



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 108A

Charleston, WV 25301-1400

Bob Wise
Governor

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TOLL FREE: 1-888-676-5546

Ivin B. Lee
Executive Director

**Via Certified Mail-
Return Receipt Requested**

September 10, 2004

Samuel R. Lewis
1567 Lewis Street
Apartment B
Charleston, WV 25311

Vincent E. Cheeks
c/o Catherine Martin
313 Central Avenue
South Charleston, WV 25303

Jonathan L. Matthews, Esquire
Assistant Attorney General
Civil Rights Division
L & S Bldg., 2nd Floor
812 Quarrier St.
PO Box 1789
Charleston, WV 25326-1789

Mayflower Vehicle Systems, Inc.
3100 MacCorkle Avenue, S.W.
South Charleston, WV 25303

Mark A. Atkinson, Esquire
Paul Frampton, Esquire
Atkinson Mohler & Polak, PLLC
POB 549
Charleston, WV 25322-0549

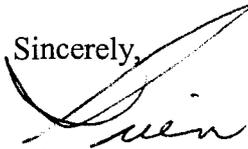
Re: Samuel R. Lewis v. Mayflower Vehicle Systems, Inc.;
Docket No. ER-270-02;
Vincent E. Cheeks v. Mayflower Vehicle Systems, Inc.;
Docket No. ER-464-02.

Dear Parties:

Enclosed please find the Commission's Final Order in the above-referenced matter. Attached hereto is the Administrative Law Judge's Amended Final Decision and an updated Notice of Right to Appeal. Pursuant to W. Va. Code § 5-11-11, 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

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September 10, 2004

updated Notice of Right to Appeal for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

Ivin B. Lee
Executive Director



IBL/jk

Attachments

cc: The Honorable Joe Manchin
Secretary of State

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this Order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This **must** be done **within 30 days** from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she **will not** file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed **within 30 days** from the date of receipt of this Order.

For a more complete description of the appeal process see **WV Code** § 5-11-11 and the **West Virginia Rules of Appellate Procedure**.

IMPORTANT: If you elect to file your appeal in the Circuit Court you must notify the Commission either by letter or copy of the Notice of Appeal to the Circuit Court so that a certified record can be prepared and submitted to the court in a timely fashion in accordance with WV Code § 5-11-11. The Circuit Court of Kanawha County requires the Commission to file the certified record within 30 days from the date of receipt of the parties' Notice of Appeal to circuit court. Since the Circuit Court no longer notifies the Commission of these appeals; it is important that you notify the Commission of your appeal in a timely manner.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SAMUEL R. LEWIS,

Complainant,

v.

Docket No: ER-270-02
EEOC No: 17JA200132

MAYFLOWER VEHICLE SYSTEMS, INC.,

Respondent.

VINCENT E. CHEEKS,

Complainant,

v.

Docket No. ER-464-02
EEOC No. 17JA200293

MAYFLOWER VEHICLE SYSTEMS, INC.,

Respondent.

FINAL ORDER

On August 19, 2004, the West Virginia Human Rights Commission reviewed the Amended Final Decision issued by Administrative Law Judge Robert B. Wilson, in the above-captioned matter.

After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Amended Final Decision as its own, without modification or amendment.

It is, therefore, the Order of the Commission that the Administrative Law Judge's Amended Final Decision, be attached hereto and made a part of this Final Order.

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 as Exhibit A.

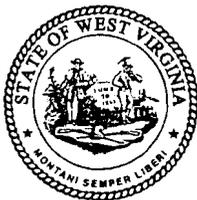
It is so **ORDERED**.

Entered for and at the direction of the West Virginia Human Rights Commission this 10 day of September, 2004, in Charleston, Kanawha County, West Virginia.

WV HUMAN RIGHTS COMMISSION

A handwritten signature in cursive script, reading "Ivin B. Lee", is written over a horizontal line.

IVIN B. LEE
EXECUTIVE DIRECTOR
Rm 108A, 1321 Plaza East
Charleston, WV 25301-1400
Ph: 304/558-2616 Fax: 558-0085



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Bob Wise
Governor

Ivin B. Lee
Executive Director

**VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED**

August 12, 2004

Samuel R. Lewis
1566 Lee Street
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Vincent E. Cheeks
913 Glendale Avenue
South Charleston, WV 25303

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Commissioners of the
WV Human Rights Commission:

Lew G. Tyree, Chair Person
Charlene Marshall, Vice-Chair
William L. Williams, Jr.
Marion J. Capehart
Joan Browning
Kenneth Gilbert
Betsy Haught
H. R. Whittington

Re: Samuel R. Lewis v. Mayflower Vehicle Systems, Inc.
Docket No. ER-270-02;
Vincent E. Cheeks v. Mayflower Vehicle Systems, Inc.
Docket No. ER-464-02.

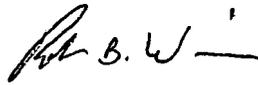
Dear Parties and Commissioners:

Pursuant to the June 29, 2004, Order of the West Virginia Human Rights Commission, in the above-captioned matter, the undersigned Administrative Law Judge has issued his **AMENDED FINAL DECISION** incorporating the Commission's updated Damage Calculation Summary, to which the Respondent herein failed to reply.

As the parties have already taken their appeal to the Commission with the original Final Decision, any further appeal to this Amended Final Decision will have to be taken by the parties after the Commission enters its Final Order in this matter.

If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the Commission at the above address.

Yours truly,

A handwritten signature in black ink, appearing to read "R. B. Wilson", with a horizontal line extending to the right.

Robert B. Wilson
Administrative Law Judge

RBW/jek

Enclosures

cc: Ivin B. Lee, Executive Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SAMUEL R. LEWIS,

Complainant,

v.

**Docket Number: ER-270-02
EEOC Number: 17JA200132**

**MAYFLOWER VEHICLE SYSTEMS,
INC.,**

Respondent.

VINCENT E. CHEEKS,

Complainant,

v.

**Docket Number: ER-464-02
EEOC Number: 17JA200293**

**MAYFLOWER VEHICLE SYSTEMS,
INC.,**

Respondent.

**A M E N D E D
FINAL DECISION**

A public hearing, in the above-captioned matter, was convened on September 18, 2003, in Kanawha County, in Conference Room B of the West Virginia Human Rights Commission Offices at 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The Complainants, Samuel R. Lewis, and Vincent E. Cheeks, appeared in person and by counsel for the Commission, Jon L. Matthews, Assistant Attorney General, for the Office of the West Virginia Attorney General, Civil Rights Division. The Respondent appeared in person by its representative, Jana Dawson, Industrial Relations Manager; as well as by

counsel, Mark Atkinson, Esquire, and Paul Frampton, Esquire, with the firm Atkinson, Mohler & Polak. The parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof, and response briefs through December 29, 2003.

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 necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

A.

FINDINGS OF FACT

1. Respondent, Mayflower Vehicle Systems, Inc., is an “employer” and a “person” as those terms are defined in W.Va. Code §§5-11-3(a) and (d) respectively. Tr. Page 156; Joint Exhibit No. 2.

2. Complainant, Vincent Eugene Cheeks, is an African American, residing in South Charleston, West Virginia. Tr. Pages 47 and 48.

3. Mr. Cheeks worked for Respondent from October 1999 until November 2001 as a laborer primarily engaged in operating a press or as a mill finisher. The work was hard and dangerous. It involved lifting heavy parts that were often slippery from oil dope used to treat the parts prior to stamping. Mr. Cheeks worked second shift at the time he was discharged, starting at 4:30 pm . He was typically working ten hour days Monday through Thursday. Tr. Pages 48-50.

4. Mr. Cheeks states that other employees would say “He’s just crying. He needs to get his black ass back on the job and do his work.” They would say “His black ass ain’t this, and his black ass ain’t that.” Tr. Pages 50 and 51.

5. Mr. Cheeks noted that he was routinely given more strenuous assignments such as operating the press, while white employees were regularly given less strenuous work such as inspecting the finished parts. The assignments were made by the team leaders. Although Mr. Cheeks did not bring these concerns directly to management of Respondent, he did bring them up with the union. Tr. Pages 51-54, and 100.

6. On February 22, 2001, Mr. Cheeks admits he was found asleep in the compressor room, an offense for which one can be summarily discharged. Respondent did not discharge him, but rather only suspended him on that occasion. It should be noted, however, that Jason Kovacik, a white employee, caught sleeping on the job, was suspended, not discharged as well. Tr. Pages 68, 69, 173 and 174.

7. In late October and early November 2001, Mr. Cheeks had lower lumbar sprain, high blood pressure and swollen hemorrhoids with bleeding. Tr. Pages 54 and 55.

8. Mr. Cheeks was absent on October 11, October 12, and October 18, 2001; and again absent on November 1 and November 2, 2001. Prior to returning from his absence on October 18, 2001 Mr. Cheeks attempted to secure FMLA (Family Medical Leave Act) papers from the Respondent’s Human Resource Department, but was unable to obtain them from Tracy Olive, for a period of several days due to her unavailability. He finally obtained those papers from Ms. Olive on October 25, 2001 and returned them from the Doctor’s Office on October 30, 2001. The FMLA completed by Dr. Canario listed the chronic condition as Ess. Hypertension/ Lumbar Sprain and stated that Mr. Cheeks required to be seen periodically to check blood pressure and regulate his medication, listing days off from 10/11/01 - 10/18/01. A return to work slip from 10/26/01 stated he had lumbar sprain and a return to work slip dated 11/05/01 for 11/01/01 to 11/04/01 listed lumbar sprain/rectal bleeding. Despite the fact that he had submitted a FMLA form and had just returned to work on November 5, 2001

after absences on November 1st and 2nd; for which he had a return to work, Mr. Cheeks was terminated for excessive absences on November 5, 2001. Tr. Pages 58-68; Joint Exhibit No. 1, Documents at Tab 11.

9. Complainant, Samuel R. Lewis, is an African American, resident of Charleston, West Virginia. Tr. Pages 109 and 115.

10. Mr. Lewis was initially hired to work at Respondent's business through Manpower in 1995. He was one of the first people hired after completing the manufacturing orientation training at Ben Franklin. He worked as a laborer. He moved up to team leader, an hourly employee paid slightly higher than others to run a couple of lines. Then he was offered a position as a group leader, a salaried position, running blankers, metal finish holes and core receiving. He accepted the salaried position when the union came in. Later his boss, Odell Jeffers, took retirement during a change in management, and Mr. Lewis returned to hourly work as a union employee when Mr. Jeffers retired, and, after learning that others had received larger raises with less seniority as group leaders. Tr. Pages 110-112.

11. Mr. Lewis was subjected to racially hostile comments and treatment at the hands of management and employees. Mr. Lewis' floor boss, Dave Payne, would make remarks like, "Sam, I locked my keys in my car but you can get them out." One day he came to work and found a racial joke on the black board. It said, " Sam, what do you call a bunch of antique farm equipment? A bunch of N*****." It was brought to the attention of management and it was erased, but nothing else was done about it. He wrote up one of his employees, Scotty Cain, when he stated, "You black son of a bitch, don't you touch my press. I'll kick your black ass if you touch my press, or as a matter of fact, meet me at the Athletic Club after work and I'll show you what I'll do to you." This was reported to Odell Jeffers and Chuck Whittington and was swept under the rug and nothing was done about it. Tr. Pages 115-117.

12. Mr. Lewis admits that he had nine occurrences, or absences which is grounds for termination under Respondent's policies. He notified Respondent himself, of the ninth

occurrence, the result of a fight that left his eye swollen shut. He attempted to work something out with Jana Dawson upon his return to work, but she avoided him for three days and would not meet with him. He was terminated by Tracy Olive, who stated with tears in her eyes, "We gotta terminate you, you know. I'm just doing what Jana told me to do." Mr. Lewis was terminated effective August 22, 2001. Tr. Pages 121-123; Joint Exhibit No. 1, Tab 1.

13. Mr. Lewis did not expect to be fired. As a member of management, he had brought a white employee, Roger Thevenin, in for his ninth occurrence, and Ms. Dawson had indicated she was going to terminate him. Instead she gave him a day back and put him on a ninety day agreement. This was because he produced a subpoena for one of the days according to Ms. Dawson. Nevertheless, Ms. Dawson had given several other white employees a second chance, but did not give Mr. Lewis a second chance. Tr. Pages 123-126, 131, 153 and 154.

14. Mr. Lewis testified credibly, that call ins for all the group leaders went to the same number and that when one group leader listened to the messages and erased them, without relaying that information to the appropriate individual, those people calling in would then be listed as no show no calls. This would occur routinely and as a member of management, Mr. Lewis had to change such instances routinely. Respondent asserts without credibility that the three instances where this was corrected by Respondent for Mr. Lewis, were in fact additional occurrences. This is in fact incorrect and such absences were in fact vacation days that had not been recorded properly. Even though Ms. Dawson was aware of the fact that vacation days that had been called in were being erased and recorded as no call no shows, she flatly refused to make any further corrections, regardless of the fact it was not his fault and there was nothing Mr. Lewis could do about that. Tr. Pages 118-120, 132, 145 and 146.

15. The union failed to file Mr. Lewis's appeal of his grievance after someone, i.e. Ms. Dawson, had told the union that Frank Cobb had given Mr. Lewis his days back. Mr.

Cobb denied to Mr. Lewis that he remembered giving Mr. Lewis any days back. Tr. Pages 127-129 and 152.

16. Ralph Baxter served as Recording Secretary on the UAW Executive Board for the Respondent's plant and currently continues to serve as Zone Steward. As Zone Steward he testified that Lisa Tucker, a white employee, was reinstated following a termination for nine occurrences when she was sent home on return from absences which could have been claimed as FMLA had she been given the two days in which to declare them as such. (This situation was similar to Mr. Cheeks, who was terminated on the day he returned to work from absences, without being given the two days to declare the absences as FMLA.) Mr. Baxter testified credibly that Respondent has not strictly enforced the 15 day requirement to return paperwork from the doctor for FMLA. He testified credibly that he is aware of a dozen, or more, rehired by Respondent after nine or more occurrences. Tr. Pages 18, 24, 25, 29, 35 and 37; Joint Exhibit No. 1, Tab 40.

17. Mr. Cheek's team leader wrote a note to Jana Dawson apparently on November 1, 2001, stating, "Jana, is there anything we can do. It's every Thursday that he is a no call no show. Call me at home. Thanks, Jody. Since Aug. 3 he has worked two Thursdays." Mr. Cheeks testified credibly that Ms. Adkins lied, that he called the guard and left messages, that Ms. Adkins would always return his call, and, that he told her he needed FMLA. Mr. Cheeks' testimony is credible because the Respondent had already received his Application for Family or Medical Leave by October 31, 2001 completed by the Dr. Canario. Tr. Pages 79-81; Joint Exhibit No. 1, Tab 11.

18. Tracy Olive wrote to Jana Dawson on June 21, 2000 regarding Donald Muncy, a white employee terminated on that date, in which she states "re: Muncy May 1st brought in copy of a testing procedure that could be covered under FMLA." Mr. Muncy was subsequently rehired on July 11, 2000. The memo clearly indicates that Mr. Muncy did not timely file his FMLA and nothing in the documents at Tab 35 indicates that this rehiring was the result of union intervention. Tr. Pages 172 and 173, Joint Exhibit No. 1, Tab 35.

19. No African Americans had been fired and later rehired prior to Mr. Cheeks and Mr. Lewis filing their complaints with the Human Rights Commission. Since that time Mr. Durham, an African American, was fired, rehired and fired again for violating his last chance agreement for attendance. Tr. Pages 174-175.

20. Darren Brown, a white employee, was given a last chance agreement following his ninth occurrence for a DUI arrest. Tr. Pages 169-171.

21. Todd Bryan, a white employee, has been given three last chance agreements. Tr. Pages 179 and 180; Joint Exhibit No. 1, Tab 28.

22. Other white employees that were fired and subsequently rehired by Respondent include:

Robert Carpenter fired 7-31-00 rehired 12-17-01

T. J. Clark fired 11-20-00 rehired 12-5-00

Mike Lowe fired 8-29-01 rehired 3-4-02

Terry Haynes fired 6-26-01 rehired 10-23-01

Jason Kovacik fired 6-12-00 rehired 7-11-00

Roy Pauley fired 11-8-00 rehired 1-15-01

Kevin Staley fired 2-4-00 rehired 2-24-00

fired 6-9-00 rehired 7-25-01

Terry Summers fired 5-22-00 rehired 7-11-00

Fired 11-20-00 rehired 9-4-01

See Joint Exhibit No. 1, Tabs 29, 30, 31, 33, 34, 36, 37 and 38 respectively.

23. Since August 22, 2001, when Mr. Lewis was discharged, he has sustained lost wages of \$407.12 in August of 2001, and \$1,628.48 per month thereafter. Mr. Lewis received unemployment benefits based upon the hearing deputy's finding of termination without cause, and has since mitigated his damages with employment beginning in April 2002, in the amount of \$1,201.00 per month for April and May 2002, and \$1,419.00 per month thereafter. Net back pay through February 2004 is \$17,060.52. Mr. Lewis would continue to have net

lost wages of \$209.48 per month thereafter. Joint Exhibit No. 1, Tab 1; Joint Exhibit No. 2.

24. Since November 5, 2001, when Mr. Cheeks was discharged, Mr. Cheeks has lost wages from Respondent of \$3,347.57 per month. In 2001 Mr. Cheeks received \$1,690.00 and \$11,492.00 in unemployment compensation, for 2001 and 2002 respectively. Mr. Cheeks mitigated his damages with earnings of \$764.50 per month for November and December 2002, \$869.43 per month for January, February and March 2003, and \$1,862.20 per month for April and May 2003, and \$300.00 for June 2003. Mr. Cheeks mitigated his damages with earnings of \$168.52 in November, 2003, and \$342.36 per month for December, 2003 and January, 2004. Mr. Cheeks' Net Back Pay claim through July 31, 2004 is \$101,754.88. Commission's Damage Calculation Summary for Vincent E. Cheeks, July 28, 2004.

25. The West Virginia Human Rights Commission has incurred reasonable costs of \$425.05, for the cost of the hearing transcripts in its prosecution of this matter. Exhibit B of Commission's Proposed Findings of Fact and Conclusions of Law and Memorandum of Law.

26. The undersigned finds as a matter of fact, that the Respondent regularly discharged employees upon nine occurrences without regard to the race of the employee. The undersigned finds as a matter of fact, that the Commission has demonstrated by a preponderance of the evidence that Respondent discriminated against the Complainants, Mr. Lewis and Mr. Cheeks, on the basis of their race, in failing to rehire them subsequent to their discharge.

27. The undersigned finds as a matter of fact, that Mr. Lewis was subjected to racial harassment in the form of a racial joke posted on his chalk board, the kidding of his supervisor concerning his ability to get his keys from his locked car, and the threats of violence by his underling, Mr. Cain; that such actions were not responded to properly by Respondent in failing to discipline Mr. Cain; but, finds as a matter of fact and law that these incidents were not severe or pervasive enough to be deemed to create a hostile work environment. Similarly the use of the term "black ass" by co-workers has not been

demonstrated by a preponderance of the evidence to have been sufficiently pervasive or severe to create a hostile work environment as to Mr. Cheeks. The evidence of the record does not indicate that the assignment of job duties of a less strenuous nature, on the basis of race, were ever brought to the attention of the Respondent's management, but rather only to the union.

28. Mr. Cheeks was angry and upset when he was terminated. Although Mr. Lewis did not specifically testify as to how he felt, when he testified concerning Ms. Dawson's refusal to discuss his ninth occurrence and his subsequent termination, he was visibly frustrated and angry about the failure to be given a second chance as he had seen other white employees given. Tr. Pages 68, and 121-124.

B.

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 . . . [or] age." 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 and/or age, 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.

The Human Rights Act imposes on an employer a duty to ensure, as best they can, that workplaces are free of harassment that creates a hostile or offensive working environment. Hanlon v. Chambers Syl. Pt. 8, 195 W.Va. 99, 464 S.E. 2nd 741 (1995); Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E. 2nd 801, at 809 (1996). To establish a hostile or abusive work environment claim, it must be established:

- 1) That the subject conduct was unwelcome;
- 2) It was based on the ancestry of the plaintiff;
- 3) It was sufficiently severe or pervasive to alter the plaintiff's condition of employment; and
- 4) It was imputable on some factual basis to the employer. Fairmont Specialty Services v. West Virginia Human Rights Commission, Syl. Pt. 2, 206 W.Va. 86, 522 S.E. 2nd 180 (1999).

"The aggravated nature of discriminatory conduct, together with its frequency and severity, are factors to be considered in assessing the efficacy of an employer's response to such conduct." Ibid, and Syl. Pt. 3.

"Conduct such as use of the "N" word to describe an African American, ... or other racial ... pseudonyms intended to denigrate others, cannot be tolerated in the workplace. They are the type of outrageous discriminatory conduct that may be considered to be of an aggravated nature, such that the threshold for it to be actionable is much lower than more subtle forms of discrimination which cumulatively cause conduct to be actionable under the Human Rights Act. Fairmont Specialty, 522 S.E. 2nd at 187-188, no. 8.

Applying the law to the facts in this case, it is apparent that Complainants have made out a prima facia case of race discrimination in respect to Respondent's failure to rehire them subsequent to their terminations. Both Mr. Lewis and Mr. Cheeks are African Americans,

a protected class under the West Virginia Human Rights Act. The Respondent has to this day refused to rehire either Mr. Lewis or Mr. Cheeks, thus they have been subjected to adverse actions in respect to the terms of their employment (or rather non-employment). Finally, in at least a dozen or more instances, other employees who were terminated for nine occurrences, have subsequently been rehired. Prior to the filing of their complaints with the West Virginia Human Rights Commission, none of those rehired were African Americans. From this, it can be inferred that but for the race of the Complainants, they also would have been rehired.

Respondents argue that it is only because the union dropped their grievances that they were never given a second chance, that if any racial discrimination occurred, it would be the union that discriminated against the Complainants and not the Respondent, who cannot be held liable for the discrimination of the union in dropping the grievances, and further swear that Jana Dawson, Respondent's Industrial Relations Manager, made that determination to fire the Complainants without regard to their race. The undersigned agrees with Respondent's argument that should discrimination not have motivated Respondent's decisions, then they are free to ratify the results of racial discrimination at the hands of the union in dropping their grievances. For several reasons, the undersigned finds that impermissible racial discrimination by Respondent's management played a role in their decision to decline to rehire the Complainants.

When Roger Thevenin, a white employee, produced a subpoena for one of his days, Ms. Jana Dawson gave the day back. The union had nothing to do with her decision. In contrast, when Mr. Lewis notified her of the vacation days he had taken, which were misrecorded as no call, no shows, she told him, "Sam, this is the last time I'm going to do this for you." Those occurrences of failing to report his vacation days were not anything Mr. Lewis could control, they were a simple mistake, verified by his boss. Ms. Dawson told him in no uncertain terms that she would refuse to correct such errors after Mr. Lewis had watched her do so for a white employee, Mr. Thevenin, when he was brought to her with the

nine occurrences.

When Donald Muncy, a white employee, was terminated for nine occurrences on June 21, 2000, Ms. Olive wrote a memo to Ms. Jana Dawson outlining the fact that his ninth occurrence was for a testing procedure that could be covered under FMLA if he had filed the correct paperwork. Mr. Muncy was later rehired. Ms. Dawson claims this was the result of union intervention. (Tr. P. 178-179). Nothing in the documents at Tab 35 indicates the filing of a grievance regarding FMLA by the union however. In contrast, even though Mr. Cheeks had filed his FMLA application and supplied her with Doctor's notes for absences on October 11, 12 and 18, and again on November 1 and 2, Ms. Olive did not write any memo on his behalf. Documentary evidence indicates that Mr. Cheeks filed a union grievance which proceeded to at least the third stage. As of March 31, 2002, Mr. Cheeks' grievance was denied again by the Respondent, and it was represented to the union that he didn't turn his paperwork in until November 5, 2001, as attested to by the signature of Ms. Dawson on that date. The documentary evidence clearly indicates that Respondent received his FMLA application on October 31, 2001. Mr. Muncy, a white employee who was rehired less than one month later, clearly didn't timely file FMLA paperwork, versus Mr. Cheeks, an African American employee who had a request in promptly after receiving it from Respondent's HR, denied at the third stage of the grievance process five months later. Respondent claims Mr. Muncy got rehired because of the union, and Mr. Cheeks didn't, because of the union. The undersigned finds pretext for racial animus by Ms. Dawson, and that Mr. Cheeks has proven by a preponderance of the evidence that he was treated differently from Mr. Muncy, the white employee, when Respondent refused to rehire him.

The union did fail to file the appeal papers for Mr. Lewis' grievance. Mr. Lewis testified credibly that someone had told the union that Frank Cobb had given Mr. Lewis his days back. That someone would have to have been Ms. Dawson since she was the one to handle this stage of the grievances. It is not at all clear that such a grievance could be successful as Mr. Lewis readily admits that he incurred a ninth occurrence under

Respondent's policies. It is clear that others with nine occurrences received second (and sometime third chances or even fourth chances), and these employees were white, while Mr. Lewis is African American. There is Mr. Brown, a white employee who was given a last chance agreement after his ninth occurrence when he was arrested for DUI. Mr. Lewis was not given a last chance agreement when he incurred his ninth occurrence following a fight that left him with two swollen eyes. The explanation that Respondent feared an ADA claim is preposterous, when Mr. Lewis is African American and did file a Human Rights Commission claim.

Although the Complainants have proven by a preponderance of the evidence that they would have been rehired but for Respondent's unlawful consideration of their race, a back pay award might not be appropriate. Many of those employees who were rehired after Respondent fired them, were subject to last chance agreements. Some of those rehired by the Respondent have subsequently been terminated without rehiring. In the case of Mr. Cheeks, the evidence was that his medical condition frequently was preventing him from working an entire work week. The record does not disclose why his claim for back pay shows no lost wages subsequent to June, 2003, nor mitigation thereafter. In the case of Mr. Lewis, he was unquestionably subject to discharge upon his ninth occurrence. That said, it nevertheless seems inequitable to deny a back pay award when other employees were rehired after similar instances of unquestionable terminable offenses. Especially, when the record indicates that it is only by working 50 hour weeks in his present employment that he is able to reduce the net loss in income per month to \$209.48 Both Complainants are entitled to an Order reinstating them to the next available full time position with the Respondent. Mr. Lewis is entitled to front pay of \$209.48 per month, while Mr. Cheeks is entitled to front pay of \$3,347.57 per month, until such time as they are rehired by the Respondent.

In regards to the racially hostile workplace claims, Mr. Cheek's claim is invalid as a matter of law as he never reported those claims to Respondent's management. Therefore, any alleged hostile workplace claim as to him cannot be imputed to the employer. Mr.

Lewis' claim for a racially hostile workplace is much stronger. The use of the "N" word under current West Virginia case law, qualifies as a severe occurrence. In this instance, it has not been demonstrated that a member of Respondent's management placed the racial joke on Mr. Lewis' chalk board. It was erased, and it is unclear what could be done to ascertain the responsible party. The incident was not repeated. The comments by Mr. Payne did not use any racial epithets, nor were they racially derogatory even though Mr. Lewis found them to be. The incident with Mr. Cain challenging Mr. Lewis to meet him after work was treated as the sort of idle chest beating which is common place to a factory setting. Just as management instructed Mr. Lewis that he would be fired if he took Mr. Cain up on his invitation, the same speech was in all likelihood given to Mr. Cain as well. This is what Mr. Lewis refers to as nothing being done about it. Given the context of the incidents, those that are imputable on some basis to the Respondent are simply not severe or pervasive enough to constitute a hostile work environment, as to alter the terms and conditions of Mr. Lewis' employment. As the disparate raises for group leaders was not timely filed as a Human Rights complaint, it cannot serve as the basis of a hostile workplace claim, but nevertheless is indicative of racial motivation by Respondents regarding the claims of wrongful termination and failure to rehire.

C.

CONCLUSIONS OF LAW

1. The Complainants, Samuel R. Lewis and Vincent E. Cheeks, are individuals aggrieved by an unlawful discriminatory practice, and are proper Complainants under the West Virginia Human Rights Act, W. Va. Code §5-11-10.
2. The Respondent, Mayflower Vehicle Systems, Inc., is a "person" and an "employer" as those terms are defined under 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 West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

5. The Complainants have established a prima facie case of race discrimination, regarding the failure to rehire them subsequent to their terminations for nine occurrences. The Respondent has articulated a legitimate non discriminatory reason for the failure to rehire, that the union dropped their grievances and no obvious error was being corrected; which the Commission has demonstrated by a preponderance of the evidence to be pretext for unlawful discrimination on the basis of race.

6. As a result of the Respondent's unlawful discriminatory conduct, Complainant Samuel R. Lewis, is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity. As a result of the Respondent's unlawful discriminatory conduct, Complainant Vincent E. Cheeks, is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity.

7. As a result of the Respondent's unlawful discriminatory conduct, Complainants are entitled to back pay and reinstatement in the next available full time positions with the Respondent, with award of front pay until such time as they are reinstated.

8. The Commission is entitled to an award of its reasonable costs incurred in prosecution of this matter in the amount of \$425.05 as more fully set forth in Exhibit B of Commission's Memorandum of Law.

D.

RELIEF AND ORDER

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

1. The above named Respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of the receipt of the undersigned's order, the Respondent shall pay the reasonable costs of the Commission incurred in the prosecution of this matter, in the amount of \$425.05.

3. Within 31 days of the receipt of the undersigned's order, the Respondent shall pay the Complainants incidental damages in the amount of \$3,277.45 each, for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of Respondent's unlawful discrimination, plus post-judgment statutory simple interest of ten percent.

4. Respondent shall reinstate Complainants in the next available full time position. Respondent shall pay Mr. Lewis front pay of \$209.48 per month until such time as Respondent reinstates him to the next available full time position. Respondent shall pay Mr. Cheeks front pay of \$3,347.57 per month until such time as Respondent reinstates him to the next available full time position.

5. Within 31 days of the receipt of the undersigned's order, Respondent shall pay Mr. Lewis an award of net back pay in the amount of \$18,107.92 through July 31, 2004, as more fully set forth in Exhibit A of Commission's Memorandum of Law; plus simple prejudgment interest at 10% in the amount of \$5,281.47; and, Respondent shall pay simple post-judgment interest at 10% annually on the \$23,389.39 thereafter.

6. Within 31 days of the receipt of the undersigned's Order, Respondent shall pay Mr. Cheeks an award of net back pay in the amount of \$101,754.88 through July 31, 2004, as more fully set forth in Commission's Damage Calculation Summary for Vincent E. Cheeks dated July 28, 2004; plus simple prejudgment interest at 10% in the amount of \$27,982.57; and Respondent shall pay simple post-judgment interest at 10% annually on the \$129,737.45 thereafter.

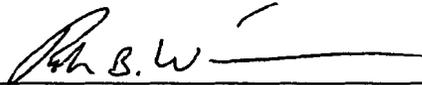
7. In the event of failure of the Respondent to perform any of the obligations hereinbefore set forth, Complainants are directed to immediately so advise the West Virginia Human Rights Commission, William D. Mahan, Director of Compliance/Enforcement, 1321

Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 12th day of August, 2004.

WV HUMAN RIGHTS COMMISSION

BY: 

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE
1321 Plaza East, Room 108-A
Charleston, WV 25301
Ph: 304-558-2616 / 558-0085



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

1321 Plaza East
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Bob Wise
Governor

Ivin B. Lee
Executive Director

COPY

June 29, 2004

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2004 JUN 29 PM 12 59
WV HUMAN RIGHTS
COMMISSION

Samuel R. Lewis
1566 Lee Street
Apartment 3
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Mayflower Vehicle Systems, Inc.
c/o Mark A. Atkinson, Esquire
Atkinson, Mohler & Polak, PLLC
P. O. Box 549
Charleston, WV 25322-0549
(By Counsel)

Vincent E. Cheeks
913 Glendale Avenue
South Charleston, WV 25303

Mark A. Atkinson, Esquire
Paul Frampton, Esquire
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Jonathan L. Matthews, Esquire
Assistant Attorney General
Civil Rights Division
P. O. Box 1789
Charleston, WV 25326-1789

Robert B. Wilson
Administrative Law Judge
WV Human Rights Commission
1321 Plaza East, Room 108-A
Charleston, WV 25301

***RE: Samuel R. Lewis v. Mayflower Vehicle Systems, Inc.
Docket No. ER-270-02;
Vincent E. Cheeks v. Mayflower Vehicle Systems, Inc.
Docket No. ER-464-02.***

Dear Parties:

On June 24, 2004, the Commissioners of the West Virginia Human Rights Commission met to review and discuss the above-styled cases, which are on appeal

Page 2
June 29, 2004

from the Final Decision of Administrative Law Judge Robert B. Wilson, and to come to a decision with regard to the same.

As per the attached Order, the Commission hereby **AFFIRMS *in all respects*** the ALJ's Final Decision with regards to **Complainant Samuel R. Lewis**.

Further, per the attached Order, with regards to **Complainant Vincent E. Cheeks**, the Commission **AFFIRMS** the ALJ's Final Decision **as to liability ONLY**. However, the Commission **REVERSES** the ALJ's Final Decision **with regards to damages**, and hereby **REMANDS** these matters back to Administrative Law Judge, Robert B. Wilson, for the recalculation of Complainant Cheeks' back pay and calculation of his front pay, and for ALJ Wilson to prepare an Amended Final Decision for submission to the Commission.

Very truly yours,

A handwritten signature in cursive script that reads "Ivin B. Lee". The signature is written in black ink and is positioned above the printed name and title.

IVIN B. LEE
EXECUTIVE DIRECTOR

IBL/jk

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SAMUEL R. LEWIS,

Complainant,

v.

MAYFLOWER VEHICLE
SYSTEMS, INC.,

Respondent.

VINCENT E. CHEEKS,

Complainant,

v.

MAYFLOWER VEHICLE
SYSTEMS, INC.,

Respondent.

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DOCKET NO. ER-270-02
EEOC NO. 17JA00096

FILED
2004 JUN 29 PM 12 59
WV HUMAN RIGHTS
COMMISSION

DOCKET NO. ER-464-02
EEOC NO. 17JA200293

ORDER

On June 24, 2004, this matter came before the West Virginia Human Rights Commission on appeal from the Final Decision of Administrative Law Judge Robert B. Wilson. After due consideration of the aforementioned Decision, and after a thorough review of the transcript and exhibits, the arguments and briefs of counsel, the Petition for Appeal and Answer filed in response

thereto, and the separate Petition for Appeal filed by Complainant Cheeks and Answer filed in response thereto, the Commission does hereby find as follows.

Lewis v. Mayflower Vehicle Systems, Inc., Docket No. ER-270-02

With respect to the case presented by Complainant Lewis, the Commission concludes that the record supports the opinion of the ALJ as to liability in all respects. The Commission hereby affirms the ALJ's Final Decision as to liability.

The Commission further affirms the ALJ's Final Decision as to damages, finding that the record supports the ALJ's selection of remedies, including but not limited to the ALJ's award of reinstatement, back pay, front pay, incidental damages, and costs.

Cheeks v. Mayflower Vehicle Systems, Inc., Docket No. ER-464-02

With respect to the case presented by Complainant Cheeks, the Commission concludes that the record supports the opinion of the ALJ as to liability in all respects. The Commission hereby affirms the ALJ's Final Decision as to liability.

However, the Commission reverses the ALJ's Final Decision as to damages, finding that the ALJ was clearly wrong in concluding that Claimant Cheeks did not claim lost back pay subsequent to June, 2003, and further that the ALJ misapplied the law in concluding that Claimant Cheeks had failed to mitigate his damages for twenty-two of the months between his termination and the date of the ALJ's Final Decision. The law in West Virginia is clear that mitigation of damages is an affirmative defense, see, e.g., Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990), and in this case the employer failed to even raise, let alone prove, failure to mitigate.

The Commission concludes that Complainant Cheeks is entitled to be awarded the same remedies as those awarded to Complainant Lewis, including but not limited to reinstatement, back pay, front pay, incidental damages, and costs. Accordingly, this case is REMANDED to Administrative Law Judge Robert B. Wilson for recalculation of Complainant Cheeks' back pay and calculation of his front pay. To ensure fairness to the Respondent, Complainant Cheeks' counsel is ORDERED to submit information to the ALJ concerning all post-June, 2003 earnings or other compensation within thirty days of entry of this Order. If the Respondent disputes any of this information, its counsel shall notify the ALJ within ten days of receipt thereof, and the ALJ shall utilize any procedures necessary to resolve the dispute.

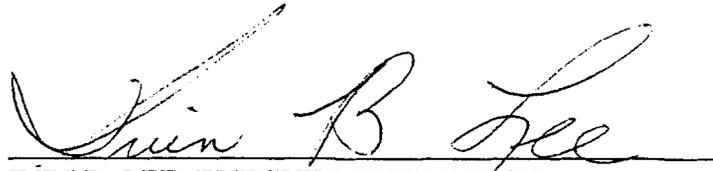
Thereafter, the ALJ shall forthwith prepare an Amended Final Decision for submission to the Commission. If either party contests the ALJ's recalculation of Complainant's back pay award or the ALJ's calculation of the front pay award, such party shall file a Petition for Appeal. All arguments of the parties with respect to all other issues are preserved and need not be re-appealed or re-argued. The Final Order of the Commission will acknowledge and rely upon the complete record in this case, including the cross Petitions for Appeal and briefs already filed.

It is, therefore, the ORDER of the West Virginia Human Rights Commission that this case be REMANDED to the Administrative Law Judge for the limited purposes set forth herein.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 29
day of June, 2004, in Charleston, Kanawha County, West Virginia.

A handwritten signature in cursive script, reading "Ivin B. Lee". The signature is written in black ink and is positioned above a horizontal line.

IVIN B. LEE, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SAMUEL R. LEWIS,

Complainant,

v.

DOCKET NO. ER-270-02
EEOC NO. 17JA00096

MAYFLOWER VEHICLE
SYSTEMS, INC.,

Respondent.

VINCENT E. CHEEKS,

Complainant,

v.

DOCKET NO. ER-464-02
EEOC NO. 17JA200293

MAYFLOWER VEHICLE
SYSTEMS, INC.,

Respondent.

CERTIFICATE OF SERVICE

I, Ivin B. Lee, Executive Director of the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing Order by placing true and exact copies in the United States mail, postage prepaid, this 29 day of June, 2004, addressed as follows:

Jonathan L. Matthews, Esq.
Asst. Attorney General
Civil Rights Division
P.O. Box 1789
Charleston, WV 25326-1789

Samuel R. Lewis
1566 Lee Street
Apartment 3
Charleston, WV 25311

Vincent E. Cheeks
913 Glendale Avenue
South Charleston, WV
25303

Mark A. Atkinson, Esq.
Paul Frampton, Esq.
Atkinson Mohler & Polak, PLLC
P. O. Box 549
Charleston, WV 25322-0549

Mayflower Vehicle Systems, Inc.
c/o Mark A. Atkinson, Esq.
Atkinson, Mohler & Polak, PLLC
P. O. Box 549
Charleston, WV 25322-0549



IVIN B. LEE, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION



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**

February 24, 2004

Samuel R. Lewis
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Vincent E. Cheeks
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South Charleston, WV 25303

Jonathan L. Matthews, Esquire
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Charleston, WV 25326-1789

Mayflower Vehicle Systems, Inc.
3100 MacCorkle Avenue, S.W.
South Charleston, WV 25303

Mark A. Atkinson, Esquire
Paul Frampton, Esquire
Atkinson Mohler & Polak, PLLC
POB 549
Charleston, WV 25322-0549

Re: Samuel R. Lewis v. Mayflower Vehicle Systems, Inc.
Docket No. ER-270-02;
Vincent E. Cheeks v. Mayflower Vehicle Systems, Inc.
Docket No. ER-464-02.

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:

“§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:

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,



Robert B. Wilson
Administrative Law Judge

RBW/jek

Enclosure

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SAMUEL R. LEWIS,

Complainant,

v.

Docket Number: ER-270-02

EEOC Number: 17JA200132

**MAYFLOWER VEHICLE SYSTEMS,
INC.,**

Respondent.

VINCENT E. CHEEKS,

Complainant,

v.

Docket Number: ER-464-02

EEOC Number: 17JA200293

**MAYFLOWER VEHICLE SYSTEMS,
INC.,**

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on September 18, 2003, in Kanawha County, in Conference Room B of the West Virginia Human Rights Commission Offices at 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The Complainants, Samuel L. Lewis, and Vincent E. Cheeks, appeared in person and by counsel for the Commission, Jon L. Matthews, Assistant Attorney General, for the Office of the West Virginia Attorney General, Civil Rights Division. The Respondent appeared in person by its representative, Jana Dawson, Industrial Relations Manager; as well as by

counsel, Mark Atkinson, Esquire, and Paul Frampton, Esquire, with the firm Atkinson, Mohler & Polak. The parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof, and response briefs through December 29, 2003.

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 necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

A.

FINDINGS OF FACT

1. Respondent, Mayflower Vehicle Systems, Inc., is an “employer” and a “person” as those terms are defined in W.Va. Code §§5-11-3(a) and (d) respectively. Tr. Page 156; Joint Exhibit No. 2.

2. Complainant, Vincent Eugene Cheeks, is an African American, residing in South

Charleston, West Virginia. Tr. Pages 47 and 48.

3. Mr. Cheeks worked for Respondent from October 1999 until November 2001 as a laborer primarily engaged in operating a press or as a mill finisher. The work was hard and dangerous. It involved lifting heavy parts that were often slippery from oil dope used to treat the parts prior to stamping. Mr. Cheeks worked second shift at the time he was discharged, starting at 4:30 pm . He was typically working ten hour days Monday through Thursday. Tr. Pages 48-50.

4. Mr. Cheeks states that other employees would say “He’s just crying. He needs to get his black ass back on the job and do his work.” They would say “His black ass ain’t this, and his black ass ain’t that.” Tr. Pages 50 and 51.

5. Mr. Cheeks noted that he was routinely given more strenuous assignments such as operating the press, while white employees were regularly given less strenuous work such as inspecting the finished parts. The assignments were made by the team leaders. Although Mr. Cheeks did not bring these concerns directly to management of Respondent, he did bring them up with the union. Tr. Pages 51-54, and 100.

6. On February 22, 2001, Mr. Cheeks admits he was found asleep in the compressor room, an offense for which one can be summarily discharged. Respondent did not discharge him, but rather only suspended him on that occasion. It should be noted however, that Jason Kovacik, a white employee, caught sleeping on the job, was suspended, not discharged as well. Tr. Pages 68, 69, 173 and 174.

7. In late October and early November 2001, Mr. Cheeks had lower lumbar sprain, high blood pressure and swollen hemorrhoids with bleeding. Tr. Pages 54 and 55.

8. Mr. Cheeks was absent on October 11, October 12, and October 18, 2001; and again absent on November 1 and November 2, 2001. Prior to returning from his absence on October 18, 2001 Mr. Cheeks attempted to secure FMLA papers from the Respondent's Human Resource Department, but was unable to obtain them from Tracy Olive, for a period of several days due to her unavailability. He finally obtained those papers from Ms. Olive on October 25, 2001 and returned them from the Doctor's Office on October 30, 2001. The FMLA completed by Dr. Canario listed the chronic condition as Ess. Hypertension/ Lumbar Sprain and stated that Mr. Cheeks required to be seen periodically to check blood pressure and regulate his medication, listing days off from 10/11/01 - 10/18/01. A return to work slip from 10/26/01 stated he had lumbar sprain and a return to work slip dated 11/05/01 for 11/01/01 to 11/04/01 listed lumbar sprain/rectal bleeding. Despite the fact that he had submitted a FMLA form and had just returned to work on November 5, 2001 after absences on November 1st and 2nd, for which he had a return to work, Mr. Cheeks was terminated for excessive absences on November 5, 2001. Tr. Pages 58-68; Joint Exhibit No. 1, Documents at Tab 11.

9. Complainant, Samuel R. Lewis, is an African American, resident of Charleston, West Virginia. Tr. Pages 109 and 115.

10. M r. L ewis w as i nitially h ired t o w ork a t R espondent's b usiness t hrough

Manpower in 1995. He was one of the first people hired after completing the manufacturing orientation training at Ben Franklin. He worked as a laborer. He moved up to team leader, an hourly employee paid slightly higher than others to run a couple of lines. Then he was offered a position as a group leader, a salaried position, running blankers, metal finish holes and core receiving. He accepted the salaried position when the union came in. Later his boss Odell Jeffers took retirement during a change in management, and Mr. Lewis returned to hourly work as a union employee when Mr. Jeffers retired, and, after learning that others had received larger raises with less seniority as group leaders. Tr. Pages 110-112.

11. Mr. Lewis was subjected to racially hostile comments and treatment at the hands of management and employees. Mr. Lewis' floor boss, Dave Payne, would make remarks like, "Sam, I locked my keys in my car but you can get them out." One day he came to work and found a racial joke on the black board. It said, " Sam, what do you call a bunch of antique farm equipment? A bunch of N*****." It was brought to the attention of management and it was erased, but nothing else was done about it. He wrote up one of his employees, Scotty Cain, when he stated, "You black son of a bitch, don't you touch my press. I'll kick your black ass if you touch my press, or as a matter of fact, meet me at the Athletic Club after work and I'll show you what I'll do to you." This was reported to Odell Jeffers and Chuck Whittington and was swept under the rug and nothing was done about it. Tr. Pages 115-117.

12. Mr. Lewis admits that he had nine occurrences, or absences which is grounds

for termination under Respondent's policies. He notified Respondent himself, of the ninth occurrence, the result of a fight that left his eye swollen shut. He attempted to work something out with Jana Dawson upon his return to work, but she avoided him for three days and would not meet with him. He was terminated by Tracy Olive, who stated with tears in her eyes, "We gotta terminate you, you know. I'm just doing what Jana told me to do." Mr. Lewis was terminated effective August 22, 2001. Tr. Pages 121-123; Joint Exhibit No. 1, Tab 1.

13. Mr. Lewis did not expect to be fired. As a member of management, he had brought a white employee, Roger Thevenin, in for his ninth occurrence, and Ms. Dawson had indicated she was going to terminate him. Instead she gave him a day back and put him on a ninety day agreement. This was because he produced a subpoena for one of the days according to Ms. Dawson. Nevertheless, Ms. Dawson had given several other white employees a second chance, but did not give Mr. Lewis a second chance. Tr. Pages 123-126, 131, 153 and 154.

14. Mr. Lewis testified credibly, that call ins for all the group leaders went to the same number and that when one group leader listened to the messages and erased them, without relaying that information to the appropriate individual, those people calling in would then be listed as no show no calls. This would occur routinely and as a member of management, Mr. Lewis had to change such instances routinely. Respondent asserts without credibility that the three instances where this was corrected by Respondent for Mr. Lewis,

were in fact additional occurrences. This is in fact incorrect and such absences were in fact vacation days that had not been recorded properly. Even though Ms. Dawson was aware of the fact that vacation days that had been called in were being erased and recorded as no call no shows, she flatly refused to make any further corrections, regardless of the fact it was not his fault and there was nothing Mr. Lewis could do about that. Tr. Pages 118-120, 132, 145 and 146.

15. The union failed to file Mr. Lewis's appeal of his grievance after someone, i.e. Ms. Dawson, had told the union that Frank Cobb had given Mr. Lewis his days back. Mr. Cobb denied to Mr. Lewis that he remembered giving Mr. Lewis any days back. Tr. Pages 127-129 and 152.

16. Ralph Baxter served as Recording Secretary on the UAW Executive Board for the Respondent's plant and currently continues to serve as Zone Steward. As Zone Steward he testified that Lisa Tucker, a white employee, was reinstated following a termination for nine occurrences when she was sent home on return from absences which could have been claimed as FMLA had she been given the two days in which to declare them as such. (This situation is similar to Mr. Cheeks, who was terminated on the day he returned to work from absences, without being given the two days to declare the absences as FMLA.) Mr. Baxter testified credibly that Respondent has not strictly enforced the 15 day requirement to return paperwork from the doctor for FMLA. He testified credibly that he is aware of a dozen, or more, rehired by Respondent after nine or more occurrences. Tr. Pages 18, 24, 25, 29, 35 and

37; Joint Exhibit No. 1, Tab 40.

17. Mr. Cheek's team leader wrote a note to Jana Dawson apparently on November 1, 2001, stating, "Jana, is there anything we can do. It's every Thursday that he is a no call no show. Call me at home. Thanks, Jody. Since Aug. 3 he has worked two Thursdays." Mr. Cheeks testified credibly that Ms. Adkins lied, that he called the guard and left messages, that Ms. Adkins would always return his call, and, that he told her he needed FMLA. Mr. Cheeks' testimony is credible because the Respondent had already received his Application for Family or Medical Leave by October 31, 2001 completed by the Dr. Canario. Tr. Pages 79-81; Joint Exhibit No. 1, Tab 11.

18. Tracy Olive wrote to Jana Dawson on June 21, 2000 regarding Donald Muncy, a white employee terminated on that date, in which she states "re: Muncy May 1st brought in copy of a testing procedure that could be covered under FMLA." Mr. Muncy was subsequently rehired on July 11, 2000. The memo clearly indicates that Mr. Muncy did not timely file his FMLA and nothing in the documents at Tab 35 indicates that this rehiring was the result of union intervention. Tr. Pages 172 and 173, Joint Exhibit No. 1, Tab 35.

19. No African Americans had been fired and later rehired prior to Mr. Cheeks and Mr. Lewis filing their complaints with the Human Rights Commission. Since that time Mr. Dunham, an African American, was fired, rehired and fired again for violating his last chance agreement for attendance. Tr. Pages 174-175.

20. Darren Brown, a white employee, was given a last chance agreement following

his ninth occurrence for a DUI arrest. Tr. Pages 169-171.

21. Todd Bryan, a white employee, has been given three last chance agreements.

Tr. Pages 179 and 180; Joint Exhibit No. 1, Tab 28.

22. Other white employees that were fired and subsequently rehired by Respondent include:

Robert Carpenter fired 7-31-00 rehired 12-17-01

T. J. Clark fired 11-20-00 rehired 12-5-00

Mike Lowe fired 8-29-01 rehired 3-4-02

Terry Haynes fired 6-26-01 rehired 10-23-01

Jason Kovacik fired 6-12-00 rehired 7-11-00

Roy Pauley fired 11-8-00 rehired 1-15-01

Kevin Staley fired 2-4-00 rehired 2-24-00

fired 6-9-00 rehired 7-25-01

Terry Summers fired 5-22-00 rehired 7-11-00

Fired 11-20-00 rehired 9-4-01

See Joint Exhibit No. 1, Tabs 29, 30, 31, 33, 34, 36, 37 and 38 respectively.

23. Since August 22, 2001, when Mr. Lewis was discharged, he has sustained lost wages of \$407.12 in August of 2001, and \$1,628.48 per month thereafter. Mr. Lewis received unemployment benefits based upon the hearing deputy's finding of termination without cause, and has since mitigated his damages with employment beginning in April 2002, in the

amount of \$1,201.00 per month for April and May 2002, and \$1,419.00 per month thereafter. Net back pay through February 2004 is \$17,060.52. Mr. Lewis would continue to have net lost wages of \$209.48 per month thereafter. The undersigned finds that Mr. Lewis has adequately attempted to mitigate his damages. Joint Exhibit No. 1, Tab 1; Joint Exhibit No. 2.

24. Since November 5, 2001, when Mr. Cheeks was discharged, Mr. Cheeks has lost wages from Respondent of \$3,451.10 per month. In 2001 Mr. Cheeks received \$1,690.00 and \$11,492.00 in unemployment compensation, for 2001 and 2002 respectively. Mr. Cheeks mitigated his damages with earnings of \$764.50 per month for November and December 2002, \$1,032.00 per month for January, February and March 2003 and \$1,290.00 per month for April and May 2003, and \$300.00 for June 2003. Mr. Cheeks' Net Back Pay claim through June 2003 is \$61,517.02, and he does not claim lost back pay subsequent to June 2003, although the record is unclear as to why. Records indicate that Mr. Cheeks has mitigated his damages in just eight months out of thirty-two since his discharge through the end of February 2004. His net back pay for those eight months is \$15,781.60. The undersigned finds Mr. Lewis has not demonstrated adequate attempts to mitigate his damages for the remainder of the twenty-four months since his discharge from employment with the Respondent. Joint Exhibit No. 1, Tab 7; Joint Exhibit No. 2; Exhibit A of Commission's Proposed Findings of Fact and Conclusions of Law and Memorandum of Law.

25. The West Virginia Human Rights Commission has incurred reasonable costs

of \$425.05, for the cost of the hearing transcripts in its prosecution of this matter. Exhibit B of Commission's Proposed Findings of Fact and Conclusions of Law and Memorandum of Law.

26. The undersigned finds as a matter of fact, that the Respondent regularly discharged employees upon nine occurrences without regard to the race of the employee. The undersigned finds as a matter of fact, that the Commission has demonstrated by a preponderance of the evidence that Respondent discriminated against the Complainants, Mr. Lewis and Mr. Cheeks, on the basis of their race, in failing to rehire them subsequent to their discharge.

27. The undersigned finds as a matter of fact, that Mr. Lewis was subjected to racial harassment in the form of a racial joke posted on his chalk board, the kidding of his supervisor concerning his ability to get his keys from his locked car, and the threats of violence by his underling, Mr. Cain; that such actions were not responded to properly by Respondent in failing to discipline Mr. Cain; but, finds as a matter of fact and law that these incidents were not severe or pervasive enough to be deemed to create a hostile work environment. Similarly the use of the term "black ass" by co-workers has not been demonstrated by a preponderance of the evidence to have been sufficiently pervasive or severe to create a hostile work environment as to Mr. Cheeks. The evidence of the record does not indicate that the assignment of job duties of a less strenuous nature, on the basis of race, were ever brought to the attention of the Respondent's management, but rather only to

the union.

28. Mr. Cheeks was angry and upset when he was terminated. Although Mr. Lewis did not specifically testify as to how he felt, when he testified concerning Ms. Dawson's refusal to discuss his ninth occurrence and his subsequent termination, he was visibly frustrated and angry about the failure to be given a second chance as he had seen other white employees given. Tr. Pages 68, and 121-124.

B.

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 and/or age, 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.

The Human Rights Act imposes on an employer a duty to ensure, as best they can, that workplaces are free of harassment that creates a hostile or offensive working environment. Hanlon v. Chambers Syl. Pt. 8, 195 W.Va. 99, 464 S.E. 2nd 741 (1995); Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E. 2nd 801, at 809 (1996). To establish a hostile or abusive work environment claim, it must be established:

- 1) That the subject conduct was unwelcome;
- 2) It was based on the ancestry of the plaintiff;

- 3) It was sufficiently severe or pervasive to alter the plaintiff's condition of employment; and
- 4) It was imputable on some factual basis to the employer. Fairmont Specialty Services v. West Virginia Human Rights Commission, Syl. Pt. 2, 206 W.Va. 86, 522 S.E. 2nd 180 (1999).

“The aggravated nature of discriminatory conduct, together with its frequency and severity, are factors to be considered in assessing the efficacy of an employer's response to such conduct.” Ibid, and Syl. Pt. 3.

“Conduct such as use of the “N” word to describe an African American, . . . or other racial . . . pseudonyms intended to denigrate others, cannot be tolerated in the workplace. They are the type of outrageous discriminatory conduct that may be considered to be of an aggravated nature, such that the threshold for it to be actionable is much lower than more subtle forms of discrimination which cumulatively cause conduct to be actionable under the Human Rights Act. Fairmont Specialty, 522 S.E. 2nd at 187-188, no. 8.

Applying the law to the facts in this case, it is apparent that Complainants have made out a prima facia case of race discrimination in respect to Respondent's failure to rehire them subsequent to their terminations. Both Mr. Lewis and Mr. Cheeks are African Americans, a protected class under the West Virginia Human Rights Act. The Respondent has to this day refused to rehire either Mr. Lewis or Mr. Cheeks, thus they have been subjected to adverse actions in respect to the terms of their employment (or rather non-employment). Finally, in

at least a dozen or more instances, other employees who were terminated for nine occurrences, have subsequently been rehired. Prior to the filing of their complaints with the West Virginia Human Rights Commission, none of those rehired were African Americans. From this, it can be inferred that but for the race of the Complainants, they also would have been rehired.

Respondents argue that it is only because the union dropped their grievances that they were never given a second chance, that if any racial discrimination occurred, it would be the union that discriminated against the Complainants and not the Respondent, who cannot be held liable for the discrimination of the union in dropping the grievances, and further swear that Jana Dawson, Respondent's Industrial Relations Manager, made that determination to fire the Complainants without regard to their race. The undersigned agrees with Respondent's argument that should discrimination not have motivated Respondent's decisions, then they are free to ratify the results of racial discrimination at the hands of the union in dropping their grievances. For several reasons, the undersigned finds that impermissible racial discrimination by Respondent's management played a role in their decision to decline to rehire the Complainants.

When Roger Thevenin, a white employee, produced a subpoena for one of his days, Ms. Jana Dawson gave the day back. The union had nothing to do with her decision. In contrast, when Mr. Lewis notified her of the vacation days he had taken, which were misrecorded as no call, no shows, she told him, "Sam, this is the last time I'm going to do

this for you.” Those occurrences of failing to report his vacation days were not anything Mr. Lewis could control, they were a simple mistake, verified by his boss. Ms. Dawson told him in no uncertain terms that she would refuse to correct such errors after Mr. Lewis had watched her do so for a white employee, Mr. Thevenin, when he was brought to her with the nine occurrences.

When Donald Muncy, a white employee, was terminated for nine occurrences on June 21, 2000, Ms. Olive wrote a memo to Ms. Jana Dawson outlining the fact that his ninth occurrence was for a testing procedure that could be covered under FMLA if he had filed the correct paperwork. Mr. Muncy was later rehired. Ms. Dawson claims this was the result of union intervention. (Tr. P. 178-179). Nothing in the documents at Tab 35 indicates the filing of a grievance regarding FMLA by the union however. In contrast, even though Mr. Cheeks had filed his FMLA application and supplied her with Doctor’s notes for absences on October 11, 12 and 18, and again on November 1 and 2, Ms. Olive did not write any memo on his behalf. Documentary evidence indicates that Mr. Cheeks filed a union grievance which proceeded to at least the third stage. As of March 31, 2002, Mr. Cheeks’ grievance was denied again by the Respondent, and it was represented to the union that he didn’t turn his paperwork in until November 5, 2001, as attested to by the signature of Ms. Dawson on that date. The documentary evidence clearly indicates that respondent received his FMLA application on October 31, 2001. Mr. Muncy, a white employee, was rehired less than one month after his discharge, and clearly didn’t timely file FMLA paperwork. Mr. Muncy can

be compared to Mr. Cheeks, an African American employee, who had his FMLA paperwork in promptly after receiving it from respondent's HR, and continued to have his grievance denied at the third stage of the grievance process five months after his discharge. Respondent claims Mr. Muncy got rehired because of the union, and Mr. Cheeks didn't, because of the union. The evidence doesn't support such an explanation. The undersigned finds pretext for racial animus by Ms. Dawson, and that Mr. Cheeks has proven by a preponderance of the evidence that he was treated differently from Mr. Muncy, the white employee, when respondent refused to rehire him.

The union did fail to file the appeal papers for Mr. Lewis' grievance. Mr. Lewis testified credibly that someone had told the union that Frank Cobb had given Mr. Lewis his days back. That someone would have to have been Ms. Dawson since she was the one to handle this stage of the grievances. It is not at all clear that such a grievance could be successful as Mr. Lewis readily admits that he incurred a ninth occurrence under respondent's policies. It is clear that others with nine occurrences received second (and sometime third chances or even fourth chances), and these employees were white, while Mr. Lewis is African American. There is Mr. Brown, a white employee who was given a last chance agreement after his ninth occurrence when he was arrested for DUI. Mr. Lewis was not given a last chance agreement when he incurred his ninth occurrence following a fight that left him with two swollen eyes. The explanation that respondent feared an ADA claim is preposterous, when Mr. Lewis is African American and did file a Human Rights Act claim.

Although the Complainants have proven by a preponderance of the evidence that they would have been rehired but for Respondent's unlawful consideration of their race, a back pay award might not be appropriate. Many of those employees who were rehired after Respondent fired them, were subject to last chance agreements. Some of those rehired by the Respondent have subsequently been terminated without rehiring. In the case of Mr. Cheeks, the evidence was that his medical condition frequently was preventing him from working an entire work week. The record does not disclose why his claim for back pay shows no lost wages subsequent to June, 2003, nor mitigation thereafter. In the case of Mr. Lewis, he was unquestionably subject to discharge upon his ninth occurrence. That said, it nevertheless seems inequitable to deny a back pay award when other employees were rehired after similar instances of unquestionably terminable offenses. Especially, when the record indicates that it is only by working 50 hour weeks in his present employment that he is able to reduce the net loss in income per month to \$209.48 Both Complainants are entitled to an Order reinstating them to the next available full time position with the Respondent. Mr. Lewis is entitled to front pay of \$209.48 per month until such time as he is rehired by the Respondent.

In regards to the racially hostile workplace claims, Mr. Cheek's claim is invalid as a matter of law as he never reported those claims to Respondent's management. Therefore, any alleged hostile workplace claim as to him cannot be imputed to the employer. Mr. Lewis' claim for a racially hostile workplace is much stronger. The use of the "N" word

under current West Virginia case law, qualifies as a severe occurrence. In this instance, it has not been demonstrated that a member of Respondent's management placed the racial joke on Mr. Lewis' chalk board. It was erased, and it is unclear what could be done to ascertain the responsible party. The incident was not repeated. The comments by Mr. Payne did not use any racial epithets, nor were they racially derogatory even though Mr. Lewis found them to be. The incident with Mr. Cain challenging Mr. Lewis to meet him after work was treated as the sort of idle chest beating which is common place to a factory setting. Just as management instructed Mr. Lewis that he would be fired if he took Mr. Cain up on his invitation, the same speech was in all likelihood given to Mr. Cain as well. This is what Mr. Lewis refers to as nothing being done about it. Given the context of the incidents, those that are imputable on some basis to the Respondent are simply not severe or pervasive enough to constitute a hostile work environment, as to alter the terms and conditions of Mr. Lewis' employment. As the disparate raises for group leaders was not timely filed as a Human Rights complaint, it cannot serve as the basis of a hostile workplace claim, but nevertheless is indicative of racial motivation by Respondents regarding the claims of wrongful termination and failure to rehire.

C.

CONCLUSIONS OF LAW

1. The Complainants, Samuel R. Lewis and Vincent E. Cheeks, are individuals

aggrieved by an unlawful discriminatory practice, and are proper complainants under the West Virginia Human Rights Act, W. Va. Code §5-11-10.

2. The Respondent, Mayflower Vehicle Systems, Inc., is a “person” and an “employer” as those terms are defined under 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 West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

5. The Complainants have established a prima facie case of race discrimination, regarding the failure to rehire them subsequent to their terminations for nine occurrences. The Respondent has articulated a legitimate non discriminatory reason for the failure to rehire, that the union dropped their grievances and no obvious error was being corrected; which the Commission has demonstrated by a preponderance of the evidence to be pretext for unlawful discrimination on the basis of race.

6. As a result of the Respondent’s unlawful discriminatory conduct, Complainant Vincent E. Cheeks, is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity. As a result of the Respondent’s unlawful discriminatory conduct, Complainant Samuel R. Lewis, is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity.

7. As a result of the Respondent's unlawful discriminatory conduct, Complainants are entitled to reinstatement in the next available full time positions with the Respondent. Mr. Lewis is entitled to front pay of 209.48 until such time as he is reinstated.

8. As a result of the Respondent's unlawful discriminatory conduct, Mr. Cheeks, has not demonstrated adequate efforts to mitigate damages except as to the eight months employment between November 2002 and June Of 2003; and; is entitled to net back pay for that period in the amount of \$15,781.60. As a result of the Respondent's unlawful discriminatory conduct, Mr. Lewis is entitled to a back pay award of \$17,060.52; and has demonstrated adequate attempts to mitigate his damages.

9. The Commission is entitled to an award of its reasonable costs incurred in prosecution of this matter in the amount of \$425.05 as more fully set forth in Exhibit B of Commission's Memorandum of Law.

D.

RELIEF AND ORDER

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

1. The above named Respondent shall cease and desist from engaging in unlawful discriminatory practices.
2. Within 31 days of the receipt of the undersigned's order, the Respondent shall

pay the reasonable costs of the Commission incurred in the prosecution of this matter, in the amount of \$425.05.

3. Within 31 days of receipt of the undersigned's order, the Respondent shall pay the Complainants incidental damages in the amount of \$3,277.45 each, for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of Respondent's unlawful discrimination, plus post-judgment statutory simple interest of ten percent.

4. Respondent shall reinstate Complainants in the next available full time position. Respondent shall pay Mr. Lewis front pay of \$209.48 per month until such time as Respondent reinstates him to the next available full time position.

5. Within 31 days of the receipt of the undersigned's order, Respondent shall pay Mr. Cheeks an award of net back pay in the amount of \$15,781.60, for the eight months in which he has demonstrated attempts to mitigate his damages through employment between November 2002 and June 0f 2003; as more fully set forth in Exhibit A of Commission's Memorandum of Law; plus simple prejudgment interest at 10%, in the amount of \$3,682.37; and, Respondent shall pay simple post-judgment interest at 10% annually on the \$19,463.97 thereafter.

6. Within 31 days of the receipt of the undersigned's order, Respondent shall pay Mr. Lewis an award of net back pay in the amount of \$17,060.52, as more fully set forth in Exhibit A of Commission's Memorandum of Law; plus simple prejudgment interest at 10%,

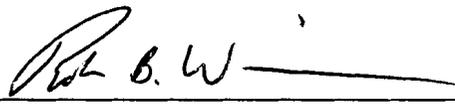
in the amount of \$4,400.54; and, Respondent shall pay simple post-judgment interest at 10% annually on the \$21,461.06 thereafter.

7. In the event of failure of the Respondent to perform any of the obligations hereinbefore set forth, Complainants are directed to immediately so advise the West Virginia Human Rights Commission, William D. Mahan, Director of Compliance/Enforcement, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 24th day of February, 2003.

WV HUMAN RIGHTS COMMISSION

BY: 
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE