STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

TELEPHONE (304) 558-2616
FAX (304) 558-0085
TDD - (304) 558-2976

Gaston Caperton
Governor

Herman H. Jones
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

October 15, 1996

William J. Jeffries, III,
6415 E. Woodbend Dr.
Charlotte, NC 28212

Norfolk & Western Railway Co.
Wayne Street
Bluefield, WV 24701

Mary C. Buchmelter
Deputy Attorney General
812 Quarrier St.
L & S Bldg. - 5th Floor
Charleston, WV 25301

Scott K. Sheets, Esq.
Huddleston, Bolen, Beatty,
Porter & Copen
611 Third Ave.
PO Box 2185
Huntington, WV 25722-2185

Lorri Kleine, Esq.
Norfolk Southern Corp.
Three Commercial Place
Norfolk, VA 23510-2191

Re: Jeffries v. N & W Railway Co.
ER-236-92

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1,

1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

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

10.8.2. Within the commission's statutory jurisdiction or authority;

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

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

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,

Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WILLIAM J. JEFFERIES, III,

Complainant,

v. DOCKET NUMBER(S): ER-236-92

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on July 8, 1996, in Mercer County, at the Princeton Municipal Building, in Princeton, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, William J. Jefferies, appeared in person and by counsel for the West Virginia Human Rights Commission, Brian J. Skinner, Assistant Attorney General. The respondent, Norfolk and Western Railway Company, appeared by its representative, counsel Lorri Kleine and by counsel, Scott K. Sheets with the firm Huddleston, Bolen, Beatty, Porter & Copen.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The complainant, William J. Jefferies, III, is an African-American male. July 8, 1996 Tr. page 11.

2. The complainant filed a complaint with the West Virginia Human Rights Commission on November 25, 1991, alleging race discrimination by the respondent on a continuing basis prior to and after July 26, 1996 in the nature of harassment and disparate treatment. July 8, 1996 Tr. page 10 and Commission's Exhibit No. 2.

3. The respondent, Norfolk and Western Railway Company is a person and an employer as those terms are defined under West Virginia Code §§5-11-3(a) and 5-11-3(d). July 8, 1996 Tr. page 11.

4. The complainant has been employed by the respondent since 1972. July 8, 1996 Tr. page 11.

5. The last day complainant worked was July 26, 1991, when he marked off sick. July 8, 1996 Tr. page 11.

6. Complainant was ruled medically disqualified in his employment status with respondent on January 22, 1992. July 8, 1996 Tr. page 11.

7. In July 1991, complainant was employed as a carman working air on the Bluefield shop track. The airman makes sure both air brake and manual hand break are operating properly and notes any other safety violations on the car for others to repair. July 8, 1996 Tr. page 31.

8. The master mechanic for much of the time preceding his leaving work in 1991 was, E. F. Campbell, the general car foreman was Harold Haldren, the car foreman was R. A. Parks, and gang leaders were Stanley Six, R. L. Gunter, Bill Snavely, R. L. Mathena and G. L. Dempsey. Mark Winfrey was another car foreman at the time. None of these individuals were African-American. The respondent had at one time employed Bill Banks briefly as gang leader and Mike Scott as a gang foreman, both of whom are African-Americans. July 8, 1996 Tr. pages 35 through 38, and July 9, 1996 Tr. page 72.

9. On May 22, 1991, senior general car foreman, Harold Haldren called complainant into his office with union representatives for a conference concerning Supervisor William Snavely's complaints that

complainant took too much time processing cars. Respondent's Exhibit No. 15. Respondent's Exhibit No. 2 indicates Mr. Haldren received a complaint from Mr. Snavely on May 24, 1991 while Respondent's Exhibit No. 3 indicates a similar report from Mr. Snavely was received on May 22, 1991. This incident was specifically alleged as an example of disparate treatment by respondent on the basis of race in that other white carmen were not disciplined when documentation from his union representative indicated he was performing a similar amount of work as the white carmen, in complainant's complaint filed with the West Virginia Human Rights Commission. July 8, 1996 Tr. pages 294 and 295, Complainant's Exhibit No. 2 and Respondent's Exhibits No. 2, 3 and 15.

10. On June 18, 1991, complainant was summoned to a formal investigation of an incident involving failure to turn in air brake sheets in a specified manner upon a charge signed by R. A. Parks. Respondent's Exhibit No. 15.

11. On June 19, 1991, complainant was summoned to a formal investigation of an incident of sleeping on the job by H. A. Haldren, based upon a charge by R. C. Parks, to whom the incident was reported by gang leaders, Snavley and Gunter. Respondent's Exhibit No. 13.

12. Although complainant was not able to accurately remember the sequence of these incidents preceding his marking off sick, it is clear that the complaint alleged a continuing practice of subjecting complainant to treatment that similar conduct did not receive when engaged in by white carmen. It is found that the allegations of harassment due to race and the events giving rise to the complaint as filed, were continuing in nature. Thus the complaint was filed within

one-hundred eighty days of the last act alleged in the continuing pattern of harassment.

13. The complainant was hospitalized at Tidewater Psychiatric Institute between August 14 and September 12, 1991, and was treated on an outpatient basis thereafter by David A. Rosin, M.D. Dr. Rosin diagnosed complainant as having Major Depression, Recurrent; and Explosive Personality, and recommended that the complainant not work as he was a potential danger to himself and others in the work environment, in his report to J. R. Salb, M.D., doctor for the respondent, dated January 6, 1992. Joint Exhibit No. 1.

14. A follow up report from Dr. Rosin to Dr. Salb dated August 9, 1993, stated that the complainant's condition was stabilized, but that mere discussion of his treatment by the railroad causes internal agitation and recurrence of emotional lability. Dr. Rosin did not think that complainant would ever return to the railroad in a working capacity, but that he is strongly motivated to work in a different environment. Joint Exhibit No. 2.

15. Although Dr. Rosin's reports do not mention the etiology of complainant's psychiatric diagnosis, complainant testified regarding why he did not return to work after July of 1991, "To go back into... a hostile environment eventually someone was going to get hurt. Eventually I could have lost my job because of their vendetta or conspiracy to end my career and ... working for [seventeen] years there, I don't think that I should have been dealt with like that." July 8, 1996 Tr. page 72.

16. Complainant stated that, "Well, to me, I've never been depressed. I didn't know what depression was, but I know I was angry,

frustrated, mad, fearful." Complainant was fearful of losing his job because of the harassment. Complainant saw Dr. Rosin last in 1993 and has not been under a doctors care for his psychiatric situation since. July 8, 1996 Tr. pages 76 and 77.

17. Complainant asked to work at the car department in Charlotte, where he talked to the gang foreman and left his name, address and phone number but was not contacted by that department. Subsequent to this request, Dr. Salb wrote to the complainant on January 22, 1992 that he would not be reinstated to active status until his condition improved through proper treatment to meet the medical standard for the position of carman. At that time he would be examined by respondent's physician to determine his fitness to return to work. Complainant's Exhibit No. 3.

18. Complainant testified credibly that whenever he would stop to talk to co-workers supervisors, including Mr. Haldren, Mr. Mathena, Mr. Belcher, and Mr. Six, and Mr. Gunter would repeatedly tell him he could not talk to others. This occurred on multiple occasions by each in the year immediately preceding his marking off sick. When white carmen would stand around and talk nothing was said to them July 8, 1996 Tr. pages 59, 96 and 97.

19. Mr. Van Oaks, an African-American, was a carman who worked with the complainant at the Bluefield shop until he retired in 1989. Mr. Van Oaks testified credibly that he had witnessed incidents similar to those described above, when Mr. Haldren had told them to stop talking, while nothing was said to anyone else. He believed that complainant was being harassed. He testified that Mr. Haldren treated

African-American employees differently from their white counterparts. July 9, 1996 Tr. pages 50 through 58, 67 and 68.

20. In addition to the formal charges of May 22, 1991, June 18, 1991 and July 18, 1991 related above; complainant was on January 24, 1990 assessed 30 days deferred suspension for sleeping during work time; and on April 27, 1990, complainant was formally charged with running to beat an oncoming train, for which no discipline was given. Respondent's Proposed Findings of Fact, Memoranda of Law, and Conclusions of Law page 23, Respondent's Exhibits Nos. 6, 7, 8 and 9, and Commission's Exhibit No. 1.

21. Complainant testified credibly that he felt that respondent's supervisory personnel were attempting to ruin his career. He related that he had twice been formally charged with sleeping on the job, both instances when he was on his lunch break. Complainant testified credibly that he trotted alongside the tracks in the instance where he was charged for running when whites were never disciplined for running on the job, although they did as well. Complainant testified credibly that he was counselled for exercising with his hands in his pockets, white individuals did the same with no discipline. July 8, 1996 Tr. pages 60, 63 through 66, and 120.

22. Complainant testified credibly that sometime after returning from an injury in 1989, Mr. Six told him that Mr. Haldren had ordered him to write him up for welding without welding gloves; although not ten feet away from Mr. Haldren several white employees were seen welding without proper equipment, who were not cited. July 8, 1996 Tr. pages 41 through 44.

23. Complainant testified credibly that on one occasion he asked Mr. Winfrey for permission to go on vacation for an additional week when he discovered he had taken off the wrong week to attend a church convention and was told he couldn't tell him yes or no. When complainant took the time off, he was cited for absenting himself from work. In similar instances when white carmen wanted to go fishing and hunting nothing was done to them for absenting themselves. Complainant was able to identify Mr. Ancil B. Sayers, a white carman who did this with impunity as complainant would often fill in for last minute requesters of leave. July 8, 1996 Tr. pages 45 through 47.

24. Upon his return from a back injury, Mr. Campbell made disparaging comments regarding five individuals who had back injuries. Although the comments were made regarding five carmen generally, Mr. Campbell directed his attention specifically to the complainant when he made them. July 8, 1996 Tr. pages 53 and 188.

25. Mr. Arnold, an African-American carman for respondent from 1974 to the present who worked around the complainant every day, testified credibly that supervisors harassed complainant about every day. He testified credibly that respondent's supervisors expected more out of both himself and complainant on the job than they did of whites. Mr. Arnold testified credibly that in enforcing safety violations management would write up African-Americans but would not do the same for whites. Mr. Arnold specifically confirmed the testimony of complainant in regard to the burning torch citation. Mr. Arnold testified credibly that he had in the past been written up for a safety violation for improper safety equipment, when he injured his eye, when he was wearing the very safety goggles he had just been

issued. Four other white employees who were injured, including one eye injury like his, were not cited. Mr. Arnold testified credibly that Mr. Campbell and Mr. Haldren had indicated that if they had a bad safety record they would not be able to get another job; and that they had placed three injuries in his personnel file that had never occurred. July 8, 1996 Tr. pages 173 through 182.

26. Mr. Van Oaks also testified credibly that he was routinely watched on an excessive basis by Mr. Haldren during his tenure with respondent. July 9, 1996 pages 67 and 68.

27. Mr. Rice, another African-American carman, who is currently working for respondent and worked some with complainant, testified that he did not think he was treated differently from his white co-workers, and when specifically asked if Mr. Mathena, Mr. Gunter and Mr. Snavely treated him like his co-workers, he responded with a half hearted "Yeah, Yeah." This testimony is not found credible based on the demeanor of the witness who was initially evasive in answering these questions, stating "I don't know if you call it racial discrimination, things that happened to me --- that happened to other people. I don't know if it was because of what color they were, you know." Mr. Rice was asked if he were treated differently because of his color at Norfolk and Western Railway, to which he responded, A. "Treated differently?"; Q. "Right, than white employees."; A. "I mean, how do you mean that?" July 8, 1996 Tr. pages 164, 169 and 170.

28. Michael Scott is an African-American who was employed by the respondent from 1985 until February, 1996, and worked as a supervisor at Bluefield between August 1986 and November, 1989. Mr. Scott testified that he was a gang foreman, who functioned as acting car

foreman for Mr. Campbell. Upon Mr. Campbell obtaining approval for creating the car foreman position, with attendant pay accorded the position, Mr. Scott was transferred and the job given to Mr. Parks, a white man. July 22, 1996 Tr. pages 8, 10, 36 and 37.

29. Mr. Campbell's testimony that Mr. Scott was not acting car foreman, and that no such position existed, is not credible in light of his testimony that he, Mr. Campbell was trying to create a car foreman's position at Bluefield during this period. July 26, 1996 Tr. pages 8 and 10.

30. Mr. Scott testified credibly that white employees were allowed to get away with things, to which African-Americans, like complainant, Mr. Rice and Mr. Arnold where required to conform. These things consisted of not going to the washroom before break time and being right out, being back on the job at the end of the break and quitting early. A specific incident Mr. Scott recalled involved Mr. Campbell observing a white individual, Bob Meddles, who had an absenteeism problem coming in late for the safety meeting without comment and shortly thereafter observing Mr. Arnold, an African-American, come in and stopping his speech to berate Mr. Arnold for being late. July 22, 1996 Tr. pages 28, 29, 33 and 34.

31. The testimony of respondent's supervisors, that they did not differentiate between African-American and white employees in conducting "counseling" and filing formal investigations, of the complainant and other African-Americans, is not credible. Gang foremen Mr. Gunter and Mr. Snavely, testified that they wrote up the complainant for sleeping on the job in June 1991. Complainant testified that he had laid down on his own time. Mr. Gunter admitted

that not everyone quit for lunch at exactly 12:00 and that he did not know when complainant started his break. Mr. Snavely testified that the buzzer signalling end of lunch didn't always work properly. Yet rather than simply confronting complainant, Mr. Gunter and Mr. Snavely ran to get a camera to take a picture, but upon their return he was gone. Mr. Snavely testified that he made notes regarding other carmen for not turning in their air papers, but never gave any of those to Mr. Haldren, the general car foreman. Mr. Mathena testified concerning one of the instances on which complainant was told to stop talking and get back to work. Mr. Mathena did not indicate he had ever told others not to talk and his demeanor was such that it was apparent that he did not feel he had the right to do so. July 8, 1996 Tr. pages 240, 241, 242, 243, 320, 322, 323 and 324.

32. The preponderance of the evidence demonstrates that the respondent singled out African-American employees, including complainant for writing up safety violations for a range of offenses for which white employees did not receive discipline; and that the respondent discriminated upon the basis of race in counseling the complainant and issuing safety violations to the complainant.

B.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 through 5-11-19. West Virginia Code § 5-11-9(a)(1) makes it unlawful "for any employer to discriminate against an individual with

respect to compensation, hire, tenure, terms, conditions or privileges of employment...." 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 general a case of discrimination against a member of a protected class may be proven by direct evidence, or by circumstantial evidence. A complainant may use circumstantial evidence to show discriminatory intent by the 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). The McDonnell Douglas method requires that the complainant or Commission first establish a prima facia case of discrimination. The burden then shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its actions. Finally, the complainant or Commission must show by a preponderance of the evidence that the reason proffered by the respondent was not a true reason for the employment decision, but rather a pretext for discrimination.

The term "pretext" as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." West Virginia Institute of Technology v. West Virginia Human Rights commission, 181 W.Va. 525, 383 S.E.2d 490, 496 (1989); citing Black's Law Dictionary, 1069 (5th Ed. 1979). A proffered reason is a pretext if it is not "the true reason for the decision." Conaway v. Eastern

Associated Coal Corporation, 178 W.Va. 164, 358 S.E.2d 423, 430 (1986).

Even where an articulated legitimate, nondiscriminatory motive is shown by the respondent to be nonpretextual, but is in fact a true motivating factor in an adverse action, a complainant may still prevail under the "mixed-motive" analysis. "Mixed-motive" analysis was 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 v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490, 496-497, n. 11 (1989). If the complainant proves that his race played some role in the decision, the employer can avoid liability only by proving that it would have made the same decision even if it had not considered race.

In the present action, the complainant alleges discriminatory and unequal imposition of discipline amounting to harassment on the basis of race. A person is being discriminated against if the employer treats him "less favorably than others because of...race..." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 48 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). The United States Court of Appeals for the Fourth Circuit has held that in a disciplinary context, a prima facia case may be made by showing (1) that the plaintiff engaged in prohibited conduct similar to that of a person of another... race..., and (2) that disciplinary measures enforced against the plaintiff were more severe than those enforced against other persons. Moore v. City of Charlotte, NC, 754 S.E.2d 1100, 1105, 1106 (4th Cir. 1985). In Moore, the Court held that the defendant than bears the burden of

introducing evidence explaining the difference in treatment, beyond merely reciting the offense for which complainant was disciplined, in a fashion designed to focus the contested issues at trial and to ensure production of evidence available only to the defendant. Should the defendant fulfill this obligation, than the plaintiff must rebut the proffered explanation and meet the ultimate burden of proving intentional discrimination. Other formulations of the prima facia showing have been articulated by other courts. In Wilmington v. J. I. Case Co., 793 F.2d 909, 915 (8th Cir. 1986) the Court held "To establish a prima facia case [plaintiff] had to show that he is a member of a protected class, that he was disciplined, and that the discipline imposed was harsher than that imposed on comparably situated whites."

In Moore v. City of Charlotte, NC, 754 S.E.2d at 1106, the Court held that the plaintiff could prevail either by offering direct evidence of racially based intent in the disciplinary decision, or by offering evidence of a general pattern of racial bias. The Commission and complainant have offered evidence which proves that respondent through its supervisors, engaged in a general pattern of racial bias in administering discipline at its Bluefield facility. The respondent has argued consistently that much of the evidence offered by the complainant regarding the discriminatory bias of respondent should have been excluded as the acts complained of arose prior to the 180 day filing period. The complainant has alleged a continuing pattern of harassment in his initial complainant. In Held v. Gulf Oil Co., 684 F.2d 427, 430 (5th Cir. 1982), the Court held, "Thus, if discriminatory acts commenced prior to the 180 day period and there

was a continuous pattern of discrimination that continued into the 180 day period, plaintiff may still maintain her action even though single discriminatory acts prior to the 180 days period are barred." Other courts have also held that a complainant may introduce evidence involving other acts of respondent against persons other than complainant, which is admissible to show the employer's "motive...intent...[or] plan...." Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983). The undersigned finds that the individual instances of "counseling" and related filing of formal investigations regarding failure to comply with various Safety and General Conduct Rules, constitute a continuing violation of race based harassment of the complainant.

The complainant has related a series of incidents in which he was counseled and written up by supervisors for the respondent when similar acts as those of complainant occurred in the presence of those supervisors by white employees, without comment or discipline being imposed. The respondent has articulated as the reason for the imposition of discipline in each instance that its supervisors believed the complainant had violated a rule or performed substandard amounts of work in each instance in which complainant was disciplined. Respondent's supervisors flatly deny that they engaged in differential treatment of employees on the basis of their race. In such a situation, the determination as to whether or not a violation of the West Virginia Human Rights Act has occurred must rest on the credibility of the witnesses for each side. Based upon the demeanor of each of the witnesses who testified, the undersigned believed the testimony of complainant, Mr. Arnold, Mr. Van Oaks, and Mr. Scott,

each of whom testified credibly that African-American employees, were routinely and consistently held to a different standard from their white counterparts.

Respondent argues that the instances of disparate treatment were of trivial nature and so isolated in occurrence that they can not be viewed as a continuous harassment of the complainant. Mr. Arnold testified credibly that the complainant was harassed about every day by the respondent's supervisors. Although respondent's counsel would have the undersigned believe that the instances of complainant being told to quit talking and start working happened only once or twice in many years, the complainant testified credibly that each of respondent's supervisors did this on two or more occasions within a one year period from mid 1990 to mid 1991. Far from being isolated instances, Mr. Van Oaks testified credibly that Mr. Haldren, general car foreman, treated African-American employees differently from their white counterparts. Mr. Arnold testified credibly that management would write up African-American employees for safety violations but not whites, and that they required more work from their African-American employees. Mr. Arnold testified credibly that Mr. Campbell and Mr. Haldren made statements to him that if he had a bad safety record he wouldn't be able to get alternate employment and that they issued violations and put injury reports in his file which had not ever been reported. Mr. Van Oaks reported credibly that Mr. Haldren would watch him excessively compared to others, a complaint that the complainant leveled against the respondent in his testimony as well. Furthermore, Mr. Scott testified credibly that differential treatment was accorded African-American employees in meting out

discipline. Thus it can not be said that the incidents cited by complainant and the Commission as establishing that the respondent disciplined African-Americans in general, and complainant in particular, for offenses it would not discipline its white employees, are in any respect isolated.

Respondent's counsel urges that the complainant has failed to offer any proof in support of his claim because he has failed to identify specific white individuals who committed the same infractions and were treated differently in the punishment imposed. Were the complaint that complainant was issued more severe treatment for an infraction than his white counterparts this might have some merit. However, the complaint of those testifying to discrimination in this case was that for these types of infractions, white employees were never cited. Thus the entire white workforce are the similarly situated employees identified by complainant and the other witnesses. Respondent did not offer examples of white employees subjected to the same "counseling" for talking on the job for instance. Furthermore, the testimony indicated that where counsel for respondent asked the witness to specifically identify the white individuals accorded different treatment in that instance being discussed, complainant was able to specifically identify Mr. Ancil B. Sayers, a white employee who was not cited for absenting himself from work when he requested leave at the last minute as was complainant. Similarly, Mr. Scott was able to identify Mr. Bob Meddles as a white individual with a tardiness problem who was not berated by Mr. Campbell at the morning safety meeting as was Mr. Arnold, an African-American. The demeanor and testimony of these witnesses regarding different treatment on the

basis of race was convincing and such that it was clear they were relating specific identifiable occurrences of such treatment rather than some vague or general belief that they were subjected to discriminatory treatment. The specific incidents that were testified to by multiple witnesses were entirely consistent in there details as related by the different witnesses.

In Moore, supra, the Court cautions that the incidents for which discipline is being imposed in a case of this nature must be examined to see that the infractions being compared are indeed comparable. The undersigned is certain that the instances upon which the witnesses testifying relied were in fact similar. The complainant and Mr. Arnold both testified that complainant had been written up for a safety violation for not wearing welding gloves. This incident occurred while Mr. Haldren was in direct sight of other white employees who were not wearing proper safety equipment while welding. Similarly the many instances of complainant being told to quit talking and get back to work, were never repeated for white employees, yet they also would stop to gather around the fire can to smoke and talk. Thus the explanation of Mr. Mathena that he wouldn't feel he had a right to tell a man not to talk to other employees, unless it was interfering with their work rings rather hollow. The preponderance of the evidence demonstrates that the respondent maintained an environment where racially motivated harassment of African-American employees was rampant from the time complainant was hired until the time he marked off sick in 1991.

Notwithstanding the testimony of Mr. Arnold that he has not had any problems since coming back from his leave of absence, or that of

Mr. Rice that he has not been subjected to racially motivated discipline, or that many of the supervisors involved in disciplining complainant have since retired or been removed from supervisory status; the overall climate of racial discrimination portrayed warrants monitoring by responsible third parties and prophylactic tolerance and diversity training. The fact of the matter is that Mr. Parks is a key party to the actions of respondent in respect to disciplining the complainant and he now functions as general car foreman. Mr. Rice's testimony as discussed in the findings of fact was hardly reassuring given his demeanor, and equivocation regarding whether or not what happened to people had anything to do with their race.

The complaint as filed in this case did not allege that complainant had been constructively discharged. Prior to Public Hearing the undersigned ruled that complainant would not be allowed to prove constructive discharge as it was not pleaded. Indeed, Commission's counsel concedes that complainant has not been terminated but rather is designated as medically unfit for duty. Also prior to Public Hearing, the undersigned ruled that back pay might be an appropriate remedy were it proven that complainant's medical condition was a result of unlawful race discrimination. The Commission did not present the appropriate medical testimony of Dr. Rosin to establish a causal connection between the complainant's diagnosed condition and the racial harassment he was subjected to by respondent. Furthermore, the complainant readily admitted that he did not undertake any reasonable attempts to find comparable alternative employment. The West Virginia Supreme Court in Paxton v. Crabtree, 184 W.Va. 237, 400

S.E.2d 245 (1990), held that an employee has a duty to mitigate damages by accepting similar employment to that contemplated by his of her contract if it is available. The complainant has testified that he has not sought employment with either of the two other railroad companies operating in Charlotte, North Carolina where he resides. Complainant states that his current occupation is that of househusband.

The only medical evidence concerning complainant's current medical condition is the letter of Dr. Rosin dated August 9, 1993 which seems to indicate that complainant's condition is stabilized. Dr. Rosin indicated that he did not think that complainant would ever return to work for the railroad but that he is strongly motivated to work in a different environment. The complainant has not been treated for his condition since that date. Under this state of facts, the undersigned finds that the complainant is capable of working for the respondent as his Major Depression and Explosive Personality have been stabilized as of August 9, 1993. Nevertheless, since the complainant would be placed back into the environment at Bluefield which could give rise to internal agitation and recurrence of his emotional lability, prior to reinstating the complainant to active employment the respondent may wish to have the complainant undergo a psychiatric examination by a doctor of its choosing at its expense prior to reinstating him to active employment.

Complainant testified credibly, that he was angry, frustrated, mad and fearful of losing his job. The mere discussion of his treatment by respondent causes internal agitation and recurrence of his emotional lability. Thus it is found that the complainant has

suffered embarrassment, humiliation and emotional distress and is entitled to an award of damages of $3,277.45, the maximum amount the Commission is authorized to award. West Virginia Human Rights Commission v. Pearlman Realty Agency, 161 W.Va. 1, 239 S.E.2d 145 (1977); Bishop Coal Company v. Salyers, 181 W.Va. 71, 380 S.E.2d 238 (1989).

C.

CONCLUSIONS OF LAW

1. The complainant, William J. Jefferies, III, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, W. Va. Code §5-11-10.

2. The respondent, Norfolk and Western Railway Company, is an employer 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 and timely filed in accordance with W. Va. Code §5-11-10.

4. The 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. Complainant has established a prima facie case of race discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its actions toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful discrimination.

7. Complainant has established by a preponderance of the evidence that the respondent engaged in unlawful racial discrimination by harassing its African-American employees, including complainant, through unequal application of its counseling and its Safety and General Conduct Rules by respondent's supervisory personnel.

8. As a result of the complainant's failure to make reasonable efforts to obtain comparable employment and mitigate his damages accordingly, complainant is not entitled to an award of back pay.

9. As a result of the unlawful discriminatory acts of the respondent, complainant is entitled to reinstatement to the next available position as a carman with the respondent at either its Bluefield or Charlotte facilities, with the respondent to provide a psychiatric evaluation of the complainant regarding his fitness to return, should it so desire.

10. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of $3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

11. As a result of the unlawful discriminatory action of the respondent, the Commission is entitled to an award of reasonable costs in the aggregate amount of $1,917.26.

D.

RELIEF AND ORDER

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

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. The respondent shall post notices prominently in its establishment at Bluefield, that respondent is an equal opportunity employer and that unlawful discriminatory practices regarding hiring, firing or any term of employment may be reported to the West Virginia Human Rights Commission. Respondent shall notify each employee and prospective employee in writing of said rights under the West Virginia Human Rights Act and the address and number of the West Virginia Human Rights Commission to contact to report violations under the Human Rights Act.

3. The respondent, by a responsible officer, shall issue a sworn statement that the respondent will in the future apply its standards and policies in a nondiscriminatory manner.

4. The respondent shall provide mandatory training sessions on cultural diversity and racial tolerance for its supervisory staff and regular workforce, including education on the effects of discriminatory behavior in the workplace. Said diversity training and education shall be approved by the West Virginia Human Rights Commission and certificates of completion of such training shall be a condition of retaining supervisory positions.

5. The West Virginia Human Rights Commission, or its designee, shall be allowed access to respondent's premises on a periodic unannounced basis for two years to determine if the respondent is complying with all requirements of this Order.

6. The respondent shall reinstate complainant to active status for the next available carman position at its Bluefield, West Virginia

or Charlotte, North Carolina facility, and shall provide a psychiatric evaluation of the complainant to determine his fitness for duty prior to his return to work should it so desire.

7. Within 31 days of receipt of this decision, the respondent shall pay to the Commission costs in the amount of $1,917.26.

8. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

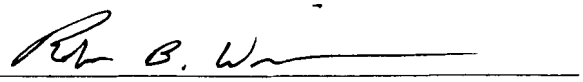
9. The respondent shall pay ten percent per annum interest on all monetary relief.

10. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 15th day of October, 1996.

WV HUMAN RIGHTS COMMISSION

BY: 

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 15th day of October, 1996, to the following:

William J. Jeffries, III
6415 E. Woodbend Dr.
Charlotte, NC 28212

Norfolk & Western Railway Co.
Wayne St.
Bluefield, WV 24701

Mary C. Buchmelter
Deputy Attorney General
812 Quarrier St.
Charleston, WV 25301

Scott K. Sheets, Esq.
Huddleston, Bolen, Beatty,
Porter & Copen
611 Third Ave.
PO Box 2185
Huntington, WV 25722-2185

Lorri Kleine, Esq.
Norfolk Southern Corp.
Three Commercial Place
Norfolk, VA 23510-2191

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE