



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
HUMAN RIGHTS COMMISSION

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VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

August 7, 2006

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Deborah Miller
509 Winfield Avenue
Winfield, WV 25132

Re: Miller v. Total Distribution, Inc.
Docket No.: ES-289-03 and
EREP-406-04

Dear Parties:

Enclosed please find the final decision of the undersigned Chief 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

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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;

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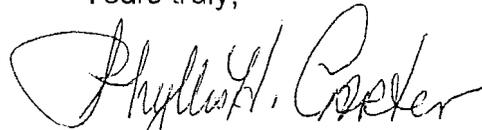
10.8.d. Supported by substantial evidence on the whole record; or

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,

A handwritten signature in cursive script, appearing to read "Phyllis H. Carter".

Phyllis H. Carter

Chief Administrative Law Judge

PHC/amh

Enclosure

cc: Ivin B. Lee, Executive Director
Charlene Marshall, Chairperson
Paul Sheridan, Esquire

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DEBORAH L. MILLER,

Complainant,

v.

**DOCKET NOS. ES-289-03 and
EREP-406-04**

TOTAL DISTRIBUTION INC.,

Respondent.

CHIEF ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

A public hearing in the above captioned-matter was convened on Tuesday, October 19-20, 2004 at 9:00 A. M. in the Putnam County Commission's Office Room, Putnam County Courthouse, Winfield, West Virginia before me.

The complainant, Deborah L. Miller, appeared in person and her case was presented by Jamie S. Alley, Assistant Attorney General, Office of the Attorney General of West Virginia. The respondent, Total Distribution, Inc. appeared by its corporate representative Donald Hamm. Respondents' case was presented by Richard Owen, Esquire of Goodwin & Goodwin.

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 arguments 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 arguments are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

The parties have stipulated that to the extent the actions of any Peoples Services, Inc. employees and/or M. Diane Neal, Kimberly Pugh, Denise Gibson, Doug Sibila, Dan Stemple, Don Hamm, John Mathews, Ronald Sibila, Bob Loftis and/or Randy Hodges are the subject of Deborah Miller's allegations with regard to her West Virginia Human Rights Act complaints, such actions are attributable to Respondent Total Distribution, Inc. (Joint Stipulation No. 8).

I.

STATEMENT OF THE CASE

The complainant, Deborah L. Miller presents two claims against respondent, Total Distribution, Inc. The first claim, HRC Docket No. ES-289-03, is a sex discrimination claim resulting from Total Distribution's alleged discriminatory treatment of Deborah Miller because of her efforts to move into Total Distribution's warehouse operations at Nitro, West Virginia, and the gender-based disparate treatment she endured in the terms and conditions of her employment as a warehouse employee.

Deborah Miller's second claim, HRC Docket No. EREP-406-04, is one of reprisal resulting from Total Distribution's retaliation against Miller filing a discrimination complaint with the West Virginia Human Rights Commission.

Deborah Miller's two claims have been consolidated for the purpose of the public hearing.

II.

SUMMARY OF DECISION

Complainant, Deborah L. Miller prevails on ES-289-03, sex discrimination and EREP-406-04 reprisal.

III.

FINDINGS OF FACT

1. The Complainant, Deborah L. Miller ("Miller"), a resident of Putnam County, West Virginia currently resides at 509 Winfield Avenue, Winfield, West Virginia. (Hr. Tr. Vol. I, at 29).

2. Respondent Total Distribution, Inc. ("Total Distribution") is an employer within the meaning of the West Virginia Human Rights Act. (Joint Stipulation No. 1). Total Distribution operates a warehouse that stores 55-gallon drums of chemicals for local vendors such as Dow and its predecessor, Union Carbide. Total Distribution accepts, stores, loads and ships drummed chemicals. (Hr. Tr. Vol. I, at 29-30, 166).

3. Total Distribution employed Miller on two separate occasions.

4. Miller first worked for Total Distribution in 1995 as a product quality report clerk and as a bar code inventory clerk. These were office positions.

5. As a product quality report clerk, Miller prepared reports regarding the clarity and composition of a chemical to be sent out with a shipment.

6. As a bar code inventory clerk, Miller scanned bar codes, selected items for shipment and prepared "pick sheets" detailing the shipment of stored drums.

7. The computer system utilized by Miller during her work as the bar code inventory clerk was also used in the warehouse operations by warehouse employees. (Hr. Tr. Vol. I, at 32).

8. Miller voluntarily ended her first employment with Total Distribution. (Hr. Tr. Vol. I, at 30-32).

9. In June 1998, Miller began her second employment with Total Distribution. (Hr. Tr. Vol. I, at 33).

10. From June through October 1998, Miller was employed at Total Distribution through Manpower, as a temporary employee. She became a full-time Total Distribution employee on November 1, 1998. (Hr. Tr. Vol. I, at 34).

11. Miller was rehired in 1998 to work in the Nitro administrative office. She initially processed orders for drum shipments and later moved into a dispatching position. As a dispatcher, Miller prepared paperwork on inbound drum shipments, including processing the bills of lading that shipment drivers received from customers, such as Union Carbide and Dow. (Hr. Tr. Vol. I, at 35-37).

12. Jim Wehrle ("Wehrle") was the Terminal Manager of the Nitro warehouse facility when Miller was hired back to work for Total Distribution in 1998. (Hr. Tr. Vol. I, at 38).

13. Donald Hamm ("Hamm") became the Terminal Manager of the Nitro location in September 2001. (Hr. Tr. Vol. I, at 188, 190).

14. For several months after Wehrle's departure and before the arrival of Hamm, Operations Supervisor; Randy Hodges ("Hodges") was responsible for the day-to-day operations at the Nitro warehouse. (Hr. Tr. Vol. I, at 166, 172).

15. Miller told Wehrle that she was interested in transferring to the warehouse. (Hr. Tr. at 40-41). She expressed this interest to every management employee in the chain of command for the Nitro warehouse, and several managers at the Nitro location including Bob Loftis ("Loftis"), Hodges, Wehrle, Hamm, and upper management based in Parkersburg and Ohio including Dan Stemple ("Stemple"), Doug Sibila and Ron Sibila. (Hr. Tr. Vol. I, at 43).

16. Miller asked Hodges, Day Shift Operations Supervisor, if he could possibly talk to his supervisors about her interest in moving into the warehouse. Hodges replied that he would see what he could do. (Hr. Tr. Vol. I, at 44-45).

17. Hodges admitted that Miller told him she was interested in moving to the warehouse. (Hr. Tr. Vol. I, at 176-177).

18. Miller expressed her interest to Doug and Ron Sibila, the Owner and Vice President, of the company when they visited the Nitro plant in the summer of 2001. She told them that she had successfully completed the forklift training and indicated that she would like to be considered for any opening in the warehouse. (Hr. Tr. Vol. I, at 48-49).

19. Miller completed Total Distribution's forklift operation qualification training program on July 8, 2000. (Hr. Tr. Vol. I, at 45-46; Commission's Exhibit 11, Exhibit B to Respondent's Responses to Interrogatories). The training involved video instruction, testing and forklift operation. Miller attended this training on a Saturday after being informed by the company that she could attend. (Hr. Tr. Vol. I, at 45-46).

20. Shortly after her meeting with the Sibilas, Miller followed up with Doug Sibila in writing, thanking the Sibilas for speaking with her and reiterating her interest in moving to the warehouse. (Hr. Tr. Vol. I, at 47; Commission's Exhibit 4). Doug Sibila never responded to Miller's letter. (Hr. Tr. Vol. I, at 49).

21. Miller filed a resume with Total Distribution in an effort to receive consideration for the warehouse position. Her resume indicated interim experience working with the Rite Aid warehouse operations during the period December 1997 to February 1998. (Hr. Tr. Vol. I, at 49; Commission's Exhibit 3).

22. Miller also spoke with Terminal Manager Hamm about her interest in moving to the warehouse. Miller not only asked Hamm to be placed in the warehouse, she also spoke with him when men were moved to the warehouse: (Hr. Tr. Vol. I, at 50).

23. From 1998 when Miller first expressed interest in moving to the warehouse through November 2002, Robert Brian Sparks ("Sparks"), Gary Michael Pauley ("Pauley"), Donnie Jordan, John Smith ("Smith"), William Arthur and Rodney Adkins, all of whom are male, were hired and or transferred to the Nitro warehouse. (Hr. Tr. Vol. I, at 51; Commission's Exhibit 12).

24. Two were hired/transferred as utility maintenance workers. (Commission's Exhibit 12).

25. Miller credibly testified that Total Distribution did not consider her for a warehouse position. (Hr. Tr. Vol. I, at 52).

26. For a period of time, Total Distribution also operated Mayflower Moving Company from the Nitro location. Mayflower was in the business of household packing and moving. (Hr. Tr. Vol. I, at 70-71). Some full and part-time employees of Mayflower Moving

were hired into the Total Distribution warehouse operation between 1998 and November 2002.

27. Sparks was hired to work in the Nitro warehouse as a forklift operator in June 1999. (Commission's Exhibit 9, at Exhibit 3 to Respondent's Responses to the Commission's Investigatory Interrogatories for Docket No. ES-289-03; Commission's Exhibit 12).

28. Hodges did not consider Miller for the position he offered to Sparks. (Hr. Tr. Vol. I, at 181-182).

29. Pauley was moved to the Nitro warehouse from a full-time position with Mayflower Moving as a utility maintenance worker in January 2000. (Hr. Tr, Vol. I. at 178; Vol. II, 20-22; Commission's Exhibit 9, at Exhibit 3 to Respondent's Responses to the Commission's Investigatory Interrogatories for Docket No. ES-289-03).

30. Hodges did not consider the Complainant for the position he offered to Pauley. (Hr. Tr. Vol. I, at 179).

31. Donald Jordan, a part-time Mayflower employee, was hired by Total Distribution as a full-time employee and moved to the Nitro warehouse on March 20, 2000. (Commission's Exhibit 9, at Exhibit 3 to Respondent's Responses to the Commission's Investigatory Interrogatories for Docket No. ES-289-03; Commission's Exhibit 12).

32. Hodges did not consider Miller for that position. (Hr. Tr. Vol. I, at 180-181).

33. Smith was transferred to the Nitro warehouse in September 2002. (Commission's Exhibit 9, at Exhibit 3 to Respondent's Responses to the Commission's Investigatory Interrogatories for Docket No. ES-289-03; Commission's Exhibit 12).

34. Smith was previously hired by Total Distribution on March 13, 2000 to work in the Charleston (or Kanawha City) warehouse. (Hr. Tr. Vol. I, at 154-155). He first began work for Total Distribution through Man Power, Inc. (Hr. Tr. Vol. I, at 152).

35. Despite the fact that forklift qualification was the only requirement for employment in the warehouse, Smith completed his initial forklift training on March 31, 2000, more than two weeks after he was hired into the Kanawha City warehouse. (Commission's Exhibit 11, Exhibit B to Total Distribution's Responses to Interrogatories;

Commission's Exhibit 12).

36. Hamm did not consider Miller for the Nitro warehouse position offered to Smith. (Hr. Tr. Vol. I, at 192).

37. William Arthur was hired by Total Distribution to work as a full-time utility maintenance employee for Total Distribution in the Nitro warehouse on March 26, 2000. Arthur worked for Total Distribution in that capacity from March 26, 2000, through June 9, 2000. (Commission's Exhibit 12).

38. Hodges stated that Arthur formerly worked part time for the Mayflower business, Hodges could not recall how long Arthur had allegedly worked for the Mayflower business. (Hr. Tr. Vol. I, at 173-174, 181).

39. Hodges did not consider Miller for the utility maintenance position he offered to Arthur. (Hr. Tr. Vol. I, at 181).

40. Rodney Adkins was hired to work in the Nitro warehouse as a forklift operator on June 28 or 29, 2000. (Commission's Exhibit 9, at Exhibit 3 to Respondent's Responses to the Commission's Investigatory Interrogatories for Docket No. ES-289-03; Commission's Exhibit 12).

41. Hodges hired Rodney Adkins. (Hr. Tr. Vol. I, at 176, 179-180).

42. Hodges did not consider Miller for the position he offered to Adkins. (Hr. Tr. Vol. I, at 180)

43. Miller asked to speak with Total Distribution's Vice President of Operations, Stemple, during his next visit to the Nitro plant about the situation. (Hr. Tr. Vol. I, at 52).

44. Miller credibly testified that she spoke with Stemple in October 2002. During that conversation, she expressed her concerns of gender discrimination: "I told him that I didn't think it was fair, you know, that they put Smith out there in the warehouse and that if I wasn't given the opportunity to go -- to move out in the warehouse, that I would take legal action." In response Stemple "stammered and stuttered around and well, you know, [said] 'I'll see what I can do.'" (Hr. Tr. Vol. I, at 53). Stemple testified that he could not dispute that this conversation occurred in October 2002. (Hr. Tr. Vol. II, at 48).

45. Total Distribution does not deny that Miller sought to move into the warehouse for several years before she was finally offered a position. (Commission's Exhibit 11, p. 6, Answer to Interrogatory No. 13).

46. Prior to November 2002, Miller was not offered the opportunity to move into the warehouse. (Hr. Tr. Vol. I, at 51).

COMPLAINANT'S TRANSFER TO THE NITRO WAREHOUSE

47. Millers credibly stated that she learned of a job offer to move to the warehouse when Hamm presented the November 7, 2002 letter to her. There was no discussion of its contents. (Hr. Tr. Vol. I, at 54-55). Total Distribution offered no testimony that any employee other than Hamm ever spoke with Miller about the transfer offer.

48. Hamm stated at the public hearing that when he provided the letter to Miller he did not discuss the letter with her in any detail (Hr. Tr. Vol. I, at 200).

49. The November 7, 2002 letter contained the following terms:

- You will initially be assigned to the Evening Shift. Your on going [sic] work hours will be determined by the Terminal Manager but will be subject to change at his discretion.

- You will be expected to gain full working knowledge and become proficient in your various assigned duties. The first sixty (60) days of employment in your new position will be considered a probationary period, in which your performance will be evaluated. Further evaluation will be performed on an as needed basis of not less than once per calendar year.

- You will maintain your company seniority for purposes of benefits and vacation accrual; however, you will be placed at the bottom of the warehouse seniority list for scheduling and work assignments.

- Your starting hourly rate will be \$11.61, which will be maintained, at least, until the end of 2003.

- Upon acceptance of this position, you agree to remain employed in the

warehouse. Your former position will be filled with another employee, whom you will not be able to bump, should you decide not to remain employed in the warehouse.

- These terms are to become effective Monday, November 11, 2002. (Commission's Exhibit 5).

50. The only explanation of probationary employment in Total Distribution's Employee Handbook deals with the first 60 days of full-time employment with Total Distribution. There is no provision in the Employee Handbook that establishes the use of a probationary period in any other context. (Commission's Exhibit 10, p. 12, Section 10.1.2.1).

51. Total Distribution required Miller to agree to a new probationary period in order to transfer into the warehouse. (Commission's Exhibit 5). It is undisputed that Total Distribution never required male transferees to undergo a new probationary period.

52. In order to transfer into the position, Miller was required to agree to a 13-month wage freeze. (Commission's Exhibit 4) It is undisputed that no male transferees were ever required to agree to a thirteen-month wage freeze.

53. Prior to seeing the November 7, 2002, letter, Miller had never heard of a "warehouse seniority list." Miller understood the phrase "scheduling and work assignments" to mean "whatever needed to be done." (Hr. Tr. Vol. I, at 57-58).

54. Miller did not know that the provisions in the letter would result in her placement at the top of the layoff list when she signed it. (Hr. Tr. Vol. I, at 58).

55. Miller was not happy with the probationary period, the salary freeze and the seniority issue. (Hr. Tr. Vol. I, at 56).

56. When Miller was told she must sign and agree to the terms of the November 7, 2002 letter, she reasonably presumed all employees had to sign such a letter and that she was following company policy for transfers. Miller signed the letter and returned it to Hamm. Miller told Hamm, and he admitted that she was not happy about signing the letter. (Hr. Tr. Vol. I, at 55-56, 59, 200).

57. Hamm was unaware of any new hire or transferee ever being given a letter

similar to the one Miller was required to sign before her transfer to the warehouse. (Hr. Tr. Vol. I, at 241-242).

58. Denise Gibson ("Gibson"), Human Resources Manager, admitted that she had never prepared a similar letter in her seven and one half years with Peoples Services . She also admitted that even newly hired employees did not get similar letters. (Hr. Tr. Vol. II, at 16, 18-19).

59. Shift Supervisor Loftis told Miller that "they shouldn't have done that. That's discriminatory, there's been no other employee that's come to the warehouse had to sign a letter like that." (Hr. Tr. Vol. I, at 63).

60. When Miller learned that no other warehouse employee was required to sign a similar letter she testified credibly that she felt "[c]heated and less of a person." (Hr. Tr. Vol. I, at 63).

61. Total Distribution has no written policies regarding the hire or transfer of employees. (Joint Stipulation No. 10)

62. Miller is the only female who has ever worked in Total Distribution's West Virginia warehouses. (See Joint Stipulation No. 2).

63. During Miller's employment with Total Distribution, all office personnel other than Terminal Manager Hamm was female. (Hr. Tr. Vol. I, at 69-70). None of the warehouse employees other than Miller were female.

64. Miller began working as a utility maintenance person in the Nitro warehouse on November 11, 2002. Her job initially consisted of stenciling and cleaning drums, garbage detail, sweeping the floor, receiving drums, bar coding and scanning. Miller used the forklift each shift. (Hr. Tr. Vol. I, at 59-60).

**TOTAL DISTRIBUTION'S DISCRIMINATORY USE OF
"WAREHOUSE SENIORITY" WITH REGARD TO LAYOFFS**

65. Total Distribution affirmatively indicated that "warehouse seniority" was the

basis for its personnel decisions. (Commission's Exhibit 11, p. 8, Answer to Interrogatory No. 18; Commission's Exhibit 18, p. 2, Answer to Investigatory Interrogatory No. 6).

66. On December 4, 2002 Miller discovered that Total Distribution intended to use her warehouse transfer date as her "warehouse seniority" date and shift to this newly-created date system for the purposes of determining layoffs. (Hr. Tr. Vol. I, at 63).

67. For all other employees in the Nitro warehouse, Total Distribution established a warehouse seniority date equivalent to the employee's full-time hire date with Total Distribution or Mayflower, whether the full-time position was in the Nitro warehouse, or as a truck driver in the Mayflower moving business or in the Charleston warehouse. For Miller, her "warehouse seniority" date was not her full-time employment date, but rather the date she transferred into the warehouse.

68. Miller was hired full time by Total Distribution on November 1, 1998. However, unlike each and every other employee, her "warehouse seniority" date was set as November 11, 2002, the date she transferred into the Nitro warehouse. (Commission's Exhibits 5 and 7)

69. Pauley became a full-time Nitro warehouse employee in January 2000. Pauley's "warehouse seniority" date was his full-time hire date of September 12, 1999, with the Mayflower moving business. (Hr. Tr. Vol. II, 20-22; Commission's Exhibit 9, p. 3, at Answer to Interrogatory No. 5; Commission's Exhibit 12).

70. Smith transferred into the Nitro warehouse in September 2002. Smith's "warehouse seniority" date was his full-time hire date of March 13, 2000, to the Charleston warehouse. (Hr. Tr. Vol. I, at 154-155; Commission's Exhibit 12).

71. Smith initially worked at the Charleston warehouse. When Smith transferred from Charleston to Nitro, he was not asked to sign any letters, he was not told he would be ineligible for a raise for 13 months, and he did not have to complete a new probationary period. (Hr. Tr. Vol. I, at 154-155, 158).

72. Smith was working in the Nitro warehouse when Miller transferred into the warehouse. (Hr. Tr. Vol. I, at 154-155).

73. Hamm assured Smith that Miller would be "beneath him" in terms of seniority. (Hr. Tr. Vol. I, at 156).

74. Hamm told Smith that Miller was causing problems because of Smith's transfer into the warehouse. Hamm also told Smith that Miller was promised a position in the warehouse. (Hr. Tr. Vol. I, at 156).

75. Smith testified that Miller was "pretty good" at her job. He testified that she "[h]elped me out a lot." (Hr. Tr. Vol. I, at 158).

76. Seldon "Ray" Norris was hired by Total Distribution as a full-time truck driver on June 14, 1999. He transferred into the Nitro warehouse on April 4, 2004. Norris' "warehouse seniority" date was June 14, 1999. (Commission's Exhibit 19, at Answer to Interrogatory No. 11).

77. By creating a new category of seniority - "warehouse seniority" - and by using the full-time hire date for every warehouse employee except Miller, Total Distribution developed a process that ensured that despite Miller's greater company seniority, the female warehouse worker would not be able to work while male employees were laid off. She would be the first employee subject to lay off in the Nitro warehouse.

78. On December 4, 2002, Miller was informed that she would need to call in to determine whether she was working on December 5, 2002. When she asked why, Miller was told it was because she was at the bottom of the warehouse seniority list. (Hr. Tr. Vol. I, at 64).

79. Miller called in on December 5, 2002, and was told to stay home because of lack of work. (Hr. Tr. Vol. I, at 67).

80. In terms of company seniority (full-time employment date of November 1, 1998), Miller is senior to Sparks (June 7, 1999), Pauley (September 12, 1999), Smith (March 12, 2000), Jordan (March 20, 2000) and Adkins (June 29, 2000). (Commission's Exhibit 12).

81. After losing a day of work (and pay) on December 5, 2002, Miller made a written complaint about it to Hamm, Gibson, Diane Neal ("Neal"), Stemple and Doug Sibila

concerning her seniority and the December 5, 2002, layoff. Miller mailed this complaint to Total Distribution's Canton, Ohio, Parkersburg and Nitro, West Virginia offices.

82. In the Complaint, Miller also mentioned that she was the only warehouse employee who was required to sign a letter like the November 7, 2002 letter before transferring into the warehouse. (Hr. Tr. Vol. I, at 65-66; Commission's Exhibit 6).

83. At the public hearing, Stemple, Hamm and Gibson did not dispute that Miller sent this complaint or that they received the complaint, and none offered testimony regarding their actions in response to receiving this complaint. It is undisputed that no one ever responded to Miller's written complaint. (Hr. Tr. Vol. I, at 68).

84. Miller was subsequently laid off December 15, 2002, through January 12, 2003; January 29, 2003, through March 22, 2003; and April 5, 2004, through the present. During these periods, persons with less company seniority remained working for Total Distribution in the Nitro warehouse. (Hr. Tr. Vol. I, at 76-78; Commission's Exhibits 9, 11 and 12; see also Joint Stipulation No. 4). Pauley and Sparks continued working during these periods of time, and Jordan, Smith and Adkins worked some of the time that Miller was laid off. (Commission's Exhibit 9). Only Miller and Jordan were subject to layoffs in 2004. To date, she has not been called back to work.

85. Miller was senior to Seldon Ray Norris, a truck driver transferred to the warehouse on the eve of Miller's April 2004 layoff. (Commission's Exhibit 19, at Answer to Interrogatory No. 11; Commission's Exhibit 12).

86. During Miller's layoffs in 2002 and 2003, she received low earnings slips from Total Distribution. (Hr. Tr. Vol. I, at 81-82).

87. Until Miller moved into the warehouse, layoffs were done strictly on the basis of company seniority (full-time hire date), not "warehouse seniority" (full-time hire date for all employees except Debbie Miller). (Hr. Tr. Vol. I, at 74-75, 120, 126, 146, 198, 243).

88. No other employee in the Nitro warehouse who worked full time for Total Distribution prior to transferring to the Nitro warehouse has ever had his transfer date, if different from his full-time employment date, used for the purposes of layoff decisions. (Hr.

Tr. Vol. I, at 75).

89. Timothy Ray Womack was first hired by Total Distribution in 1994 for the Charleston warehouse location. He accepted a transfer to Nitro in 1996 with a 1994 seniority date. He was not required to sign any letters. (Hr. Tr. Vol. I, at 144).

90. Other than with regard to Miller, Womack could not recall any other occasion where Total Distribution used any date other than the employee's original seniority date for the purpose of layoffs. (Hr. Tr. Vol. I, at 146).

REPRISAL DOCKET NO. EREP-406-04

91. On December 15, 2003, the West Virginia Human Rights Commission issued a Letter of Determination with regard to Miller's sex discrimination complaint, Docket No. ES-289-03, finding probable cause to believe discrimination had occurred. (Commission's Exhibit 24).

92. On or about March 29, 2004, Hamm approached Miller when she arrived for the evening shift and told her that Neal, Total Distribution's in-house counsel, was going to come to Nitro to speak with her co-workers about the HRC complaint. Hamm told Miller that her co-workers were going to be told about her complaint and that Neal might want Miller there. Hamm also mentioned that the Commission had requested contact information for Miller's co-workers. (Hr. Tr. Vol. I, at 86-88).

93. Miller credibly testified that after the meeting with Hamm, she felt "violated." Miller testified: "[m]aybe that they were trying to come down and sway the employees to maybe turn against me to where they wouldn't keep an open mind, to where I'd be treated differently in the workplace." (Hr. Tr. Vol. I, at 89).

94. In response to a March 31, 2004 letter, sent by Commission's counsel; counsel for Total Distribution sent a reply. In that letter, it characterized the proposed meeting as addressing "Miller's right to pursue her claim and the company's expectation that employees refrain from any conduct toward Miller that might be considered harassing."

(Compare Commission's Exhibits 15 and 17).

95. Total Distribution informed the Commission that it had determined to "refrain from addressing this matter with the employees at this time." (Commission's Exhibit 17).

96. Vice President of Operations Stemple testified that Neal and Gibson made the decision to meet with employees at Nitro about Miller's complaint. His testimony indicates he agreed to the plan. (Hr. Tr. Vol. I, at Vol. II, 46).

97. Gibson testified that she was not involved in any conversations associated with Total Distribution's intent to speak with employees in Nitro concerning Miller's claims, and that she never saw, either prior to or after Miller's complaints, the document entitled "Script -- discussion with TDI staff re Debbie Miller complaint." (Commission's Exhibit 15; Hr. Tr. Vol. II, at 24-25).

98. Gibson credibly testified that she was informed shortly before the meeting that Neal intended to meet with the employees. Neal did go through with a meeting in Nitro. (Hr. Tr. Vol. II, at 25-26)

99. Total Distribution provided the Commission with a document prepared by Neal purporting to be a script that was to be read to Total Distribution's Nitro, West Virginia, employees in late March 2004. Gibson credibly testified that Neal had discussions with supervisory employees Randy Hodges and Bob Loftis, but it is unclear from the record whether Neal met with Nitro warehouse employees. (Hr. Tr. Vol. II at 30).

100. Four days after Hamm told Miller about the planned session with her co-workers, correspondence between the parties' counsel, Miller was laid off from her employment. This testimony is undisputed. (Hr. Tr. Vol. I, at 90-91; 223).

101. Miller learned about her layoff from a co-worker in the warehouse named Duane Shue. Miller called Hamm on his cell phone during her lunch break and asked if she was to be laid off. Hamm confirmed the layoff. (Hr. Tr. Vol. I, at 91-93).

102. After the conversation with Hamm, Miller spoke with her Shift Supervisor, Loftis. He told her he was aware of the layoff and that Hamm was supposed to have told her. (Hr. Tr. Vol. I, at 93-94).

103. Miller credibly testified that when she learned of her layoff from Duane Shue, it made her feel like she was not "part of the company." (Hr. Tr. Vol. I, at 95).

104. Total Distribution asserted that a downturn in business, specifically the closing of Building 131, resulted in the layoffs. (Commission's Exhibit 18).

105. Total Distribution's own numbers showed that Total Distribution's inbound drums in April, May, and June 2004 were comparable or greater than the inbound drums for January, February and March. Miller worked January through March and was laid off beginning in April 2004:

2004 Month	Total inbound	Average inbound	Complainant work status
January	21424	1020	working
February	20383	1019	working
March	25780	1121	working
April	21049	957	laid off 4/5/04
May	22022	1101	laid off
June	24725	1124	laid off

(Total Distribution's Exhibit 3 and 10)

106. Miller asked Hamm if her layoff was permanent. Hamm told her that he did not know. (Hr. Tr. Vol. I, at 96-97). Miller has not been called back to work.

107. On or about April 2004 layoff, Smith was transferred back to the Charleston warehouse from the Nitro warehouse. When Smith asked Hamm about Miller's layoff, Hamm replied that Miller would not be back and that Smith had the lowest seniority. (Hr. Tr. Vol. I, at 157).

108. Smith resigned his employment with Total Distribution in August 2004. He was not laid off in June, July or August. (Hr. Tr. Vol. I, at 248). Miller was not offered the position vacated by Mr. Smith.

109. Other employees with less company seniority than Miller continued to work.

DAMAGES

110. The Nitro warehouse runs two 8-hour shifts, Monday through Friday, for

40-hour work weeks. (Hr. Tr. Vol. II, at 19).

111. Miller's hourly wage history with Total Distribution is as follows:

Effective Date	Hourly Rate
prior to November 11, 2002	\$9.30
November 11, 2002	\$11.61
March 2003	\$11.85
March 2004	\$12.85

(Joint Stipulation No. 3).

112. Persons who work less than 10 days or 80 hours in a month do not receive health care coverage for that month. Company policy provides as follows:

In the event of a temporary layoff, the Company will continue to pay its portion for an employee's health insurance coverage for those employees who work a minimum of 10 days/80 hours during the month, with the employee being responsible for his/her contribution portion. In a month in which an employee works less than 10 days/80 hours or has been put on indefinite layoff, the Company will not contribute its portion of the insurance premium and the employee will then be eligible to continue their coverage through COBRA.

(Commission's Exhibit 10, p. 12, Section 10.1.2.2).

113. In 2002, the cost to Total Distribution of providing benefits to Miller was \$6.48 per month. In 2003, the cost to Total Distribution of providing benefits to Miller was \$317.60 per month. In 2004, the cost to Total Distribution of providing benefits to Miller was \$346.68 per month. (Joint Stipulations Nos. 5-7).

114. Miller has not been employed nor had medical coverage or life insurance since April 2, 2004. (Hr. Tr. Vol. I, at 104; 80-81).

115. Miller was laid off and not terminated. She has made reasonable efforts to mitigate her damages by seeking other employment. Miller looked for work every week after her April 5, 2004, layoff. She'd look in the newspaper, on the computer and on the internet. (Hr. Tr. Vol. I, at 137). Miller contacted companies, including warehousing businesses such as Pepsi, Coca Cola and Jefferds. Where applications were being taken, Miller submitted applications to businesses, including grocery stores and restaurants. (Hr.

Tr. Vol. I, at 105-106).

116. In June 2004 Total Distribution offered Miller a job located at the DuPont Plant in Belle, West Virginia, which involved driving tractor trailers. Miller declined that placement, as she had no CDL license and was told that she would have to obtain a CDL license to maintain the job. Miller resides 50 miles from the DuPont Plant in Belle. Miller lives 13.6 miles from Total Distribution's Nitro warehouse. (Hr. Tr. Vol. I, at 106-107, 109).

117. The DuPont job is primarily a truck driving job. Miller did not drive trucks in the Nitro warehouse. (Hr. Tr. Vol. I, at 247-248).

118. In June or July 2004, Hamm told Miller that Total Distribution was no longer issuing low earnings slips. This is because of Miller's refusal to accept the DuPont In-Plant Utility position. (Hr. Tr. Vol. I, at 98-99; 247).

119. The West Virginia Bureau of Employment Programs declined to disqualify Miller from receiving unemployment compensation benefits related to her decision not to accept the In-Plant Utility position. (Commission's Exhibit 23).

120. Miller has refused no work, other than the DuPont Plant position offered by Total Distribution, since her April 2004 layoff. (Hr. Tr. Vol. I, at 105-106).

121. Miller has made reasonable efforts to mitigate. (Hr. Tr. Vol. I, at 105-106, 137).

122. As a result of the discriminatory actions of Total Distribution, in addition to lost wages, Miller suffered embarrassment, humiliation and mental distress to such an extent that she would be entitled to recover the maximum amount allowed of incidental damages allowed by law.

123. Miller has a separate and distinct claim for incidental damages with respect to each of her Human Rights Act complaints.

IV.

DISCUSSION

A. THE WEST VIRGINIA HUMAN RIGHTS ACT PROHIBITS AN EMPLOYER FROM DENYING AN EMPLOYEE EQUAL OPPORTUNITY BECAUSE OF SEX.

In West Virginia, equal opportunity for employment is a human and civil right. The denial of equal opportunity in employment by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability and/or familial status "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." W. Va. Code § 5-11-2.

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. W. Va. Code §§ 5-11-1 to -21. Section 5-11-9(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment"

The term "discriminate" or "discrimination" as defined in W. Va. Code § 5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, [or] age. . . ." This includes equal opportunity with regard to hiring decisions. W. Va. Code § 5-11-9.

Given this statutory framework, to recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful discrimination, or the Commission acting on her behalf, must ultimately show by a preponderance of the evidence that:

- (1) the employer excluded her from, or failed or refused to extend to her, an equal opportunity; and
- (2) that one or more impermissible reasons were a motivating or substantial factor causing the employer to exclude the Complainant from, or fail or refuse to extend to her, an equal opportunity, Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L.

Ed. 2d 268 (1989); and

(3) the equal opportunity denied a Complainant is related to any one of the following employment factors: compensation, hire, promotion, tenure, terms, conditions or privileges of employment.

A discrimination case may be proved on a disparate treatment theory. See Barefoot v. Sundale Nursing Home, Syl. pt. 6, 193 W. Va. 475, 457 S.E.2d 152 (1995); West Virginia University v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994); Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission, 181 W. Va. 251, 382 S.E.2d 88 (1989). A disparate treatment case requires proof (at least inferential proof) of discriminatory intent. Discriminatory intent may be established by showing that the decision maker acted out of stereotypical thinking, such as gender stereotypes, and need not involve some type of malice or hatred.

Two different analyses apply in evaluating the evidence in a disparate treatment discrimination case. The first, and most common, uses circumstantial evidence to prove discriminatory motive. Since those who discriminate usually hide their biases and stereotypes, making direct evidence unavailable, a Complainant may show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and adopted by our Supreme Court in Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983). See Barefoot, 457 S.E.2d at 169 n.19. The McDonnell Douglas method requires that the Complainant or Commission first establish a prima facie case of discrimination. The burden of production then shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the Complainant or the Commission may show that the reason proffered by the Respondent was not the true reason for the employment decision, but rather a pretext for discrimination.

Cases analyzed under the McDonnell Douglas test often turn on the credibility of the explanation offered by the Total Distribution for its decision. The term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive

assigned as a color or cover for the real reason or motive; false appearance; pretense." West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 531, 383 S.E.2d 490, 496 (1989), *citing* Black's Law Dictionary, 1069 (5th ed. 1979). A proffered reason is pretext if it is not "the true reason for the decision." Conaway v. Eastern Associated Coal Corp., 174 W. Va. 164, 171, 358 S.E.2d 423, 430 (1986). "Pretext may be shown through direct or circumstantial evidence of falsity or discrimination." Barefoot, 457 S.E.2d at 160. Where pretext is shown, discrimination may be inferred, Barefoot, 457 S.E.2d at 164 n.19, though discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); Skaggs v. Elk Run Coal Co., Inc., 198 W. Va. 51, 479 S.E.2d 561 (1996).

Second, there is the "mixed motive" analysis. This analysis may also work with circumstantial evidence; the difference is that here the pretext aspects of the McDonnell Douglas analysis are not applicable. Where an articulated legitimate, nondiscriminatory motive is shown by the Respondent to be non-pretextual, but is in fact a true motivating factor in an adverse action, a Complainant may still prevail under the "mixed motive" analysis. This analysis flows from the legal requirement that employment decisions must not be motivated, even in part, by illicit discriminatory motives.

The mixed motive analysis was established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), and subsequently recognized by the West Virginia Supreme Court of Appeals. Skaggs, 479 S.E.2d at 584-585; *see also* West Virginia Tech, 383 S.E.2d at 496-497. If the trier of fact is convinced that the Complainant's protected status played some role in the decision, the Respondent can avoid liability only by proving that it would have made the same decision even if it had not considered the Complainant's sex. Barefoot, 457 S.E.2d at 162 n.16, 457 S.E.2d at 164 n.18; Skaggs, at Syl. pt. 6.

The Commission, by proving a prima facie case as set out in Conaway v. Eastern Associated Coal Corp., 174 W. Va. 164, 171, 358 S.E.2d 423, 430 (1986), has shown that the employment decision was motivated at least in part by such an unlawful motive. Total

Distribution has the burden of proving that it would have taken the same steps in the transfer process, and would have established the same warehouse seniority date for Miller, even in the absence of consideration of her sex.

Total Distribution cannot carry this burden. Therefore, the Commission and the Complainant prevail.

If it is available, a Complainant or the Commission may also prove a disparate treatment claim by direct evidence of discriminatory intent. Proof of this type shifts the burden to the Respondent to prove by a preponderance of the evidence that it would have acted similarly even if it had not considered the illicit reason. Trans World Airlines v. Thurston, 469 U.S. 111, 36 Fair Empl. Prac. Cas. 977 (1985). This analysis is similar to that used in mixed motive cases.

In this case, the Commission's disparate treatment case can be analyzed under both the McDonnell Douglas and Price Waterhouse formulas.

1. THE COMMISSION ESTABLISHED A PRIMA FACIE CASE THAT MILLER WAS SUBJECTED TO DISPARATE TERMS AND CONDITIONS OF EMPLOYMENT BECAUSE OF HER SEX.

Miller established, through circumstantial evidence, a prima facie case of sex discrimination. Establishment of a prima facie case raises an inference that the Respondent has discriminated against Complainant on the basis of an impermissible motive or motives. Barefoot, at Syl. pt. 6.

In sustaining the prima facie burden, "a complainant raises an inference of discrimination through direct or circumstantial evidence because we presume the acts complained about, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." O.J. White Transfer & Storage Co. v. West Virginia Human Rights Commission, 181 W. Va. 519, 522, 383 S.E.2d 323, 326 (1989), *citing* Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). The rationale supporting this inference has been that "people do not act in a totally arbitrary manner, without any

underlying reasons, especially in a business setting . . . " Furnco, 438 U.S. at 577.

In Conaway v. Eastern Associated Coal Corp., 178 W. Va. 164, 358 S.E.2d 423 (1986), the West Virginia Supreme Court articulated a three-part prima facie test for employment discrimination.

In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. (1979), the plaintiff must offer proof of the following:

- (1) That the plaintiff is a member of a protected class;
- (2) That the employer made an adverse decision concerning the plaintiff;
- (3) But for the plaintiff's protected status, the adverse decision would not have been made.

Conaway, 358 S.E.2d at 429; Kanawha Valley Regional Transportation Authority v. West Virginia Human Rights Commission, 181 W. Va. 675, 383 S.E.2d 857, 860 (1989).

Criterion number three (3) of this formulation, inappropriately labeled the "but for" test, is merely a threshold inquiry, requiring only that a plaintiff show an inference of discrimination. Barefoot, at Syl. pt. 2; see also Powell v. Wyoming Cablevision, Inc., 184 W. Va. 700, 704-705, 403 S.E.2d 717, 721-722 (1991); Holbrook v. Poole Associates, Inc., 184 W. Va. 428, 400 S.E.2d 863 (1990); West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 529-530, 383 S.E.2d 490, 494-495 (1989). It is now very clear that it was not the intent of the West Virginia Supreme Court to tighten the standard beyond the earlier formulations of the test. Barefoot, 457 S.E.2d at 161. See also Kanawha Valley Regional Transportation Authority v. West Virginia Human Rights Commission, 181 W. Va. 675, 383 S.E.2d 857 (1989). There the Court said:

However, it is clear that our formulation in Conaway was not intended to create a more narrow standard of analysis in discrimination cases than is undertaken in the federal courts. This is manifested by our reliance on applicable federal cases as illustrated by West Virginia Institute of Technology v. West Virginia Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490, 495 (1989), where we cited a number of federal cases and described the type of evidence required to make a Conaway prima facie case:

[B]ecause discrimination is essentially an element of the mind, there will normally be very little, if any, direct evidence available. Direct evidence is not, however, necessary. What is required of the complainant is to show some circumstantial evidence which would sufficiently link the employer's decision and the complainant's status as a member of a protected class so as to give rise to an inference that the employment related decision was based upon an unlawful discriminatory criterion.

KVRTA, 383 S.E.2d at 860 (Emphasis supplied); see also Holbrook v. Poole Associates, 184 W. Va. 428, 400 S.E.2d 863 (1990); West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 383 S.E.2d 490, 494-495 (1989).

The prima facie case "is designed to allow a plaintiff with only minimal facts to smoke out a defendant--who is in control of most of the facts--and force it to come forward with some explanation for its action." Barefoot, 457 S.E.2d at 162.

**a. Miller is a member of a protected class.
W.Va. Code § 5-11-1 et seq.**

The evidence in the record establishes a prima facie case of sex discrimination. First, Miller is female and a member of a protected class.

b. Total Distribution made an adverse decision concerning Miller

Second, Total Distribution made adverse decisions regarding Miller's employment. Miller requested a transfer to the Nitro warehouse for years. She was offered a position in the Nitro warehouse as a utility maintenance clerk in November 2002. (Hr. Tr. Vol. I, at 53). However, Total Distribution attached unreasonable conditions to the offer designed either to ensure that Miller did not accept the position or that she did not have the power to affect the availability of work for male warehouse employees.

On November 7, 2002, Hamm gave Miller a letter offering her a position in the warehouse. The letter contained several provisions including a new probation period. At the time Miller received the written offer she had completed her probation period.

The evidence in the record revealed that male employees were hired and transferred

into the warehouse regularly and that they were not required to sign letters with terms and conditions like the one Miller was made to sign. If Miller had not signed the letter, she would have had the job. The letter was Total Distribution's way of protecting the seniority of the male warehouse employees, ensuring that Miller would have the lowest tenure in the warehouse and discouraging her from taking the job. These provisions of employment in the letter were harsh, and blatantly discriminatory. Total Distribution's actions toward Miller are a violation of the West Virginia Human Rights Act.

With regards to the probation provision in the letter; the only explanation of probation employment in Total Distribution's Employee Handbook deals with the first 60 days of full-time employment with the Company. There is no provision in the Employee Handbook that establishes the use of a probation period in any other context. (Commission's Exhibit 10, p. 12, Section 10.1.2.1).

Despite Total Distribution's policy, which does not discuss probation periods for any employees other than new hires, Total Distribution required Miller to agree to a new probation period in order to transfer to the warehouse. (Commission's Exhibit No. 5). It is undisputed that Total Distribution never required male transferees to undergo a new probation period.

In addition, Miller was required to agree to a 13-month wage freeze. (Commission's Exhibit 5). It is undisputed that male transferees were not required to agree to a 13-month wage freeze. (Hr. Tr. Vol. I, at 241-242).

Total Distribution argues that it did not, in fact, follow through with the wage freeze and that Miller did receive a wage increase in March 2003. However, the West Virginia Human Rights Commission issued a Notice of Discrimination Complaint to Total Distribution on February 24, 2003 related to Miller's sex discrimination complaint. (Commission's Exhibit 2). Even if Total Distribution declined to follow through with a wage freeze, Miller had to agree to the freeze to move to the warehouse. The fact that she had to agree to a wage freeze and male warehouse employees did not, is in and of itself discriminatory.

Miller reasonably presumed that she must sign the letter, that it was mandatory for

all employees and was company policy for transfers. Miller had no idea that the company intended to use the letter to place her at the top of the layoff list when she signed it. (Hr. Tr. Vol. I, at 57-58). Clearly, Total Distribution did not follow its own Personnel Policies when it came to transferring Miller to the warehouse.

Miller began working as a utility maintenance person in the Nitro warehouse on November 11, 2002. On December 4, 2002, Miller discovered that Total Distribution intended to use her warehouse transfer date as her "warehouse seniority" date and shift to this newly-created date system for the purposes of effectuating layoffs. (Hr. Tr. Vol. I, at 63). For male employees in the Nitro warehouse, however, Total Distribution established a warehouse seniority date equivalent to the employees' full-time hire date, whether the full-time position was in the Nitro warehouse or as a truck driver in the Mayflower moving business or in the Charleston warehouse. Miller's "warehouse seniority" date was not her full-time employment date, but rather the date she transferred into the warehouse.

By creating a new category of seniority called "warehouse seniority" only for Miller and by using the full-time hire date for all male warehouse employees, Total Distribution developed a process which ensured that despite Miller's greater company seniority, she would be laid off before any of the male employees who were in the warehouse when she was transferred, were laid off. She would be the first employee subject to a layoff in the Nitro warehouse. The substantial weight of evidence in the record support a finding that the seniority decision was made because of Miller's sex.

On December 5, 2002, Miller was told to stay home because of lack of work. (Hr. Tr. Vol. I, at 67). Miller was subsequently laid off December 15, 2002, through January 12, 2003; January 29, 2003, through March 22, 2003; and April 5, 2004, through the present. (Joint Stipulation No. 4).

Total Distribution does not have a written layoff policy, and could not adequately describe its practice. Total Distribution suggested that factors other than seniority contribute to its layoff decisions. However, with regard to the layoff decisions in Miller's case, Total Distribution affirmatively indicated that "warehouse seniority" was the basis for

its decisions. (Commission's Exhibit 11, p. 8, Answer to Interrogatory No.18; Commission's Exhibit 18, p. 2, Answer to Interrogatory No. 6).

Total Distribution unquestionably took adverse action with regard to Miller by requiring Miller to accept conditions to the transfer no male employees were required to accept, punitively used Miller's transfer date for layoff purposes when it used the full-time hire dates for male employees, and laid Miller off from work in 2002, 2003 and 2004. When Miller learned that no other warehouse employee was required to sign a similar letter she felt cheated and "less than a person." (Hr. Tr. Vol. I, at 63).

c. But for Miller's protected status, the adverse decision would not have been made.

Miller has also satisfied the third prong of the prima facie test. Because of her sex, Total Distribution took the identified adverse actions against Miller. Miller first expressed her interest in moving to the warehouse in 1998. She spoke with then Terminal Manager Jim Wehrle on several different occasions. Specifically, Miller indicated that if a job came open in the warehouse, she would like to be considered for it. (Hr. Tr. Vol. I, at 40-41). The record evidence revealed that Wehrle took no action on her request. (Hr. Tr. Vol. I, at 42).

From 1998 forward, Miller expressed her desire to move to the warehouse to every management employee in the chain of command for the Nitro warehouse, including managers at the Nitro location such as Loftis, Hodges, Wehrle, Hamm, and upper management based in Parkersburg and Ohio such as Stemple, Doug Sibila and Ron Sibila. (Hr. Tr. Vol. I, at 43).

Miller credibly testified that on several different occasions she asked Hodges, Day Shift Operations Supervisor, if he could possibly talk to his supervisors about her interest in moving to the warehouse. Hodges replied that he would see what he could do. (Hr. Tr. Vol. I, at 44-45).

Forklift certification was required to operate the forklift in the warehouse. Miller signed up for and successfully completed Total Distribution's forklift operation qualification training program in the summer of 2000, more than two years before she was able to transfer to the Nitro warehouse. The training involved video instruction, testing and forklift

operation. Miller gave up a Saturday for the training, after being informed by the company that she could attend, but would not be paid for the training session. (Hr. Tr. Vol. I, at 45-46). Miller initially completed forklift training and received her forklift certification on July 8, 2000. (Hr. Tr. Vol. I, at 45-46; Commission's Exhibit 11, Exhibit B to Respondent's Responses to Interrogatories).

After Total Distribution ignored Miller's initial requests to move into the warehouse, Miller expressed her interest to the Owner and Vice President of the company when they visited the Nitro plant in the summer of 2001. Miller told Doug and Ron Sibila that she believed she was qualified to work in the warehouse, mentioned that she had successfully completed the forklift training and indicated that she would like to be considered for any opening in the warehouse. (Hr. Tr. Vol. I, at 48-49).

Miller credibly testified that the Sibilas did not respond to her interest in moving into the Nitro warehouse. (Hr. Tr. Vol. I, at 48). This testimony is undisputed in the record. Shortly after her meeting with the Sibilas, Miller followed up with a letter to Doug Sibilla thanking the Sibilas for speaking with her and reiterating her interest in moving to the warehouse. (Hr. Tr. Vol. I, at 47; Commission's Exhibit 4). Miller wrote the letter because she wanted the position. (Hr. Tr. Vol. I, at 48). It is undisputed that Doug Sibila never responded to the Complainant's letter. (Hr. Tr. Vol. I, at 49).

In addition, the fact that the "warehouse seniority" system, as opposed to company seniority, was specifically created to deal with Miller's transfer and to ensure that she would be subjected to layoff before any male employees would be laid off is discriminatory because of her sex.

