



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Bob Wise
Governor

Ivin B. Lee
Executive Director

**VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED**

December 23, 2002

Jerry L. Hill
PO Box 42
Cassville, WV 26527

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Eat 'N' Park Restaurants, Inc.
c/o J. Robert Russell, Esq.
Furbee, Amos, Webb & Critchfield, PLLC
132 Adams St.
PO Box 1189
Fairmont, WV 26555-1189

J. Robert Russell, Esq.
Furbee, Amos, Webb & Critchfield, PLLC
132 Adams ST.
PO Box 1189
Fairmont, WV 26555-1189

Re: Hill v. Eat 'n' Park Restaurants, Inc.
Docket Number: ER-17-00; EEOC Number: 17J990304

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 January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

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“§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 administrative law 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 an 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 an 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 administrative law 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:

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10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

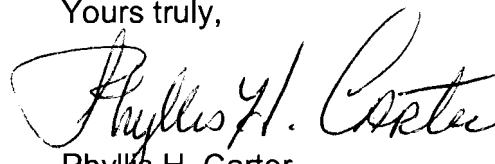
10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. 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 an 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 Ivin B. Lee, Executive Director of the commission at the above address.

Yours truly,



Phyllis H. Carter
Administrative Law Judge

PHC/slb

Enclosure

cc: Ivin B. Lee, Executive Director
Lew Tyree, Chairperson

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JERRY LEE HILL

Complainant

v.

Docket Number ER-17-00

EAT N' PARK RESTAURANTS, INC.

Respondent

FINAL DECISION

This matter matured for public hearing on June 21, 2001 at the Monogalia County Commission Meeting Room, Second Floor, 243 High Street, Courthouse, Monogalia County, Morgantown, West Virginia pursuant to proper notice.

The complainant, Jerry Lee Hill, appeared in person and by his attorney, Joan Mooney. The respondent, Eat N' Park, Inc. appeared in person by its representative, Anthony Mancini, Manager; and by its counsel Robert Russell. The record remained open until July 11, 2001 for the purpose of allowing the taking of the evidentiary deposition of Michael Witherspoon and the receipt thereof by the Commission. No evidentiary deposition was received by the Commission.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed findings of fact, conclusions of law and argument as well as the Stipulation of Wages earned in Mitigation submitted by the parties have been considered and reviewed in relation to the aforementioned

record. To the extent that the proposed findings of fact, conclusions of law and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and 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 of law have been determined as not in accord with a proper decision. To the extent that testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

I.

FINDINGS OF FACT

1. The complainant, Jerry Lee Hill, hereinafter referred to as “Mr. Hill,” is a 45 year old African American. He resides in Cassville, West Virginia. He graduated from high school and completed one semester of college in Pittsburgh. (Hr. Tr. p.15).

2. The respondent Eat N’ Park Restaurants, Inc., hereinafter referred to as “Eat N’ Park” is an employer as that term is defined by the West Virginia Human Rights Act.

3. Mr. Hill was hired as a dishwasher, day shift, at the Eat N’ Park in Morgantown on September 18, 1990. He worked at this restaurant for nine years before was constructively terminated on June 22, 1999. (Hr. Tr. pgs.15-17).

4. Mr. Hill made it clear to Eat N’ Park that he needed to use the Morgantown city bus system for transportation to and from his day shift position at the restaurant. (Hr. Tr.

p.16.)

5. The public transit system in Morgantown allowed Mr. Hill to arrive at work prior to 7:00 a. m. However, Mr. Hill left the restaurant before 4:30 p. m. because the last bus to Cassville left downtown Morgantown at 5:00 p. m. (Hr. Tr. pgs. 52,53 and 54).

6. Mr. Hill lived 10 miles from Morgantown. If he missed the 5:00 p. m. bus, he would have had to walk 10 miles home. (Hr. Tr. pg. 54).

7. Mr. Hill took two buses to get home. Because of the heavy traffic at that hour of the day, it took one half hour for the first bus to get downtown where the transfer point was located. The restaurant was is located on Patterson Drive across from the Kroger store. The bus stopped at Campus Drive and University Avenue.

8. Throughout his employment with Eat N' Park, Mr. Hill was continually called "boy" and "nigger" in spite of the fact that he asked Eat N' Park employees to stop and in spite of the fact that he complained to management. (Hr. Tr. pgs. 39,41 and 44).

9. In October, 1998, an air conditioner repairman pointed to a child's action figure that was hanging from the air conditioner above Mr. Hill's station. The figure was black and was hanging by a rubber band around its neck, lynching style. (Hr. Tr. pg.31 and Complainant's Exhibit 1).

10. Mr. Hill reported this incident to Paul Howrylak, the general manager. Although Mr. Howrylak asked for the action toy, Mr. Hill declined to give it to him. He told Mr. Howrylak that he had taken photographs of the black action figure and would share those

photographs with Mr. Howrylak when they were developed. (Hr. Tr. pg.52). Mr. Hill also discussed this incident with Mr. Spears and Mr. Mancini at their June 21, 1999 meeting. (Hr. Tr. pg.112).

11. Mr. Hill indicated that to him the black action figure represented a black man being lynched. It made him feel disgusted. (Hr. Tr. pg.34).

12. After the meeting, Mr. Hill did not hear anything else about the incident or whether an investigation was in process. There were no general announcements about Eat N' Park 's racial discrimination policy. (Hr. Tr. p. 38).

13. Although Mr. Howrylak testified that he spoke to all the dishwashers on the schedule; no one admitted to hanging the black figure. (Hr. Tr. p.174).

14. A female assistant manager followed Mr. Hill into the customer rest room on his day off and demanded to know why Mr. Hill was in the restaurant. She stood in the door way so that no one could leave or enter. Mr. Hill reported this to management. Mr. Hill explained that he had just come from the dentist's office and that he was there to request the next week off so that he could return to the dentist office. Management's response, according to Mr. Hill was that as long as the female assistant manager apologized, he should drop the subject. The female assistant manager did apologize. This testimony was uncontraverted by Eat N' Park. (Hr. Tr. p.36).

15. There was a pattern of racial name-calling that goes back to 1990, i.e. management asking Mr. Hill to wear a horse muzzle because he could not shave everyday

as a result of a medical condition he had called Pseudofolliculitis or Barber's Itch (respondent's exhibit one); comments by a waitress who asked him why he did not have to shave, while white male employees did—was it because he was special or black (Hr. Tr. p.44); being spat on by a white male employee regarding clean-ups and chased at knife point by that same employee across the street. This white male employee was fired by management after this incident but subsequently offered a job on a shift different from Mr. Hill. (Hr. Tr. pgs.41,42,43) This testimony was uncontraverted by Eat N' Park.

16. Mr. Hill suffered substantial emotional distress and mental anguish and embarrassment as a result of treatment he received by the employees at Eat N' Park in Morgantown.

17. Eugene Claypool called Mr. Hill a "lazy nigger" on the job. Mr. Hill reported this incident to management and Claypool was terminated from his employment. (Hr. Tr. pgs. 172, 198).

18. Mr. Hill was a good to average employee, who usually did his work well. Paul Howrylak, one of the general managers, testified that he would rehire Mr. Hill if he came to him for re-employment. (Hr. Tr. p.199)

19. Mr. Hill had difficulty keeping up with the dishes and doing general cleaning during the last two hours of work. Although the workers on the next shift came in before 4:00 p. m.; they did not help Mr. Hill. (Hr. Tr. pgs. 49,92,25,52,53).

20. Management changed Mr. Hill's schedule so that he would have time to

complete his cleanups and required him to work from 8:30 a. m. to 4:30 p. m. because the restaurant was due for an inspection by the health department and the new general manager wanted to get on good terms with the health department. (Hr. Tr. p.234).

21. Management did not ask the employee who was scheduled to come in at 4:00 p. m. to come in earlier, because his wife worked. (Hr. Tr. p.235).

22. Mr. Hill learned of the schedule change the day before he was to report to work.

23. Mr. Hill attempted to discuss the schedule change with his supervisor, Mr. Anthony Mancini.

24. Mr. Ken Spear and Mr. Anthony Mancini met with Mr. Hill regarding the schedule change. At that time, Mr. Hill discussed with them the incident involving the black figurine and showed them the pictures he took of the figurine hanging from the ceiling. (Complainant's Exhibit 2).

25. There is no testimony that Mr. Spears nor Mr. Mancini investigated this incident after Mr. Hill brought it to their attention at the June 21, 1999 meeting. On cross - examination, Mr. Mancini testified that he was unaware of any investigation regarding Mr. Hill's earlier complaint about the figurine.

26. Mr. Mancini recalled that Mr. Hill had indicated on his original job application that he needed to leave work in time enough to take the public transportation home. Mr. Mancini recalled that he thought the application said that Mr. Hill had to leave by 4:30 p. m.

27. Mr. Hill's testimony regarding his treatment by the employees and management at Eat N' Park in Morgantown is credible.

28. Judith Rae Kennedy's testimony at the hearing is not credible.

29. Carrie Ann Norwich's testimony at the hearing is not credible.

30. Jerry Hill was making \$7.00 per hour when his job was terminated from Eat N' Park, on June 22, 1999. He earned \$14,000.00 per year, with \$0.33 per hour raised per year. He has earned \$7,480.88 for two years and three months of the time he has not worked at Eat N' Park, which should be deducted from any back pay he is entitled to. (Stipulation submitted by the parties dated September 17, 2001.)

II.

DISCUSSION

West Virginia Code § 5-11-9(1) of the West Virginia Human Rights Act, makes it unlawful "for any employer to discriminate against an individual with respect to ... hire, tenure, conditions or privileges of employment if the person is able and competent to perform the services required..." The term "discriminate" or "discrimination" as defined in W. Va. Code § 5-11-3(h) means to "exclude from, or fail or refuse to extend to, a person equal opportunities because of race..." In order to establish a case of disparate treatment for discriminatory discharge or failure to hire under W.Va. Code § 5-11-9, with regard to race, the complainant must prove as prima facie case, that:

1. The complainant is a member of a protected class;
2. The employer made an adverse decision concerning the complainant; and,
3. But for the complainant's protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and, adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a prima facie case of discrimination; the respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by the respondent was not the true reason for the decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway

v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986). Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and, where pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). Although, discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the “mixed motive” analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, *supra*. “Mixed motive” applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the complainant need only show that the complainant’s protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the complainant’s protected class had not been considered. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

Applying these standards, Mr. Hill has established that he is a member of a protected status in that he is African American. Eat N’ Park took adverse employment action against Mr. Hill when Eat N’ Park refused to accommodate his work schedule after nine years, but accommodated the work schedules of two white employees; when Eat N’ Park allowed a

racially hostile work environment to exist, even though Mr. Hill complained several times; when Eat N' Park reinstated several other white employees who had walked off the job by allowing them to return to work; but did not allow Mr. Hill to return to work; when Eat N' Park did not stop white employees from calling Mr. Hill "boy" and "nigger" even after Mr. Hill continuously brought this problem to the attention of management; when management told Mr. Hill that he should put a "horse muzzle on his face"; when two white hostesses at Eat N' Park continuously called Mr. Hill "boy" even though Mr. Hill complained to management.

Undoubtedly, Mr. Hill has established a prima facie case of unlawful racial discrimination and that racially motivated acts committed against Mr. Hill by the employees and management of Eat N' Park are continuing in nature. Eat N' Park offered non discriminatory reasons for the termination of complainant's employment. The reason is that Mr. Hill voluntarily walked off the job when he learned that his schedule was changed and he would not be allowed to leave work at 4:00 p. m. Eat N' Park changed the schedule because health inspections were taking place in June from 3:30 p. m. to 4:00 p. m. and the restaurant needed to be cleaned and Mr. Hill was having problems finishing his clean ups prior to leaving work at 4:00 p. m. In addition, the white dishwasher who came in at 4:00 p. m. could not come in earlier because his wife worked. So, Mr. Hill's hours were changed to overlap the white dishwasher's shift so that Mr. Hill could complete his clean ups.

Several factors indicate that the explanations offered are pretextual and that a discriminatory motive was involved in the decision to change Mr. Hill's work schedule so that it would be impossible for him to continue to work at Eat N' Park after nine years of faithful employment. The schedule change was one incident in a series of incidents that support a finding that Mr. Hill was discriminated against by Eat N' Park. The first time that Mr. Hill learned of the schedule change was the day before he was scheduled to work, which would have been that Tuesday, the next day. He was not given an opportunity to make any arrangements. Mr. Mancini knew that Mr. Hill left at 4:00 p. m. on the days that he worked for nine years because he needed to be downtown by 5:00 p. m. to catch the last bus leaving Morgantown for Cassville. Mr. Mancini also knew that Mr. Hill caught the 4:30 bus leaving Eat N' Park and that the 5:00 p. m. bus left from downtown Morgantown. Eat N' Park is not located in downtown Morgantown. It takes at least 30 minutes to get to downtown Morgantown in the afternoon traffic.

Mr. Mancini testified that he was one of the opening managers at Eat N' Park and had been assigned to the Morgantown restaurant four times. So, he was familiar with the afternoon traffic problem because the restaurant is located near the University. And he was familiar with the fact that an accommodation had been made for Mr. Hill allowing him to leave work before 4:30 p. m for nine years.

Mr. Hill very credibly testified that sometimes the bus came before 4:30 p. m. This change in work schedule constituted a constructive discharge because management knew that

Mr. Hill could not leave work at 4:30 p. m. and get downtown in time to catch the 5:00 p. m. bus home. More importantly, management knew that Mr. Hill indicated on his application that he had to use public transportation to get home and that Mr. Hill was hired with the understanding that he would be able to leave work with sufficient time to take the 4:30 p.m. bus and the 5:00 p. m. bus, the last bus home. See Plaintiff's Exhibit 3. Why else would Mr. Mancini call the bus company to confirm what time the last bus left for Cassville but for the fact that Mr. Mancini knew that Mr. Hill was dependent on the public bus to get home. Management saw an opportunity to get rid of Mr. Hill because of his many allegations of racial harassment; the pictures he took of the black figurine hanging above his work station and used the "cleanliness issue" as the pretext to constructively discharge him from employment. Certainly, June, 1999, was not the first time management became concerned about cleanliness and it was not the first time that the restaurant would have been inspected by health officials.

As part of management, Mr. Mancini knew or should have known of the complainants that Mr. Hill had filed with Eat N' Park restaurant alleging racial discrimination. There had been a previous conciliation through the West Virginia Human Rights Commission regarding an earlier complainant filed by Mr. Hill against Eat N' Park restaurant. Mr. Hill very credibly testified that management had not responded to any of his complainants especially the incident concerning the black figurine hanging about his work station symbolic of a black person who has been lynched. The preponderance of the evidence supports a finding that Eat

N' Park management did not take Mr. Hill's complaints of racial harassment seriously nor that investigations of those complaints were actually conducted, particularly the one involving the lynched black figurine. Although, management claims that it did conduct an investigation, the undersigned did not find this testimony credible. The evidence is overwhelmingly in favor of Mr. Hill. For example, management never denied that it told Mr. Hill that he should put a "horse muzzle on his face." No one should be required to work in such a hostile environment. This conduct occurred in front of customers and other employees. Mr. Hill was embarrassed and humiliated.

Under the burden shifting formula of McDonnell Douglas Mr. Hill has shown by a preponderance of the evidence that the reasons advanced by Eat N' Park for the termination were pretextual. Under the mixed-motive analysis of Price-Waterhouse certainly Eat N' Park has the opportunity to show that Mr. Hill would have been terminated absent the unlawful discriminatory animus of Eat N' Park. The undersigned credits the fact that Eat N' Park did issue a letter of warning to Mr. Hill on February 25, 1994 about checking out at 3:59 p. m. when his scheduled time was 4:30 p. m. However, over a nine year period, Mr. Hill was allowed to leave before 4:30 p. m. so that he could catch the 4:30 p. m. bus downtown.

Now, let us look at the allegations of constructive discharge. The complainant must establish that "working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that the complainant prove that the employer's actions were taken with a specific intent to cause the

complainant to quit.” Slack v. Kanawha County Housing and Redevelopment Authority, 188 W. Va. 144, 423 S.E. 2d 547 at 558 (1992). Clearly, the evidence is overwhelming that Mr. Hill was subjected to an intolerable work environment that compelled him to quit.

Eat N’ Park argues that the doctrine of collateral estoppel/res judicata can be applied to the Bureau of Employment Programs decision and therefore Mr. Hill’s claims under the West Virginia Human Rights Act are barred. This is incorrect.

Regarding collateral estoppel and res judicata, the West Virginia Supreme Court of Appeals have held that for preclusion to attach to quasi-judicial determination of administrative agencies, where there are not statutory authority directing otherwise, the decisions must be rendered pursuant to the agency’s adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. Liller v. West Virginia Human Rights Commission, 180 W. Va. 433, 376 S.E. 2d 639, 646 (1988); Vest v. Board of Education of the County of Nicholas, 195 W. Va. 447; 466 S.E. 2d 447 (1995). The identity of issues litigated is a key component to the application of administrative res judicata or collateral estoppel. Id. First, there are no identical issues. The unemployment laws of the state do not impose a requirement for proving that discrimination was caused by an illicit motive or was the result of a discriminatory policy having a disparate impact as would be the required under the West Virginia Human Rights Act. Secondly, the procedure used by the Bureau of Employment Programs is not substantially similar to those used by the West Virginia Human Rights Act. The Bureau of Employment Programs does

not provide for the same rights that the Human Rights Act does. For example, there is no right to have one's claim independently investigated; be represented by counsel at the expense of the State; skip the administrative process and go straight to circuit court for a de novo hearing where jury trials and the full array of legal and equitable remedies are obtainable.

The Legislature designed the appeal procedures under the state's unemployment laws to be simple and expeditious. Issues of unlawful motive and disparate impact in a human rights case are often very difficult and complex, requiring a lot of discovery. The Supreme Court of Appeals will not apply the bar of claim preclusion on subsequent litigation under the West Virginia Human Rights Act.

In addressing issue preclusion, Justice McGraw made some observations about the grievance procedure at issue in that case that are also relevant in this case:

[T]he Legislature designed the [unemployment] process to be simple and expeditious. Consequently, the process is streamlined and lacks many of the accouterments found in judicial and [Human Rights] Commission proceedings. In the vast majority of [cases], for example, the [claimant] is represented by a lawyer. Moreover and more importantly, the [unemployment] process does not provide for any of the discovery mechanisms available under the Rules of Civil Procedure and the Commission's Procedural Rules. Finally in stark contrast to the Human Rights Act, the [unemployment] statute does not provide for the right to an investigation of [each claim] filed, does not make available at public expense representation by a lawyer for cases that proceed to a hearing before an administrative law judge and does not give any employees the option of skipping the administrative process and pursuing their claims de novo in circuit court where jury trials

