED**.

Entered this 4 day of March, 1993.

WV HUMAN RIGHTS COMMISSION

BY



GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE