



COPY

**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

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ARCH A. MOORE, JR.  
Governor

June 4, 1986

Richard Withers, Esq.  
600 Atlas Bldg.  
Box 1111  
Charleston, WV 25301

Paul N. Bowles, Esq.  
Bowles, McDavid, Graff & Love  
P. O. Box 1386  
Charleston, WV 25325-1386

RE: Lynn L. Gray V United Farm Tools, Inc.  
Docket No. HR-572-82

Dear Mr. Withers and Mr. Bowles:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Lynn L. Gray V United Farm Tools, Inc./Docket No. HR-572-82.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney  
Executive Director

HDK/kpv  
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

LYNN L. GRAY,

Complainant,

vs.

Docket No. HR-572-82

UNITED FARM TOOLS, INC.,

Respondent.

O R D E R

On the 6th day of May, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Theodore R. Dues, Jr., the Motion of the Complainant to re-open the hearing pursuant to West Virginia Human Rights Commission Administrative Regulation 7.25; and the complainants exceptions to the Recommended Decision contained within said motion and in separate comments filed pro se. After consideration of the aforementioned, the Commission hereby denies complainant's motion to re-open on the grounds that all evidence referred to in said motion and the supporting affidavit which complainant would offer if the hearing were to be re-opened would have been available to complainant prior to the original hearing and thus can not be considered newly discovered evidence of such a nature as would convince the Commission to exercise its discretion to re-open under Rule 7.25. The Commission further finds complainant's exceptions to be without merit and does hereby adopt the Findings of Fact and Conclusions of Law of the Hearing Examiner as its

own.

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.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 23 day of May, 1986.

Respectfully Submitted,



CHAIR/VICE-CHAIR  
WEST VIRGINIA HUMAN  
RIGHTS COMMISSION

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**RECEIVED**

MAR - 3 1986

W.V. HUMAN RIGHTS COMM.

LYNN L. GRAY.

Complainant,

VS.

DOCKET NO. ES-567-85

UNITED FARM TOOLS, INC.,

Respondent.

**MOTION AND REQUEST OF COMPLAINANT PRIOR  
TO ENTRY OF A FINAL ORDER BY THE COMMISSION**

Now comes the complainant, by counsel, and does move the Commission and the Hearing Commissioner for a reconsideration of the proposed Order together with the recommended findings of fact and conclusions of law contained in the report of the Hearing Commissioner dated 2/13/86; and complainant further seeks remand of this matter for introduction of further evidence which has been discovered since the hearing of November 25, 1985.

In support of her motion for reconsideration prior to entry of a final or modified Order of the Commission your complainant says as follows:

1. Since the date of the evidentiary hearing she has learned from Mrs. Erskines, a former employee of the respondent, that Mrs. Erskine was fired by the respondent in December of 1984 and replaced by Mr. Steve Milam the following month because management indicated they thought a man would do a better job. See accompanying affidavit. Mr. Milam is the male employee who

had and performed the same duties as complainant, but who was paid approximately \$6,000.00 more annually.

2. Complainant has since been informed and does believe that Mr. Keith Ferrell, respondent's employee who performed the functions for which Mr. Milam was allegedly being groomed, does not currently nor has he ever seriously considered resigning from his position. See accompanying affidavit.

3. In comparing the work related experience of the respective parties, the Commissioner failed to note the actual period of three and one-half years experience which complainant had in the position in question. The Commissioner erred in only considering work experience of the respective parties prior to employment with the respondent. Further, the Commissioner erred in emphasizing the previous experience of Mr. Milam in accounting and bookkeeping where Mr. Milam himself indicated at page 134 of the transcript of testimony that bookkeeping and accounting have "nothing to do with the credit department over at UFT ...."

4. The Hearing Commissioner failed to consider the evidence of continuing harrassment which occurred in the period preceding the tyermination of complainant's employment with the return of Mr. Morris regularly to the Charleston office. Such return visits were always imminent. Testimony of co-workers also reveals that upon such returns to the office, Morris would always mangle to get complainant alone. The Commissioner failed to consider whether these factors taken together with the hiring of Mr. Milam and the disparate pay may have constituted an environment which made it impossible for the complainant to

remain.

5. The Hearing Commissioner erred in suggesting that complainant was under any obligation to report Morris's behavior "to someone in a position of authority," since Mr. Morris was the person who was in charge of the South Charleston Office. He was her supervisor's boss.

6. The Hearing Commissioner erred in concluding that complainant quit when she found a position that paid more. The record demonstrates that the new position paid less and that related expenses of employment were greater.

7. The Hearing Commissioner erred in relying upon the case of EEOC v. Aetna Insurance Company, 616 F.2d 719 (4th Cir. 1980). In that case the company had a "bona fide merit system" which accounted for a non sex-based disparity. The 4th Circuit suggested that an exemption permitting differences in pay under that system would not be struck down if it was based on factors other than sex. In this case, the 4th Circuit suggested that the two separate merit systems defense of the employer does not form the basis of an exception to the federal Equal Pay Act. It decided, however, that two pay systems (not necessarily "merit" systems) would not constitute a violation where the differential was based upon measurably different experience and background which also was related to the job in question. The possibility of or hope for future advancement taken alone simply does not meet the standard applied in the Aetna case.

For these and other reasons appearing of record, your complainant moves and requests that the matter be referred back

to the Hearing Commissioner for further proceedings, the introduction of essential evidence and aareconsideration of the issues of law, and for such other relief as the Commission may deem proper.



Richard L. Withers, Esq.  
Box 3933  
Charleston, West Virginia 25339

Lynn L. Gray, Complainant  
by Counsel

STATE OF WEST VIRGINIA,  
COUNTY OF KANAWHA, To-Wit:

AFFIDAVIT OF LYNN L. GRAY

I, LYNN L. GRAY, being duly sworn do depose and say as follows:

1. I am that same Lynn L. Gray who is the complainant in Case No. ES-567-85 currently pending before the State of West Virginia Human Rights Commission in which Complaint I charge United Farm Tools, Inc. with discrimination in employment on the basis of sex.

2. Following the hearing held November 25, 1985 I learned that Mr. Steve Milam was hired in January of 1985 as a replacement for Mrs. Patty Erskine. Mrs. Erskine was informed that management felt a "man could do a better job." Mr. Milam was paid substantially more money than Patty Erskine. This information was not available to me or my counsel until after the November 25, 1985 hearing when Mrs. Erskine came forward.

3. I am informed and do believe that Mr. Keith Ferrell who holds the position of Treasurer has no current intention to resign or otherwise leave said position. It is precisely that position which management suggested Mr. Milam would be taking over eventually. Such alleged plan for Mr. Milam was the only justification given for disparity in pay.

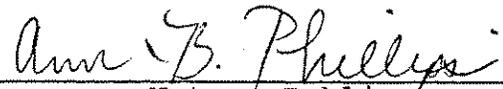
4. In the event that my complaint should be reconsidered and the record reopened for purpose of further testimony I would wish to clarify that the position I took upon leaving United Farm

Tools paid at a rate of \$4.73 an hour. This job with the Public Service Commission pays me at the rate of 40 hours per week, at \$4.64 an hour.

  
LYNN L. GRAY

Taken, subscribed and sworn to before me this the 28<sup>th</sup> day of February, 1986.

My commission expires July 6, 1992.

  
Notary Public

CERTIFICATE OF SERVICE

I, Richard L. Withers, attorney for the complainant, do hereby certify that I have served upon the respondent's attorney and the Hearing Commissioner herein a true copy of the foregoing motion and request by placing the same postage prepaid in the United States mail this 28th day of February, 1986, and addressed as follows:

P. Nathan Bowles, Jr.  
Bowles, McDavid, Graff and Love  
P.O. Box 1386  
Charleston, WV 25325-1386

Theodore R. Dues, Jr., Esq.  
405 Capitol Street  
Suite 600  
Charleston, W.V. 25301

  
Richard L. Withers

HUMAN RIGHTS COMMISSION  
WEST VIRGINIA  
CHARLESTON

DOCKET NO. ES-567-85

LYNN L. GRAY

Complainant,

vs.

UNITED FARM TOOLS, INC.,

Respondent.

COMMENTS OF THE COMPLAINANT TO THE COMMISSION  
ON THE HEARING EXAMINER'S PROPOSED ORDER

The Complainant wishes to show the Commission that in the above-numbered case, that there were numerous inaccuracies in the Hearing Examiner's Proposed Order.

FINDINGS OF FACT

No. 2. The Hearing Examiner erred in the salary received by the Complainant while employed at United Farm Tools, Inc. She was earning approximately \$9,200.00 at the time of her termination. (Page 82 of the hearing).

No. 5. The Hearing Examiner erred in stating the Complainant and Milam "possessed approximately equal educational background." Page 12 of the hearing, the Complainant testified she had one (1) full year of college while Milam changed his testimony under cross-examination (Page 133) to state he had only three (3) college courses obtained over a year-and-a-half time period.

No. 7. Milam testified on page 134 of the hearing that his accounting and bookkeeping experience were not relevant to his present position.

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HUMAN RIGHTS COMM

No. 9 and 10. The Complainant was showing the sexual harassment of Morris while employed at United Farm Tools.

No. 11. The Hearing Examiner erred when he said "that Morris never retaliated." However, in the testimony of Gombos, she testified that after she did not go out with Morris, she did not attend any more farm shows. Gombos confided of her retaliation of Morris to the Complainant (Page 98 of the hearing).

No. 13. The Hearing Examiner erred when he said "the last contact between Morris and the Complainant occurred in January 1985." Testimony of Gombos on page 103 of the hearing shows Morris made return visits to the South Charleston office every three (3) months. Again on page 157-158 of the Respondent's testimony, when asked "Has Mr. Morris been back to Charleston to visit since January?" He responded "yes....I would say two or three times."

No. 12. Being Morris was the supervisor at the South Charleston Office, there was no one to whom the Complainant could report his conduct. Respondent had nothing to do with the day to day operations.

No. 15. The Hearing Examiner erred when he said raises and time of raises received by the Complainant at her new position "do not appear from the record." Exhibit B was offered as evidence of her present pay increments. (Page 2 of the hearing).

#### CONCLUSION OF THE LAW

No. 8. It should be noted that in the case cited, the male's experience

speculative position. If this defense were permitted, it would be sufficient for an employer to state that a male was hired for a better position but until an opening arose he was paid a higher salary to keep him.

No. 12. The Complainant charged a pattern of discrimination exists at this location; not throughout all locations.

No. 11 and 14. The Hearing Examiner erred when he stated that "there is not pattern of discrimination." Two of the three women who receive less than any of the men have more accounting experience than Milam. The woman who is paid \$400.00 per year less than Milam is the Advertising Manager (Page 95 of the transcript ) while Milam is a clerk. All male managers are paid more than this female manager.

No. 15. Remarks made by other management employees are the responsibility of the Respondent and shows sexist conditions evident at United Farm Tools, Inc. Again, another reason the Complainant was force to leave her job at UFT.

No. 16. This evidence was offered to support the Complainant's contention of intolerable working conditions; not sex discrimination.

No. 18. The Hearing Examiner failed to point out that the Complainant was more than just "embarrassed" by the lunch invitations, sign language, and notes of Morris. However, on page 155 of the hearing, the Hearing Examiner refused to hear any more testimony of this and than sloughed it off as "embarrassment." Again, this shows the conditions the Complainant

No. 19. The Hearing Examiner admitted "the Complainant has established a prima facie case of sexual harassment" but again he erred by stating more than ninety (90) days had elapsed prior to filing of the case. (On pages 157-158 of Respondent's testimony he stated Morris regularly visited the South Charleston facility up until the time the Complainant left. The Complainant testified upon return visits Morris would leave notes. (Page 99 and 103 of the hearing). Gombos testified Morris would get the Complainant alone.

No. 20. Again the Hearing Examiner erred when stating that the Complainant "found another position which paid more." The Complainant was actually paid less for her new position. She received \$4.73/hour based on a 37.5 hour work week at United Farm Tools, Inc. and was paid \$4.64/hour based on a 40 hour work week at her new position, plus additional expenses (page 72 of the transcript). Again, the Hearing Examiner erred when he stated "Morris had been gone from the office for more than a year." Testimony of Respondent on page 157-158 again states Morris had made return trips to the South Charleston office.

No. 21. Testimony of Gombos shows Complainant considered leaving United Farm Tools, but was encouraged to stay knowing Morris was leaving and felt conditions would improve. However, Milam was hired doing the same job making approximately \$6,000.00 more per year. Again, the Hearing Examiner erred stating "constructive discharge occurs when an employee quits because working conditions are so intolerable that it is better to have lesser paying one." The Complainant did take a lesser paying position as stated in No. 20, and the constant job discrimination and sexual harassment made her job intolerable.

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STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

MAR 10 1986

W.V. HUMAN RIGHTS COMM.

LYNN L. GRAY,

Complainant,

v.

DOCKET NO. ES-567-85

UNITED FARM TOOLS, INC.,

Respondent.

RESPONSE TO MOTION BY COMPLAINANT  
FOR RECONSIDERATION

The complainant, on February 28, 1986, filed a motion seeking reconsideration of the matter. Also on February 28, the complainant, pro se, wrote to the Commission to say that she intends to file exceptions to the recommended decision.

The respondent, United Farm Tools, Inc., as a preliminary matter, notes that neither the Code of West Virginia nor the Rules and Regulations of the Commission expressly provide a procedure for reconsideration of a proposed order or for filing exceptions to it. Rule 7.25 of the Rules of the Commission allows the chairperson to reopen proceedings for good cause. The points asserted by the complainant do not amount to good cause.

To address the points of the motion in the order raised by complainant:

1. The complainant states in her affidavit that the information concerning the firing of Mrs. Erskine "was not available to me or my counsel until after the November 25, 1985, hearing when Mrs. Erskine came forward." However, there is no showing that the complainant or her counsel ever attempted to contact Mrs. Erskine prior to the hearing. Further, as a matter of fact, Mrs. Erskine was fired for other reasons, not related to her sex or the sex of her replacement. In any event, the complainant had sufficient opportunity prior to the hearing to investigate and develop evidence concerning the reasons for Mrs. Erskine's termination.

2. The complainant gives no reason why she could not have subpoenaed Mr. Ferrell for the hearing. Her belief that he does not intend ever to retire is mistaken or misplaced.

3. The hearing examiner can be presumed to have considered all of the complainant's work history without reciting it verbatim in the proposed finding. The examiner is empowered to give any person's work experience the weight he deems it deserves.

4. The hearing examiner may be presumed to have considered the return of Mr. Morris to the office once every three months and to have given it the weight to which it was entitled -- none.

5. Where the "harasser" has a supervisor, the victim has a duty to inform that supervisor of the offending behavior. Cf. citations in Respondent's Proposed Findings.

6. Ms. Gray knew that Mr. Hall had authority over Mr. Morris. She consciously chose to save the love notes in an attempt to make out a charge of discrimination, rather than try to end the discrimination by reporting the behavior to Mr. Hall.

7. It may be presumed that the hearing examiner realizes that no case cited by the respondent is on point on all fours, but that most or all are analogous to the present case.

#### CONCLUSION

The complainant has no procedural right to file a motion such as the present one. The reasons given to support it are not such as would warrant any reconsideration, reopening of evidence, or other relief. Her affidavit tells what the complainant subjectively believes or feels. It contains double, triple, and even further removed hearsay. It should not prejudice the right of the respondent to have this case dismissed on the basis of the evidence adduced at the hearing.

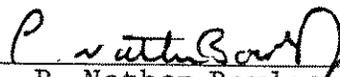
CERTIFICATE OF SERVICE

I, P. Nathan Bowles, Jr., counsel for United Farm Tools, Inc., do hereby certify that the foregoing "Response to Motion by Complainant for Reconsideration" has been served on the following by mailing true copies thereof by regular United States mail, postage prepaid, this 7th day of March, 1986, to:

Richard L. Withers, Esq.  
Post Office Box 3933  
Charleston, West Virginia 25339  
Counsel for Complainant

Theodore R. Dues, Jr., Esq.  
405 Capitol Street  
Suite 600  
Charleston, West Virginia 25301  
Hearing Examiner

Nathaniel G. Jackson, Chairman  
West Virginia Human Rights Commission  
1036 Quarrier Street  
Charleston, West Virginia 25301



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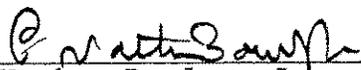
P. Nathan Bowles, Jr.

The complainant had her day in Court and lost. Her recourse, if any, is prescribed in the Rules and in the Code. That recourse does not include motions such as the present one.

Respectfully submitted,

UNITED FARM TOOLS, INC.

By Counsel



---

P. Nathan Bowles, Jr.  
BOWLES, McDAVID, GRAFF & LOVE  
Post Office Box 1386  
Charleston, West Virginia 25325-1386  
(304) 347-1100

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**RECEIVED**

FEB 21 1986

W.V. HUMAN RIGHTS COMM.  
*[Signature]*

LYNN L. GRAY,

Complainant,

vs.

Docket No. ES-567-85

UNITED FARM TOOLS, INC.,

Respondent.

**EXAMINER'S RECOMMENDED FINDINGS  
OF FACT AND CONCLUSION OF LAW**

This matter matured for hearing on November 25, 1985. The hearing was held at the Large Conference Room, Daniel Boone Building, 405 Capitol Street, Charleston, Kanawha County, West Virginia. The Complainant appeared in person and by Richard L. Withers, her counsel. The Respondent appeared by D. Ray Hall, its President and by Paul N. Bowles, its counsel. The presence of a Hearing Commissioner was waived by the parties. Proposed findings were received by January 31, 1986.

**ISSUES**

1. Did the Respondent unlawfully discriminate against the Complainant by paying her less than a male who performed the same job?
2. Was the Complainant sexually harassed on her job?
3. Was the Complainant constructively discharged from her job?

**FINDINGS OF FACT**

The Complainant, Lynn L. Gray, is a female resident of Kanawha County, West Virginia.

1. The Respondent, United Farm Tools, Inc., is a West Virginia corporation employing eight persons in its South Charleston, West Virginia office. The Respondent has twelve or more employees in West Virginia. Nationwide, the Respondent employs approximately one hundred persons.

2. The Complainant took a job with the Respondent in August, 1981. Although she started with somewhat lesser responsibilities, by the beginning of 1985, and thereafter until she resigned on April 15, 1985, her main job was to identify, call and write delinquent accounts. In addition, she spent up to twenty percent (20%) of her time completing insurance (both property and employee benefit) forms and responding to insurance inquiries.

3. On or about January 2, 1985, the Respondent employed a male, Steve Milam, (hereinafter sometimes referred to as "Milam"), whose main duty was also to contact delinquent accounts. Although Milam did not have the insurance duties which the Complainant had, both Milam and the Complainant worked the same hours, the same days, and their work required approximately the same level of skill (Complainant learned the insurance job after a brief training program and by self training).

4. Milam was paid \$15,000.00 per year. The Complainant received \$9,000.00 per year.

5. The Complainant and Milam possessed approximately equal educational backgrounds.

6. The Complainant's employment background consisted mainly of secretarial work, though she had been both a secretary

and a personnel director at a hospital.

7. In contrast, Milam has approximately twelve (12) years of accounting and bookkeeping experience, including some experience supervising others.

8. Hall had the final say on hiring and was responsible for setting the salary levels of the Respondent's employees. Prior to and during the latter half of 1983, Jim Morris held the position of office manager of the Respondent's South Charleston office.

9. Morris invited the Complainant to lunch on more than one occasion, which she considered to be improper.

10. Morris sometimes addressed the Complainant as "pretty lady" and wrote notes to her which called her "pretty."

11. On several occasions, he wrote notes to the Complainant concerning office business and signed them with a symbol which he later told her meant, "I love you." Although there was no evidence that Morris ever attempted to use his superior position to threaten or force the Complainant to respond to his overtures, and there is no evidence that Morris ever retaliated for her failure to do so. His behavior did make the Complainant uncomfortable.

12. The Complainant failed to complain about Morris' conduct.

13. The last contact between Morris and the Complainant occurred in January, 1985.

14. On April 15, 1985, the Complainant quit her position with the Respondent although she offered to continue working if

Hall would raise her salary to \$15,000.00 per year. Hall refused the raise.

15. The Complainant took a position with the State of West Virginia at \$805.00 per month, the equivalent of \$9,660.00 per year. She has received raises since that time but the dates and amounts do not appear from the record.

16. After the Complainant's resignation, and through the date of the hearing, Milam handled all delinquent accounts, including those previously handled by the Complainant. He reported to Curtis Martin, credit manager.

17. At this time, Milam also approved credit in Martin's absence and did some accounting work with reference to installment sales and write-offs.

18. Of the eight employees in the Respondent's Spring Hill office, five are women, three are men. Although the record is not complete as to their salaries and positions, the following information is present:

<u>Employee</u>	<u>Position</u>	<u>Salary</u>
Keith Ferrell	Treasurer	Unknown
Mable Wilmoth	Unknown	\$18,000.00
Curtis Martin	Credit Manager	Unknown; less than \$18,000.00
Steve Milam	Credit/Accounting	\$15,000.00
Edna Gumbos	Sales Promotion	\$14,600.00
Three Women	Unknown	Unknown; less than \$15,000.00

### CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties herein.

2. As in all cases, the Complainant has the burden of proving her charge of discrimination. West Virginia uses the three-step analysis elucidated by the United States Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 797, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). Shepherdstown Volunteer Fire Department v. State ex rel. State Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983).

3. The Complainant must first make out a prima facie case by proving that she is a member of a protected class (female), that she possessed qualifications equal to that of a male and did the same job as that male, but received less pay than the male for that work.

4. Once the Complainant has demonstrated a prima facie case, the Respondent has the burden of articulating a legitimate, nondiscriminatory reason for the inequality in pay. To meet this burden, the employer need not convince the Hearing Examiner that the articulated reasons were the true reasons for the apparent discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981).

5. Once the employer has articulated a legitimate reason for the apparent discrimination, the Complainant has a further burden of demonstrating that the employer's reason is simply a pretext for discrimination or is otherwise not believable. Texas

Department of Community Affairs v. Burdine, supra; McDonnell Douglas Corporation v. Green, supra; Shepherdstown Volunteer Fire Department v. State ex rel. State Human Rights Commission, supra.

6. The record clearly demonstrates that during the ninety-day periods preceeding the filing of the complaint in this case, the Respondent paid the Complainant less than it paid Milam and that during that period both performed essentially the same, if not identical, tasks. On an annual basis, the Complainant received \$9,000.00; Milam received \$15,000.00. Therefore, the Complainant established a prima facie case.

7. Hall hired Milam with the reasonable expectation that Milam would assume the position of head accountant upon the retirement of the person who held that position. Milam was qualified for the position of head accountant by reason of his twelve years of business accounting experience. Gray possessed no accounting background. Until such time as the present accountant retired, Milam was expected to gain experience in the collection aspect of the Respondent's business and hall could observe Milam's work and personal habits. In order to hire Milam and thus have him available when the accounting position opened, it was necessary to pay Milam a reasonable portion of what he had previously earned.

8. A Fourth Circuit Court of Appeals decision arising under the Federal Equal Pay Act (29 USC §206) held that an employer may justify unequal pay by showing management decisions, not based on sex, which rationally relate to the disparity. "The difference . . . [in] salary was not determined on the basis of

sex but was based on Aetna's reasonable expectation that [the male's] ability and more substantial prior underwriting and managerial experience would allow him to take on greater responsibility and make him a more valuable employee." EEOC v. Aetna Insurance Company, 616 F.2d 719 (4th Cir. 1980).

9. The Respondent thus articulated legitimate reasons for the disparity in pay, not based upon sex.

10. The burden then shifted back to the Complainant to show that these reasons are mere pretexts for discrimination. Very little, if any, evidence in the record would even tend to support such a rebuttal.

11. Five women and three men work in the Spring Hill office. One woman was paid more than two of the men. One woman was paid \$400.00 per year less than Milam but her duties were substantially different. It may be inferred that the other three women received less than any of the men.

12. This is not persuasive evidence of a pattern of discrimination or of an attempt to discriminate. With over a hundred employees nationwide, a sample of eight is not necessarily representative.

13. Even this sample of eight employees in the South Charleston office does not show a pattern of discrimination. It does not appear that any of the men in the Spring Hill office do the same work as any of the women.

14. The disparity in pay between the Complainant and Milam is an isolated incident, explainable by a nondiscriminatory business purpose, and not part of unlawful disparate treatment or

an observable discriminatory pattern.

15. Apparently, one of the Complainant's co-workers remarked in a meeting that a male sole provider could less afford a pay cut than could a woman whose husband worked. However, nothing demonstrates that Hall, who had the final say in such matters, agreed with this statement. The remark was a personal opinion, made while Hall was out of town.

16. Hall's refusal to pay the Complainant more if she took the job managing the Cross Lanes branch cannot be said to constitute sexual discrimination. There is no evidence that the person who took the position, whether male or female, was paid any more than the Complainant made as a credit clerk.

17. The Examiner finds, therefore, that while the Complainant has established a prima facie case of unequal pay for equal work, she has not successfully rebutted the legitimate business reasons, not related to sex, which the Respondent gave for the disparity in pay. She has therefore failed to establish her charge that the Respondent unlawfully discriminated against her on the basis of sex with regard to her pay.

18. The Complainant established that she was embarrassed and made uncomfortable by the lunch invitations, sign language notes, and "pretty, pretty" notes emanating from Jim Morris.

19. Finally the Examiner finds that even if the Complainant had established a prima facie case of sexual harrassment, she would be entitled to no award under the facts for the reason that all the events concerning requests for luncheon dates, love notes, and remarks occurred well before

ninety (90) days prior to her filing her complaint. Furthermore, there is no showing that the Complainant ever attempted to report Morris' offensive behavior to someone in a position of authority. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).

20. The Examiner finds and concludes that the Complainant was not constructively discharged. Rather, she was dissatisfied with her job with the Respondent and quit when she found another position which paid more. Undoubtedly, she was made uncomfortable by Jim Morris' actions, but Morris had been gone from the office for more than a year before the Complainant quit. She also became uncomfortable when she learned that Milam was being paid more than she was, but continued to work beside Milam for several months, until she had secured another position.

21. Constructive discharge occurs when an employee quits because working conditions are so intolerable that it is better to have no job, or a lesser paying one, than to continue. Sparrow v. Piedmont Health Systems Agency, Inc., 593 F. Supp. 1107 (1984).

There is no showing that anyone at the Respondent's office ever intended to force the Complainant to quit her position. Indeed, it remained open until she voluntarily quit.

22. The standards for determining constructive discharge are objective, not dependent upon the subjective feelings of the employee. "Working conditions which have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. "Borque v. Powell Electrical

Manufacturing Company, 617 F.2d 61 at 65 (5th Cir. 1980), citing Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977).

23. Although the Complainant was dissatisfied with her job, she stayed there until she could find one which paid as well or better. As a matter of law, unequal pay is not of itself a grounds for finding constructive discharge. Heagney v. University of Washington, 642 F.2d 1157, 1166 (9th Cir. 1981); Bourque v. Powell Electrical Manufacturing Company, supra; Sparrow v. Piedmont Health Systems Agency, Inc., supra.

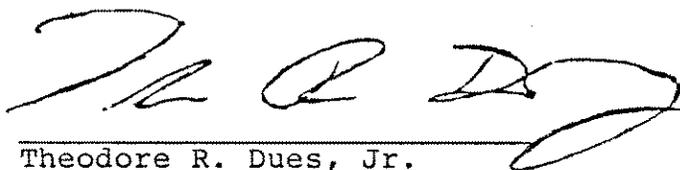
#### DISCUSSION

Although the Complainant made out a prima facie case of discrimination in that she was paid less money for doing substantially the same work as her male counterpart, she failed to rebut the legitimate business reasons proffered by the Respondent for the disparity in pay. Accordingly, she has failed to carry her burden of proving unlawful discrimination.

The Complainant was not unlawfully sexually harassed. Although she was made uncomfortable and was perhaps embarrassed by the behavior directed towards her by Jim Morris, such behavior did not rise to the level of unlawful sexual harassment. Furthermore, any such behavior occurred more than ninety (90) days prior to the filing of her complaint in this case, and had ceased by that time. She took no steps to report the offensive behavior to anyone in a position of authority who could take remedial action. For all of these reasons, she should be denied an award for her claim of sexual harassment.

CERTIFICATE OF SERVICE

I, Theodore R. Dues, Jr., hereby certify that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSION OF LAW upon Paul N. Bowles, Esq., Bowles, McDavid, Graff & Love, P.O. Box 1386, Charleston, West Virginia, 25325-1386 and Richard Withers, Esq., 600 Atlas Building, P.O. Box 3933, Charleston, West Virginia, 25339, by placing the same in a properly addressed and stamped envelope on this 13th day of February, 1986.



Theodore R. Dues, Jr.  
Hearing Examiner

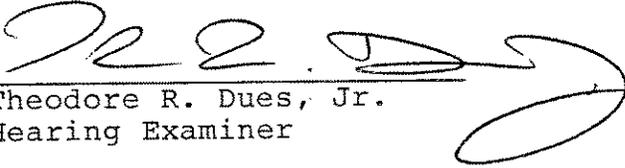
The Complainant has failed to establish that she was constructively discharged within the legal meaning of that term.

**PROPOSED ORDER**

The Examiner recommends to the Commission that it enter an award in favor of the Respondent, and dismiss this case from the docket.

DATED 2-13-86

ENTER:

  
Theodore R. Dues, Jr.  
Hearing Examiner