and the full array of legal and equitable remedies are obtainable. The issue in a human rights case – especially unlawful motive and disparate treatment are extremely difficult and often complex. Invariably, they require substantial degrees of fact gathering and familiarity with the concepts of discrimination law. A [claimant] without a lawyer could not possibly be expected to grasp the significance of that law, put together a case of discrimination, and comprehend the full impact of claim and issue preclusion doctrines. A claimant with a lawyer would have an unfairly difficult task trying to prove illicit motive or disparate treatment without access to the full panoply of discovery opportunities. The problem especially apparent by the fact that in matters of motive and disparate impact the employer ordinarily possesses the crucial evidence. Thus, the plaintiff in this case was not ‘afforded a full and fair opportunity to litigate the matters in dispute[.]’ Wheeling-Pittsburgh Steel Corporation v. Kyu Chong Rowing and the West Virginia Human Rights Commission, 205 W. Va. 286, 297, 517 S.E. 2d 763, 774 (1999).

Respondent argues that the rules and procedures before the Bureau provide the complainant with ample opportunity to present his constructive discharge claim as the reason for him leaving his employment with Eat N’ Park. The Supreme Court of Appeals noted in Wheeling-Pittsburgh Steel Corporation, supra that the reason it accorded preclusive effect to the decisions of the Court of Claims is because this court maintains procedural and discovery rules that are similar to those that govern circuit courts.

On the other hand, the West Virginia Supreme Court of Appeals recognizes that the legal standards in question are substantially different as between unemployment compensation claims and other types of wrongful termination and/or constructive discharge cases. The undersigned relies on Slack v. Kanawha County Housing and Redevelopment

Authority, 188 W. Va. 144, 155; 423 S.E. 2d 547, 558, n. 13 (1992).. In Slack. Former Justice Miller stated that "...the statutory standard applicable in unemployment compensation cases is more liberal in accordance with the beneficial purposes underlying employment security law and is not applicable in a constructive discharge case."

III.

CONCLUSIONS OF LAW

1. Mr. Hill, the complainant, is an individual aggrieved by an unlawful discriminatory practice and is a proper complainant under the West Virginia Human Rights Act. W. Va. Code § 5-11-1-10.

2. Eat N' Park Restaurants Inc., the respondent, is an employer and person as defined by W. Va. Code § 5-11-1 et seq. and is subject to the provisions of the West Virginia Human Rights Act.

3. The complaint in this matter was properly filed in accordance with W. Va. Code § 5-11-10.

4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W. Va. Code § 5-11-9 et seq.

5. Mr. Hill has proven by a preponderance of the evidence that he was subjected to racial discrimination and constructive discharge. He is entitled to back pay.

6. Mr. Hill is found to have been subjected to racial harassment severe enough

to suffer substantial emotional distress and mental anguish so as to warrant a recovery of incidental damages.

7. Mr. Hill has proven that a reasonable person would have quit.
8. Mr. Hill is entitled to reasonable attorney fees and costs.

IV.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, this administrative law judge orders the following relief:

1. The above named respondent, Eat N' Park Restaurants Inc., shall cease and desist from engaging in unlawful discriminatory practices.
2. Respondent, Eat N' Park Restaurants Inc. Is ORDERED to pay the complainant, Mr. Jerry Lee Hill a back pay award that includes the value of lost benefits from June 22, 1999 through the date of this Final Decision plus statutory interest at ten percent simple interest per annum minus any mitigation. Complainant shall submit back pay calculations that reflect not only the Stipulation Agreement but this Final Decision within 31 days of the receipt thereof.
3. Respondent, Eat N' Park Restaurants Inc. Is ORDERED to reinstate the complainant, Mr. Jerry Lee Hill in the next available dishwasher position. Also, Mr. Hill is entitled to front pay with statutory interest at the rate of ten percent simple interest per

to suffer substantial emotional distress and mental anguish so as to warrant a recovery of incidental damages.

7. Mr. Hill has proven that a reasonable person would have quit.
8. Mr. Hill is entitled to reasonable attorney fees and costs.

IV.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, this administrative law judge orders the following relief:

1. The above named respondent, Eat N' Park Restaurants Inc., shall cease and desist from engaging in unlawful discriminatory practices.
2. Respondent, Eat N' Park Restaurants Inc. Is ORDERED to pay the complainant, Mr. Jerry Lee Hill back pay award plus the value of lost benefits from June 22, 1999 through the date of this Final Decision plus statutory interest at ten percent simple interest per annum minus any mitigation. Complainant shall submit back pay calculations that reflect not only the Stipulation Agreement but this Final Decision within 31 days of the receipt thereof.
3. Respondent, Eat N' Park Restaurants Inc. Is ORDERED to reinstate the complainant, Mr. Jerry Lee Hill in the next available dishwasher position. Also, Mr. Hill is entitled to front pay with statutory interest at the rate of ten percent simple interest per

annum until such time he is reinstated to a comparable position like the one he was unlawfully and constructively discharged from.

4. The respondent Eat N' Park Restaurants Inc., is ordered, within thirty-one days of this Final Decision to conduct appropriate awareness training regarding racial discrimination for all employees at its Morgantown location. Documentation to this effect shall be provided to Mr. William Mahan, compliance officer at the Commission within 60 days of the receipt of this Final Decision.

5. As a result of Eat N' Park's unlawful discriminatory conduct, respondent shall pay Mr. Hill an award of \$3,277.45 plus statutory interest at the rate of 10 percent simple interest per annum for humiliation, embarrassment, emotional distress and loss of personal dignity.

6. Mr. Hill is entitled to reasonable attorneys fees and costs. Counsel for complainant shall submitted a petition and an affidavit to the undersigned within 31 days of receipt of this Final Decision. Respondent shall have 15 days from the date of receipt of complainant's petition and affidavit for attorney fees and costs to file exceptions.

7. A Supplemental Final Decision shall issue upon receipt of the amended back pay calculations and the complainant's petition for attorney fees and costs.


8. In the event of failure of the respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia

Human Rights Commission, Ivin B. Lee, Director, 1321 Plaza East, Room 108-A,
Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 23rd day of December, 2002.

WV HUMAN RIGHTS COMMISSION

BY: 
PHYLLIS HARDEN CARTER
ADMINISTRATIVE LAW JUDGE



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**1321 Plaza East
Room 108A
Charleston, WV 25301-1400**

**TELEPHONE (304) 558-2616
FAX (304) 558-0085
TDD - (304) 558-2976
TOLL FREE: 1-888-676-5546**

**Bob Wise
Governor**

**Ivin B. Lee
Executive Director**

**VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED**

March 7, 2003

Jerry Hill
PO Box 42
Cassville, WV 26527

Joan A. Mooney, Esq.
Stiller & Mooney, PLLC
2931 University Ave.
Morgantown, WV 26505

Eat -n-Park Restaurants, Inc.
c/o J. Robert Russell, Esq.
Spilman, Thomas & Battle, PLLC
990 Elmer Prince Dr., Suite 205
Morgantown, WV 26504

J. Robert Russell, Esq.
Spilman, Thomas & Battle, PLLC
990 Elmer Prince Dr., Suite 205
Morgantown, WV 26504

Re: Hill v. Eat 'n' Park Restaurants, Inc.
Docket Number: ER-17-00; EEOC Number: 17J990304

Dear Parties:

Enclosed please find the **Supplemental Final Decision Damages and Attorneys' Fees and Costs** 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 January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

March 7, 2003

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“§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 administrative law 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 an 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 an 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 administrative law 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:

March 7, 2003

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10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. 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 an 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 Ivin B. Lee, Executive Director of the commission at the above address.

Yours truly,



Phyllis H. Carter
Administrative Law Judge

PHC/mst

Enclosure

cc: Ivin B. Lee, Executive Director
Charlene Marshall, Acting Chairperson

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JERRY LEE HILL,

Complainant,

v.

Docket Number ER-17-00

EAT N' PARK RESTAURANTS, INC.,

Respondent.

SUPPLEMENTAL FINAL DECISION
DAMAGES AND ATTORNEYS' FEES AND COSTS

Comes now the undersigned administrative law judge, after a review of the complainant's Statement of Lost Wages and Petition for Attorneys' Fees and Costs and submits the following findings of fact, conclusions of law, relief and order.

A.

BACKGROUND

The undersigned administrative law judge entered a final decision on December 23, 2002, in which the following relief was ordered regarding damages, attorneys' fees and costs:

1. Respondent, Eat N' Park Restaurants Inc., is ORDERED to pay the complainant, Mr. Jerry Lee Hill, a back pay award plus the value of lost benefits from June 22, 1999, through December 31, 2002, plus statutory interest at ten percent simple interest per annum, minus any mitigation within 31 days of the receipt of this final decision. Complainant shall submit back pay calculations that reflect not only the stipulation agreement but this Final Decision within 31 days of the receipt thereof.
2. As a result of Eat N' Park's unlawful discriminatory conduct, respondent shall pay Mr. Hill an award of \$3, 277.45, plus statutory interest at ten percent simple interest per annum humiliation, emotional distress and loss of personal dignity.
3. Mr. Hill is entitled to reasonable attorneys' fees and costs. Counsel

for complainant shall submit a petition and affidavit to the undersigned within 31 days of receipt of this Final Decision. Respondent shall have 15 days from the date of receipt of complainant's petition and affidavit for attorneys' fees and costs to file exceptions.

4. A Supplemental Final Decision shall issue upon receipt of the amended back pay calculations and the complainant's petition for attorneys' fees and costs.

In the December 23, 2002 Final Decision, the undersigned found that the complainant had established a *prima facie* case of discrimination and had proven by a preponderance of the evidence that the respondent discriminated against the complainant because of his race and as a result violated the West Virginia Human Rights Act. The complainant is entitled to be made whole. Subsequently, the respondent appealed this Final Decision to the Commission and the complainant filed a response.

On January 28, 2003, the complainant filed a Statement of Lost Wages and a Petition for Attorneys' Fees and Costs. The respondent did not file a reply to these pleadings.

B.

FINDINGS OF FACT

1. The Final Decision date December 23, 2002 is incorporated and made a part of this Supplemental Final Decision on Damages, Attorneys' Fees and Costs. See Exhibit A attached hereto.
2. The gravamen of the complainant's case is whether the respondent discriminated against the complainant because of his race. On these issues, the complainant prevailed entirely. Therefore, the complainant is entitled to be made whole.
3. On December 23, 2002, the undersigned administrative law judge entered a final decision in favor of the complainant and ordered the complainant to provide this administrative law judge with a detailed calculation of the back pay award that reflects the stipulation agreement and the final decision of December 23, 2002, as well as a petition for attorneys' fees and costs.

Respondent had 15 days from the receipt of Complainant's Statement of Lost Wages and Petition for Attorneys' Fees and Costs to file a reply in opposition thereto.

4. To date, respondent has not filed a reply in opposition to Complainant's Statement of Lost Wages and Petition for Attorneys' Fees and Costs.
5. Based on the undisputed calculations provided by the complainant, complainant's total lost wages are \$48,230.52 minus mitigation in the amount of \$10,762.20 for net lost wages of \$37,468.32. The prejudgment interest is \$3,863.05. The total damages owed the complainant is for a grand total of **\$41,331.37**. See Exhibit B attached hereto.
6. Complainant is entitled to \$3,277.45 plus post judgment interest at the rate of 10 percent per annum.
7. Complainant is entitled to attorneys' fees in the amount of \$3,720.00 and costs in the amount of \$480.10 for a grand total **\$4,200.10**. See Exhibit C attached hereto.
8. Complainant submitted a very detailed, clear and sufficient description of the work performed and costs incurred by his counsel in this case identifying fees and costs by date, activity, time spent on each activity and hourly fee.
9. Complainant's counsel graduated from law school in 1983. She was employed at the North Central West Virginia Legal Aid for five years. She was a Law Clerk to United States Magistrate Judge David L. Core for three years and United States District Court Judge Irene Keeley for six years before she began her private practice in 1999.
10. Complainant's counsel charged an hourly rate of \$100.00 which is reasonable under the West Virginia Human Rights Act.
11. The costs incurred by complainant are likewise reasonable.

C.

DISCUSSION

Once a complainant establishes by a preponderance of the evidence that unlawful discriminatory employment action has occurred, he is entitled to an award of back pay.

Frank's Shoe Store v. WV Human Rights Commission, 365 S.E.2d 251 (1986). The purpose of back pay awards is to make the victim of discrimination whole. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Hensley v. WV Dept. of Health & Human Resources, 456, 508 S.E.2d 616 (1975); Griben v. Kirk, 466 S.E.2d 147 (1995).

To obtain an award of back pay in a case before the Commission, the complainant has the burden of proving the extent and the amount of the economic loss she suffered as a result of the employer's unlawful conduct. Frank's Shoe Store, *supra*. The complainant has done this. The measure of a back pay award is the difference between the complainant's actual earnings for the period in question and those which the employee would have earned, absent the discrimination. Gotthardt v. Nat'l R.R. Passenger Corp., 191 F.3d 1148 (9th Cir. 1999). An award of back wages is considered special damages and subject to prejudgement interest as a matter of right. Gribben, *supra*. An award of prejudgement interest is calculated as simple interest at the rate of 10% per annum in accordance with W. Va. Code § 56-6-31. Hensley, *supra*. Prejudgement interest on an award of back pay is calculated from the date the employee was discharged. Rodriguez v. Consolidation Coal Co., 524 S.E.2d 672 (W. Va. 1999).

Incidental damages are awarded in Human Rights cases. Pearlman Realty Agency v. West Virginia Human Rights Commission, 239 S.E.2d 145 (1977).

Counsel for complainant filed a petition for attorneys' fees and costs for a total of \$4,200.10. Respondent did not file a reply. The general rule provides that each party bears his own attorneys' fees unless there is an express statutory authorization to the contrary. Where there is an express statutory provision to the contrary then that provision must be followed. The West Virginia Human Rights Act at W. Va. Code §5-11-13 modifies the general rule because it provides that where actions are brought under the Act and the court finds that respondent engaged in or is engaging in an unlawful discriminatory practice charged by the complainant, the court in its discretion can award reasonable attorney fees.

In making discretionary fee awards the court must find that the party seeking to have the fees and costs shifted is the prevailing party and that the requested fees and costs are reasonable. See Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933 (1983). The undersigned administrative law judge found that the respondent had engaged in discriminatory acts against the complainant and had therefore violated the West Virginia

Human Rights Act. The undersigned administrative law judge ordered that respondent cease and desist from engaging in unlawful discriminatory practices; ordered back pay, incidental damages and attorneys' fees and costs.

The West Virginia Supreme Court in Aetna Casualty and Surety Co. v. Pitrolo, 176 W. Va. 190, 342 S.E.2d 156 (1986) and Brown v. Thompson, 192 W. Va. 412, 452 S.E.2d 728 (1994) set forth a twelve-factor test for determining reasonableness of attorneys' fees. Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the question presented; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee charged in similar cases; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and the length of the professional relationship with the client; and, (12) awards in similar cases.

Although the complexity of the legal issues is no greater than in comparable cases arising under the West Virginia Human Rights Act, complainant had few witnesses who could assist him and counsel experienced some difficulty locating those witnesses. Complainant's counsel's hourly fee, under the circumstances, was at the lowest end of the fee scale in these types of cases before the Commission, and therefore is very reasonable.

Hourly rates previously awarded by the West Virginia Human Rights Commission have ranged from \$100.00 to \$300.00 per hour. The rate of \$100.00 per hour is well within the parameters of recent fees awarded, given the experience of complainant's counsel and the high quality of counsel for the parties. The case was taken on a contingency fee basis and therefore the case is not very desirable in light of the risk that no fee would have been recovered in prosecuting the complainant's claim if complainant had lost. Public policy dictates that when the complainant prevails, reasonable fees and costs are awarded so that private counsel is encouraged to prosecute actions seeking enforcement of the State's Human Rights Act. Furthermore, employment discrimination cases tend to involve claims that are difficult to prove, as direct evidence of discrimination and retaliation rarely exists. Often, proof is circumstantial and requires intensive discovery.

The administrative law judge is vested with wide discretion in determining awards

of attorneys' fees and costs. Such determinations should only be disturbed if there has been an abuse of that discretion. Louden v. Division of Environmental Protection, 2001 WL 913962 (W. Va.), W. Va., June 8, 2001 (No. 28664).

The West Virginia Supreme Court of Appeals recognized the need for adequate fee awards in human rights cases. The Court's position is that "the goal of the West Virginia human rights law is to protect the most basic, cherished rights and liberties of the citizens of West Virginia. Effective enforcement of the human rights law depends upon the action of private citizens who, from our observations of these matters, usually lack the resources to retain legal counsel necessary to vindicate their rights. Full enforcement of the Act requires adequate fee awards." Bishop Coal Co. v. Salyers, 181 W. Va.. 71, 380 S.E.2d 238 (1989) and Orndorff v. West Virginia Department of Health, 165 W. Va.1, 267 S.E.2d 430, 432 (1980)and Casteel v. Consolidation Coal Co., 383 S.E.2d 238 (W. Va. 1989).

D.

CONCLUSIONS OF LAW

1. The complainant prevailed on the issues of liability and damages and is entitled to be made whole.
2. The West Virginia Human Rights Act, W. Va. Code §5-11- 13 authorizes the Commission to award attorneys' fees and costs to the successful party.

E.

RELIEF AND ORDER

Pursuant to the above findings and conclusions of law, it is hereby **ORDERED** as follows:

1. Within 31 days of receipt of this Supplemental Final Decision on Damages and Attorneys' Fees and Costs, the respondent shall pay the complainant \$41,331.37 in back pay and interest.
2. Within 31 days of receipt of this Supplemental Final Decision on Attorneys' Fees and Costs, the respondent shall pay complainant

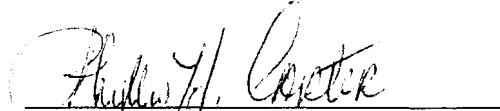
- \$4,200.10 in attorneys' fees and costs.
3. In the event of failure of the respondent to perform any of the obligations hereinbefore set forth, the complainant is directed to immediately so advise the West Virginia Human Rights Commission, Ivin B. Lee, Executive Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone (304) 558-2616.

It is so **ORDERED**.

Entered this 7th day of March 2003.

WV HUMAN RIGHTS COMMISSION

BY



PHYLLIS H. CARTER
ADMINISTRATIVE LAW JUDGE
ROOM 108A
1321 PLAZA EAST
CHARLESTON, WV 25301-1400
PH: (304) 558-2616

**Administrative Law Judge Phyllis H. Carter's
Supplemental Final Decision on Damages and Attorney's Fees and Costs
Entered March 7, 2003**

ADMINISTRATIVE LAW JUDGE'S

EXHIBIT A

**Administrative Law Judge Phyllis H. Carter's Final Decision
Entered December 23, 2002**