



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

November 16, 1990

Terry L. Hawthorne  
228 Mool Avenue  
Beckley, WV 25801

Marvin Masters, Esquire  
Masters & Taylor, L.C.  
416 Peoples Building  
Charleston, WV 25301

Office of Raleigh County  
Prosecuting Attorney  
Raleigh County Courthouse  
Beckley, WV 257801

John A. Hutchison, Esquire  
N. Robert Grillo, Esquire  
Post Office Drawer AU  
Beckley, WV 25802-2843

Re: Hawthorne v. Office of Raleigh  
County Prosecuting Attorney  
Docket No. REP-344-86

Dear Parties and Counsel:

Herewith please find the Final Order of the West Virginia Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for a review of this Final Order.

Sincerely

A large, stylized handwritten signature in black ink, appearing to read "Quewanncoi C. Stephens".

Quewanncoi C. Stephens  
Executive Director

Enclosures

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

cc: Secretary of State

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

TERRY L. HAWTHORNE,

Complainant,

v.

DOCKET NO. REP-344-86

OFFICE OF THE RALEIGH  
COUNTY PROSECUTING ATTORNEY,

Respondent.

FINAL ORDER  
AND SUPPLEMENTAL ORDER ON ATTORNEY'S FEES

On 8 August 1990 the West Virginia Human Rights Commission entered an order holding that respondent, Office of the Raleigh County Prosecuting Attorney, violated the West Virginia Human Rights Act by engaging in retaliatory action against the complainant because he had filed a complaint pursuant to the rights afforded him by the West Virginia Human Rights Act (HRA).

Due to the inadequacy of the record regarding attorney's fees and costs, the Commission was unable to render a final order at that time and instructed the complainant to submit all evidence and documents he deemed necessary relating to attorney's fees and costs. The Commission gave respondent thirteen days from the date of submission of complainant's documents to file a response. The Commission warned that failure to comply with the stated timelines would result in a denial of relief or refusal by the Commission to consider any untimely document or argument.

On 16 August 1990 the complainant filed a verified petition for attorney's fees and costs, along with affidavits of local practitioners relating to a reasonable hourly fee. As of this date, respondent has filed no objections or response whatsoever to complainant's petition.

A prevailing complainant is entitled to a reasonable attorney's fee, plus costs. Bishop Coal Company v. Salyers, 380 S.E.2d 238 (1989). In Salyers, the Court held that

"When the relief sought in a human rights action is primarily equitable, 'reasonable attorney's fees' should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate -- the lodestar calculation -- and (2) allowing, if appropriate, a contingency enhancement."

Syl. pt. 3., Salyers.

The Salyers Court further advised that the general factors outlined in Aetna Casualty and Surety Company v. Pitrolo, 342 S.E.2d 156 (1986), "should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and (2) the allowance and amount of a contingency enhancement." Ibid.

Counsel for complainant requests that he be compensated at a rate of \$150 per hour for 81.5 hours, or a total of \$12,225. He additionally asks that an associate be compensated in the amount of \$1,240 (15.50 hours x \$80 per hour) and that an investigator be compensated in the amount of \$4,025 (115 hours x \$35 per hour).

In Salyers, as well as more recently in Casteel v. Consolidation Coal Company, 383 S.E.2d 305 (1989), the Supreme Court of Appeals approved attorney's fees in the amount of \$130, \$110, and \$95 per hour. Absent extraordinary circumstances, this Commission has determined that it will not award fees at a higher level than have been approved by the Supreme Court in Salyers and Casteel, except as may be adjusted from time to time to allow for inflation or to conform to the prevailing competitive market rate in West Virginia.

Since complainant has produced affidavits showing that the prevailing competitive market rate in the Southern West Virginia area for an attorney of his experience and reputation is \$150 per hour, and respondent has filed no objection to the same, we deem it appropriate to make an exception from our standard rule and do hereby award Mr. Masters an attorney fee in the amount of \$150 per hour.

All other fees and hours expended, having not been objected to, and appearing reasonable on their face, are likewise awarded as petitioned for. Therefore, we award complainant total fees of

\$17,490.\* Complainant has not requested a contingency enhancement so none is awarded.

Complainant is additionally awarded his proven costs in the amount of \$1,225.10.

ORDER

As its Final Order in this matter the West Virginia Human Rights Commission ADJUDGES, ORDERS, and DECREES as follows:

1. The complaint of Terry L. Hawthorne, Docket No. REP-344-86, is sustained.

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\*This is our first opportunity to consider whether an investigator's fee is allowed under the Human Rights Act. It has been routinely held that paralegal fees should be allowed in a Title VII case, if reasonable and not duplicative. Missouri v. Jenkins, 109 S. Ct. 1930 (1989); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983). So long as fees are consistent with market rates and practices and there is no evidence that a windfall will accrue to complainant's attorney with regard to an award of investigator fees, it seems proper to treat an investigator's fee as a federal court would treat a paralegal's fee. The Court in Jenkins noted that it is proper for a paralegal to be compensated separately from the attorney where the paralegal does such work as factual investigation, including locating and interviewing witnesses, and other duties which assist the attorney. That appears to be what the investigator did here. Nowhere is there an indication that he performed purely clerical, secretarial or other tasks which Jenkins instructed may not be billed separately from the attorney's rate. In Jenkins, the Court also noted that separate billing appears to be the practice in most communities today. Again, it should be noted that the respondent filed no objections to the petition despite the clear request of a separate fee for the investigator.

2. The respondent shall pay to complainant the sum of \$2,500 for incidental damages for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity.

3. The respondent shall cease and desist from retaliating against individuals for filing complaints, testifying, or otherwise participating in proceedings under the West Virginia Human Rights Act.

4. The respondent shall pay attorney's fees and costs in the amount of \$18,715.10.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the Notice of Right to Appeal attached hereto. A copy of the Order previously entered on 8 August 1990 is attached hereto and made a part hereof.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 16<sup>th</sup> day of November, 1990, in Charleston, Kanawha County, West Virginia.



QUEWANICOI C. STEPHENS  
EXECUTIVE DIRECTOR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

TERRY L. HAWTHORNE,

Complainant,

v.

DOCKET NO. REP-344-86

OFFICE OF RALEIGH COUNTY  
PROSECUTING ATTORNEY,

Respondent.

ORDER

This matter matured for public hearing on 8 June 1987 and concluded on 11 June 1987. The hearing was held in the Raleigh County Courthouse, Beckley, West Virginia. The hearing examiner was Theodore R. Dues, Jr. The complainant appeared in person and by counsel, Marion Masters. The respondent appeared by its counsel, John A. Hutchison and N. Robert Grillo.

On 23 February 1989 the hearing examiner submitted his Recommended Findings of Fact and Conclusions of Law to the Commission. At its March 1990 meeting the Commission reviewed said recommendations, as well as the exceptions filed in response thereto by the respondent.

Upon mature consideration of the examiner's recommendations, the respondent's exceptions and all proposed findings, conclusions and supporting arguments submitted by the parties, and upon an

independent review of the entire record herein, the Commission does hereby enter its Findings of Fact and Conclusions of Law as set forth hereinbelow. To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

ISSUE TO BE DECIDED

Whether the respondent violated W. Va. Code § 5-11-9(a)(9)(C) by unlawfully engaging in retaliatory action against the complainant for filing a proceeding under the Human Rights Act. Complainant alleges that he was arrested during a recess of his Human Rights Commission hearing on complaint Docket No. ER-130-75 against the Raleigh County Sheriff's Civil Service Commission. Complainant further alleges that Assistant Prosecuting Attorney Kristen Keller orchestrated the arrest to embarrass and humiliate him before the Human Rights Commission's hearing examiner. Respondent does not deny that Kristen Keller arranged for a State Trooper to arrest complainant at the hearing site. Rather, respondent denies liability by asserting that Kristen Keller acted in her private capacity, or alternatively, if Keller acted as



Assistant Prosecutor that her actions are protected by absolute immunity from liability under the Human Rights Act.

#### FINDINGS OF FACT

1. In 1974, Terry Hawthorne, a black male, filed an employment discrimination complaint with the Human Rights Commission (HRC) against the Raleigh County Deputy Sheriff's Civil Service Commission, (Deputy Sheriff's Commission) Docket No. ER-130-75.

2. In or about 1985, the Prosecuting Attorney of Raleigh County, Kenneth Lazenby, assigned complainant's case, along with two other HRC complaints against the Raleigh County Sheriff's Department, to Kristen Keller, an Assistant Prosecuting Attorney with some experience in civil rights law.

3. In or about early September 1985, the Office of the Prosecuting Attorney withdrew from the Hawthorne case because they were not statutorily required to represent the Raleigh County Deputy Sheriff's Civil Service Commission. The Deputy Sheriff's Commission then retained Kristen Keller in her private capacity, and paid her \$350 for representing them in the Hawthorne matter. The Prosecuting Attorney's Office continued to provide some support services to Ms. Keller. Assistant Prosecuting Attorneys in Raleigh County are free to conduct a private civil practice.

4. Ms. Keller did not want to take the case but the Deputy Sheriff's Commission was unsuccessful in finding other counsel. Ms. Keller stated that she believed the underlying complaint would be dismissed or would result in a decision favorable to the respondent.

5. The HRC hearing was scheduled to take place on 26 September 1985 at the Raleigh County Library.

6. About two weeks before the hearing, State Police Trooper Dorsey told Trooper Richard Jones that the Prosecuting Attorney's Office had asked about a warrant for Terry Hawthorne, and that if Trooper Jones had a warrant for Hawthorne he should call Kristen Keller, the Assistant Prosecuting Attorney.

7. Trooper Jones had a warrant for Mr. Hawthorne issued eight months earlier on 18 January 1985. The underlying incident occurred 6 January 1985. The record shows that on that date Andre Moore and Steve Jones were in a fight which Mr. Hawthorne attempted to break up. Andre Moore, the victim, never implicated Mr. Hawthorne in hitting him. Trooper Jones, who swore out the warrant, did not witness the altercation, and it is unclear who made the allegation that Mr. Hawthorne struck Andre Moore. Nevertheless, a warrant for the offense of malicious wounding was issued and, after eight months, was still in Trooper Jones' possession.

8. When Trooper Jones called Ms. Keller at the Prosecuting Attorney's Office, she advised him that Hawthorne would be present at a hearing at the library on 26 September 1985. She testified that she suggested that she would call the Troopers if Mr. Hawthorne was at the hearing, so they could serve the warrant.

9. Ms. Keller made no inquiry as to the basis for the warrant. She did not ask Trooper Jones about what attempts had been made to locate Mr. Hawthorne, nor did she check to see that Trooper Jones had the address for Hawthorne listed on the Human Rights Act complaint. She also made no attempt to obtain additional information from Hawthorne's counsel as to his workplace or residence.

10. Prior to speaking with Ms. Keller in early September 1985, Trooper Jones had driven by Hawthorne's mother's home looking for Hawthorne's car on several occasions, but he never knocked on the door or looked for him at work. In or about mid-February, Trooper Jones put the warrant in a file, and he made no further attempt to serve Mr. Hawthorne.

11. Mr. Hawthorne visited his mother and picked up his mail at 228 Mool Avenue on a daily basis between January and September 1985. He did not leave the Beckley, Raleigh County area during this period, and he worked at Eastman Associated Coal Corporation, Keystone No. 4 Mine throughout this time.

12. Trooper Jones testified that, if not for Ms. Keller's request, the warrant would not have been served at the hearing and eventually the file would have been purged.

13. Trooper Jones was unavailable on 26 September 1985, so he asked Troopers Ferda and Fluharty "to contact Kristen Keller to see what time and where" to serve the warrant.

14. Ms. Keller advised Larry Frail, another Assistant Prosecuting Attorney, and possibly Mr. Lazenby that Mr. Hawthorne would be served an arrest warrant if he appeared at the Human Rights hearing.

15. On the morning of 26 September 1985 Ms. Keller made two or three calls to the State Troopers. When they arrived at the library, she told them to come back near lunch time and they returned shortly before noon and stood at the rear of the hearing room.

16. At 11:53 a.m., during her cross-examination of Mr. Hawthorne, Ms. Keller suggested that the proceedings recess for lunch. Troopers Ferda and Fluharty served the warrant and arrested Mr. Hawthorne in the hearing room in front of his representative, the hearing examiner, and Ms. Keller.

17. The Troopers took Mr. Hawthorne to the magistrate. He was released on bond at about 3:00 p.m. that afternoon. On 21

October 1985 Mr. Hawthorne plead guilty to the misdemeanor of battery and paid a fine of \$235 because he was told that if he did not plead he would go to jail.

18. When the hearing reconvened at 1:00 p.m., Ms. Keller opposed a continuance despite the fact that Mr. Hawthorne had not yet returned to the hearing. Ms. Keller argued that Mr. Hawthorne should have known that his appearance at a hearing in which the opposing counsel was an Assistant Prosecuting Attorney was asking to be arrested and therefore no continuance should be granted.

19. The complainant had no knowledge of the outstanding warrant and was embarrassed and humiliated before the hearing examiner after waiting eleven years for a hearing. The arrest left him upset and nervous, and disrupted his sleep. Mr. Hawthorne was ostracized at work after an article stating that he was arrested at the Human Rights Commission hearing was placed on the job bulletin board. Mr. Hawthorne's reputation also suffered among those who knew him.

20. Ms. Keller, acting in her official capacity as Assistant Prosecuting Attorney, violated the West Virginia Human Rights Act § 5-11-9(a)(9)(c) by intentionally engaging in active reprisal by having Mr. Hawthorne arrested for appearing at a hearing on his Human Rights Act complaint.

21. Complainant suffered emotional and mental distress, humiliation and loss of personal dignity and is entitled to an award of incidental damages in the amount of Two Thousand Five Hundred Dollars (\$2,500.00).

DISCUSSION OF EVIDENCE AND OF APPLICABLE LAW

I.

DOES THE RECORD ESTABLISH UNLAWFUL RETALIATORY ACTION?

The West Virginia Human Rights Act provides explicit statutory protection for Human Rights complainants making it an unlawful discriminatory practice for "any person. . .to. . .[e]ngage in any form of reprisal" against a person because he filed or participated in a proceeding under the Human Rights Act. W. Va. Code § 5-11-9(a)(9)(C). The burden is on the complainant to establish a prima facie showing of retaliation. Frank's Shoe Store v. West Virginia Human Rights Commission, \_\_\_ W. Va. \_\_\_, 365 S.E.2d 251 (1986), establishes the four elements of the prima facie case of retaliatory discharge. Adapting this standard to the present case, the complainant must show:

- (1) That the complainant engaged in protected activity;
- (2) That respondent was aware of the protected activity;
- (3) That complainant was subsequently the subject of a reprisal action and (absent other evidence tending to establish a retaliatory motivation);

(4) That the reprisal action followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Id. at 259.

In the instant matter, complainant has made out a prima facie case of retaliatory action under the Frank's Shoe Store, framework. The four elements of the prima facie case are satisfied as follows:

(1) Complainant engaged in a protected activity by filing a complaint against the Raleigh County Deputy Sheriff's Commission on the basis of race discrimination in hiring and subsequently appearing in person at the hearing on the complaint.

(2) Respondent, the Prosecuting Attorney's Office, was fully aware of this action through its involvement on behalf of the Deputy Sheriff's Commission, first directly and later via Assistant Prosecuting Attorney Kristen Keller.

(3) Complainant was arrested at his Human Rights hearing.

(4) The concurrence of the Human Rights hearing and the arrest are sufficient to support an inference of retaliatory motivation. The record leaves no doubt that the time and place of the arrest were specifically arranged by Assistant Prosecuting Attorney Kristen Keller.

Once the complainant meets the prima facie standard, a "rebuttable presumption of discrimination" is created, and "the burden shifts to the respondent to offer some legitimate and nondiscriminatory reason" for its actions. Shepherdstown Volunteer

Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342, 352 (1983). The burden placed upon respondent is only one of production not persuasion.

Respondent articulated two reasons for arresting Hawthorne at the hearing. First, Ms. Keller testified that the reason she suggested the warrant be served at the hearing site was because State Troopers had searched for Hawthorne unsuccessfully. Second, Ms. Keller asserted a duty to institute proceedings pursuant to W. Va. Code § 7-4-1.

Once respondent met this burden of production, it became incumbent upon Hawthorne to show by a preponderance of the evidence that the reasons proffered were a mere pretext for unlawful retaliation. A proffered reason is considered a pretext if it was not "the true reason for the decision." Conaway v. Eastern Associated Coal Corporation, 358 S.E.2d 423, 430 (1986).

Complainant offered evidence which demonstrated the pretextual nature of respondent's proffered reasons. In regard to the first reason, the unsuccessful search for the presumably elusive Mr. Hawthorne, the record makes it abundantly clear that during the eight months between the issuance of the warrant and complainant's arrest at the hearing no search was made. Trooper Jones drove by Hawthorne's house a few times during the first month and then placed the warrant in a file. Mr. Hawthorne did not leave the Beckley area during this period, and he visited his mother and



picked up his mail at her house on a daily basis. Furthermore, Keller and Trooper Jones both stated that Ms. Keller made no inquiry about whether service of the warrant had been attempted. The uncontradicted evidence that Ms. Keller had no basis to believe that Mr. Hawthorne was alluding a search, and that there had been no active attempt to locate him, reveals the pretextual nature of respondent's first reason for arresting Hawthorne at the hearing.

The respondent's second proffered reason -- that the Assistant Prosecuting Attorney had a duty to instigate the arrest -- is equally unpersuasive. First the duty to institute "necessary and proper proceedings" under W. Va. Code §7-4-1 is qualified by the exercise of sound prosecutorial discretion. A prosecutor must not accept allegations at face value but has a duty to investigate the underlying complaint; failure to do so is an abuse of prosecutorial discretion. State ex rel. Skinner v. Dostert, 166 W. Va. 743, 753, 278 S.E.2d 624, 632 (1981). Some investigation is a prerequisite to instituting proceedings even when a writ of mandamus requires the prosecuting attorney to take action. State ex rel. Ginsberg v. Naum, \_\_\_ W. Va. \_\_\_, 318 S.E.2d 454 (1984). In State ex rel. Ginsberg the court stated that the prosecutor must examine the facts to see first if they showed probable cause to charge the suspects "and, if they do, he must prosecute." Id. at 455. The record in the case at hand demonstrates that the prerequisite investigation was not performed and no duty to initiate proceedings had yet arisen. Ms. Keller made no inquiry into the allegations behind the warrant. In a case such as this where the alleged

"victim" does not raise charges, and the complaint is sworn out by an individual who did not witness the events, the duty to investigate the underlying facts before instituting proceedings is particularly important.

Furthermore, the duty to institute proceedings does not take precedent over other statutory duties, particularly where no necessary conflict exists. In this case, Ms. Keller exercised the duties of her office in a way which infringed upon Mr. Hawthorne's statutory right under the Human Rights Act to file a complaint and appear at his hearing without being subjected to reprisal. The Prosecuting Attorney's duty to investigate and, if necessary, institute proceedings could have been performed while accommodating the duty not to engage in retaliatory action.<sup>1</sup>

In this case Ms. Keller made no attempt to have the warrant served during the two weeks prior to the hearing that she was aware of the outstanding warrant. Nor did she ask that the warrant be served before or after the hearing. Rather she directed the State Troopers to come to the hearing room at a certain time and interrupted her cross examination of Mr. Hawthorne to ask for a lunch recess, knowing the Troopers would arrest Mr. Hawthorne.

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<sup>1</sup>Reprisal, even when carried out within the scope of official duties, is a "particularly vicious form of discrimination" and gives rise to the right to relief under the Civil Rights Act of 1964, § 701 et seq., 42 U.S.C. § 2000e et seq. Reyes v. Mathews, 428 F. Supp. 300 (D.D.C. 1976). In Reyes relief was granted to an employee of the Department of Health, Education and Welfare for a reprisal claim against this government agency, though the acts complained of were considered official duties. Id. at 301.

The Troopers made the arrest in the hearing room, before the hearing examiner, and all those present at the public hearing. Ms. Keller made no attempt to mitigate the prejudice to Mr. Hawthorne in relation to the Human Rights hearing, but argued against both a continuance of the hearing and the recusal of the Hearing Examiner. Because the prosecuting attorney's duty to institute proceedings was performed without necessary investigation, and in a way calculated to infringe on Mr. Hawthorne's right to a fair hearing, we conclude that this reason is also pretextual.

The complainant shows both the pretextual nature of the respondent's articulated reasons and proffers evidence of retaliatory motivation. Ms. Keller stated that she believed the underlying complaint would lose, and that complainant, in appearing at the hearing, was asking to be arrested. The hearing examiner's recommended findings and the record as a whole leave little doubt that Ms. Keller appreciated the significance and prejudice which would result from complainant's arrest at the hearing, and that she made no attempt to try to mitigate this prejudice by instructing the Troopers to locate and arrest Hawthorne at some other place.

We therefore conclude that the complainant has succeeded in showing the pretextual nature of respondent's reasons, and that the respondent was more likely motivated by an unlawful retaliatory reason:

## II.

WAS KRISTEN KELLER ACTING IN HER PRIVATE OR OFFICIAL CAPACITY IN ARRANGING THE ARREST OF MR. HAWTHORNE AT HIS HUMAN RIGHTS HEARING?

Respondent argues that Ms. Keller was acting in her private capacity in the underlying matter and therefore denies responsibility for her actions. There is no doubt that Ms. Keller had been retained as private counsel for the Raleigh County Deputy Sheriff's Civil Service Commission at a rate of \$50 per hour for seven hours to represent it at the hearing. However, Ms. Keller testified that the Deputy Sheriff's Civil Service Commission did not ask her to have Mr. Hawthorne arrested. Ms. Keller did not bill them for time spent in contacting the State Troopers and arranging the arrest. Ms. Keller did not orchestrate the Hawthorne arrest in her role as private counsel.

There is evidence in the record that Ms. Keller acted in her official capacity as an Assistant Prosecuting Attorney in having Hawthorne arrested. She invoked the authority of the Office of the Prosecuting Attorney in obtaining the cooperation of the State Troopers. The State Troopers acted on Ms. Keller's request that they serve the warrant at the hearing, and on her specific instructions to return later in the day, in a manner in which they would not have responded to a private citizen. Ms. Keller stated that she acted in a dual role and, that as an Assistant Prosecuting Attorney, she could not allow Mr. Hawthorne to go unarrested. Ms.

Keller also advised Larry Frail, another Assistant Prosecuting Attorney, and possibly Mr. Lazenby, the Prosecuting Attorney, that Mr. Hawthorne would be served the warrant if he appeared at his Human Rights hearing.

### III.

#### IS RESPONDENT ENTITLED TO ABSOLUTE IMMUNITY FROM CIVIL RIGHTS ACTIONS?

Respondent contends that if Ms. Keller acted in her official capacity she and the Office of the Prosecuting Attorney are entitled to prosecutorial immunity from any civil rights claim. Respondent, however, is not entitled to such immunity. Prosecutorial immunity was developed to protect the prosecutor (or assistant prosecuting attorney) from personal liability for quasi-judicial acts taken in initiating and prosecuting cases. Imbler v. Pachtman, 424 U.S. 409, 413 (1976). The purpose of prosecutorial immunity is to insulate the prosecutor's discretionary process from private concerns of personal liability. This purpose, to protect the individual public official in the exercise of discretionary duties, is not served by granting immunity to the Office of the Prosecuting Attorney as distinct from the individual. The Supreme Court has not allowed municipal entities to cloak themselves in immunities developed to protect public officers in the context of § 1983 claims. Owen v. City of Independence 445 U.S. 622, 697 (1980). Because The West Virginia Human Rights Act is part of a joint state/federal scheme to enforce

the Fourteenth Amendment the Office of the Prosecuting Attorney is not entitled to broader immunity than that available under federal law. Kerns v. Bucklew, \_\_\_ W. Va. \_\_\_, 357 S.E. 2d 750, 758 (1987). Thus the Office of the Prosecuting Attorney is not entitled to immunity from liability under the West Virginia Human Rights Act by virtue of either general governmental immunity, or by the extension of the immunity from personal liability of individual prosecutors.<sup>2</sup>

#### CONCLUSIONS OF LAW

1. The respondent is a person within the meaning of W. Va. Code § 5-11-3(a).

2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W. Va. Code § 5-11-3(a).

3. The West Virginia Human Rights Act is violated when a person engages in retaliatory action against another because he or she has filed a complaint pursuant to the Act.

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<sup>2</sup>Even if the Prosecuting Attorney's Office were entitled to such immunity in general, the acts complained of herein are not entitled to absolute immunity because they were not among the quasi-judicial acts of the prosecutor. In this case, no prosecutorial judgment was exercised and the acts complained of were merely administrative. Qualified immunity also does not apply to these acts as they were in clear violation of complainant's statutory rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

4. The complainant made a prima facie case showing that respondent unlawfully retaliated against him by orchestrating his arrest at his Human Rights hearing.

5. The respondent articulated two legitimate non-retaliatory reasons for arresting the complainant at the site of the hearing.

6. The complainant showed by a preponderance of the evidence that the reasons articulated by respondent to explain its actions were a pretext and not true, and that the respondent was more likely motivated by an unlawful retaliatory reason.

7. Respondent's actions are not entitled to absolute immunity since prosecutorial immunity extends to the prosecutor in her/his private capacity, not to the Prosecutor's Office.

8. Complainant is entitled to an award of incidental damages for humiliation, emotional and mental distress, and loss of personal dignity suffered as a result of respondent's acts in the amount of Two Thousand Five Hundred Dollars (\$2,500.00).

9. Complainant is additionally entitled to an award of attorney's fees and costs in an amount to be determined by the Commission upon submission of the information described infra.

ORDER

In view of the foregoing, the West Virginia Human Rights Commission ADJUDGES, ORDERS, and DECREES as follows:

1. The complaint of Terry L. Hawthorne, Docket No. REP-344-86, is sustained.

2. Respondent shall pay to complainant the sum of Two Thousand Five Hundred Dollars (\$2,500.00) for incidental damages for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity.

3. Respondent shall cease and desist from retaliating against individuals for filing complaints, testifying, or otherwise participating in proceedings under the West Virginia Human Rights Act.

4. Respondent shall pay attorney's fees and costs in the amounts to be determined by supplemental order of the Commission.

Due to the inadequacy of the record as placed before the Commission, complainant shall submit (or resubmit) all evidence and documents relating to attorney's fees and costs. Complainant shall articulate an hourly fee sought by his attorney, with any supporting argument he wishes to make relevant to the factors used to arrive at an appropriate fee as outlined in Bishop Coal Co. v.

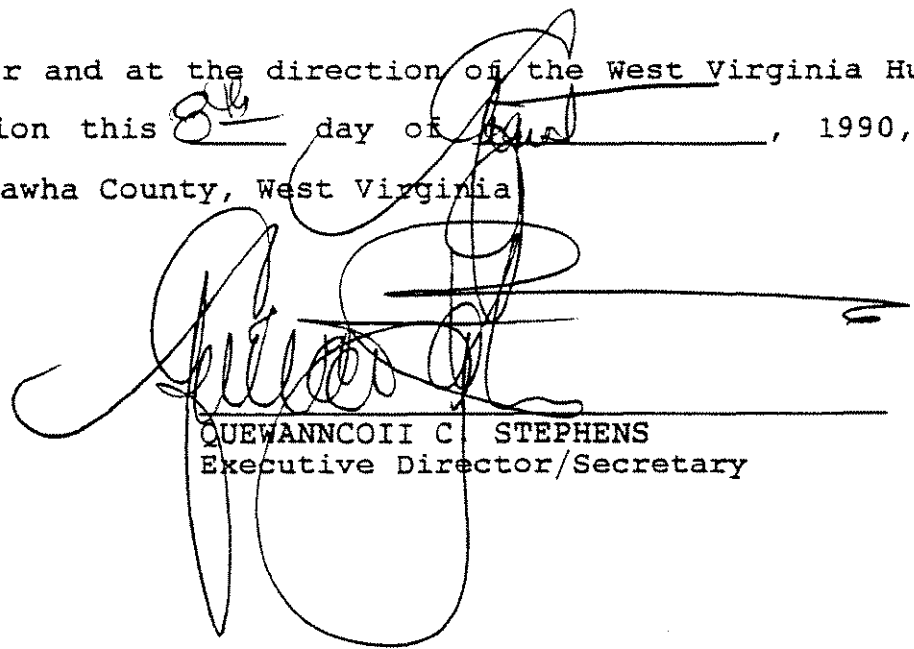


Salvers, 380 S.E.2d 238 (1989). Complainant has ten (10) days from the date of receipt of this Order to comply with this request by serving said documents on the Executive Director of the Commission. Respondent shall have thirteen (13) days from the date of service to file a response. Failure to comply shall result in a denial of relief or refusal by the Commission to consider any untimely document or argument. It is the intent of the Commission to issue a supplemental order regarding attorney's fees and costs on or before 15 October 1990.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 8th day of June, 1990, in Charleston, Kanawha County, West Virginia



QUEWANNCOLL C. STEPHENS  
Executive Director/Secretary