Until Miller moved into the warehouse, layoffs were done strictly on the basis of company seniority (full-time hire date), not "warehouse seniority" (full-time hire date for all employees except Debbie Miller). (Hr. Tr. Vol. I, at 74-75, 120, 126, 146, 198, 243). Every other employee in the Nitro warehouse is male. For each of the male employees, Total Distribution established his full-time hire date as his "warehouse seniority" date. (Commission's Exhibits 9 and 12). Miller is the only employee who has ever had her

transfer date, rather than her full-time hire date, used for layoff purposes. Pauley became a full-time Nitro warehouse employee in January 2000. Pauley's "warehouse seniority" date was his full-time hire date of September 12, 1999, with the Mayflower moving business. (Hr. Tr. Vol. II, at 20-22; Commission's Exhibit 9, at Answer to Interrogatory No. 5; Commission's Exhibit 12).

Total Distribution first hired Timothy Womack in 1994 for the Charleston warehouse location. He was offered a transfer to Nitro in 1996. Womack was not required to sign any letters, and he kept his company hire date as his seniority date. (Hr. Tr. Vol. I, at 144). When Mr. Womack transferred into the Nitro warehouse, he was not told he would be ineligible for a raise for 13 months. He did not recall being placed on a second probationary employment period and he did not lose his company seniority for purposes of layoff. (Hr. Tr. Vol. I, at 149). Despite Womack's 10 years of working for Total Distribution at two different locations, he did not understand there to be any difference between an employee's company seniority and warehouse seniority dates. (Hr. Tr. Vol. I, at 145).

Smith transferred to the Nitro warehouse in September 2002. Smith's "warehouse seniority" date was his full-time hire date of March 13, 2000, to the Charleston warehouse. (Hr. Tr. Vol. I, at 154-155; Commission's Exhibit 12). Smith was not asked to sign any letters. He was not told he would be ineligible for a raise in 13 months, and he did not have to complete a new probation period. (Hr. Tr. Vol. I, at 154-155, 158).

Total Distribution hired Seldon "Ray" Norris as a full-time truck driver on June 14, 1999. He transferred into the Nitro warehouse on April 4, 2004. Norris' "warehouse seniority" date was June 14, 1999. (Commission's Exhibit 19, at Answer to Interrogatory No. 11).

During the periods of Miller's layoffs, men with less company seniority remained working for Total Distribution in the Nitro warehouse. (Hr. Tr. Vol. I, at 76-78; Commission's Exhibits 9, 11 and 12; see also Joint Stipulation No. 4). In every instance, had Total Distribution used Miller's company seniority, as it did with every other employee, she would not have been subject to layoff.

Miller also spoke with Terminal Manager Hamm about her interest in moving into the warehouse. Miller not only asked Hamm to be placed in the warehouse, she also spoke with him when men were moved into the warehouse. (Hr. Tr. Vol. I, at 50).

It is undisputed that Total Distribution did not ask Miller to fill out an application. Miller finally put her request in writing because she "thought maybe if nothing else worked, maybe that would." (Hr. Tr. Vol. I, at 135-136).

The only requirement for working in the Nitro warehouse was forklift certification. (Hr. Tr. Vol. I, at 228). Apparently, completion of forklift certification was not even required prior to being hired, as Smith undertook his forklift certification after he was hired by Total Distribution and began working full-time in the Charleston warehouse. Smith completed his forklift training more than two weeks after he was hired to work in the Kanawha City warehouse. (Commission's Exhibit 11, Exhibit B to Respondent's Responses to Interrogatories; Commission's Exhibit 12). Therefore, Miller was at least minimally qualified to work in the warehouse before she obtained forklift training in July 2000.

Hodges hired or transferred six men in Total Distribution's Nitro warehouse after Miller first expressed interest in a warehouse position. They were Brian Robert Sparks, Pauley, Donnie Jordan, John Smith, William Arthur and Rodney Adkins, all of whom are male. (Hr. Tr. Vol. I, at 51; Commission's Exhibit 12). Two were hired or transferred as utility maintenance workers. One of these positions was offered to Miller in November 2002. (Commission's Exhibit 12).

Randy Hodges admittedly did not consider Miller for any of the six positions filled between 1998 and November 2002. It was not until after Miller threatened legal action that she was offered a transfer into the warehouse. In response, Stemple said he would look into it. Stemple testified that he could not dispute that this conversation occurred in October 2002. (Hr. Tr. Vol. II, at 48). Shortly after her October 2002 conversation with Stemple, Miller was offered a position in the Nitro warehouse as a utility maintenance clerk. (Hr. Tr. Vol. I, at 53). These facts raise the inference that gender directed Total Distribution's adverse actions with regard to Miller.

The inference of sex discrimination is also supported by the testimony of Miller's former co-workers, Timothy Womack and John Smith.

When Womack, credibly testified he could not recall any other occasion Total Distribution used any date other than company seniority date for the purpose of layoffs. (Hr. Tr. Vol. I, at 146). Womack did not believe Total Distribution treated Miller fair regarding her layoff. (Hr. Tr. Vol. I, at 149).

John Smith credibly testified that Hamm told him that Miller was causing problems because Miller wanted to transfer into the Nitro warehouse. Hamm also told Smith that Miller was promised a position in the warehouse. (Hr. Tr. Vol. I, at 156). When Miller moved into the Nitro warehouse, Hamm assured Smith that Miller would be "beneath him" in terms of seniority. (Hr. Tr. Vol. I, at 156).

Total Distribution's actions against Miller were discriminatory and this constituted violations of the West Virginia Human Rights Act. Total Distribution's offer letter to Miller contained terms and restrictions male employees were not subject to, and adversely affected her seniority in ways that the seniority of male employees were not. Had Total Distribution not considered Miller's gender and created a new category of seniority that punitively placed Miller at the top of the layoff list, she would not have been subject to layoff on any of the occasions that Total Distribution did, in fact, lay her off.

The Commission and the Complainant met their burden of establishing a prima facie case of discrimination. Miller is female; Total Distribution selected an adverse "warehouse seniority" date for Miller and laid her off from employment in 2002, 2003 and 2004; and Total Distribution took the adverse actions because Miller is a woman.

2. TOTAL DISTRIBUTION HAS ARTICULATED LEGITIMATE, NONDISCRIMINATORY REASONS FOR ITS SENIORITY DECISION.

Even if the Commission and the Complainant establish a prima facie case, Total Distribution may still avoid liability if it articulates a legitimate, nondiscriminatory defense. The establishment of a prima facie case creates a "presumption that the employer

unlawfully discriminated against" the Complainant. Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342, 352 (1983). "[T]he burden then shift[s] to the defendant . . . to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254.

The burden on Total Distribution under this test is one of production, not persuasion. Total Distribution "must clearly set forth through the introduction of admissible evidence the reason for the [complainant's] rejection." Id. at 254. The employer's stated reason should "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Id. at 255-256. The explanation provided "must be clearly and reasonably specific," id. at 258, "must be legally sufficient to justify a judgment for the defendant," and it must be both legitimate and nondiscriminatory. Id. at 254.

With regard to Total Distribution's decision to require Miller to sign and agree to the November 7, 2002, letter, Total Distribution provided the following legitimate, nondiscriminatory reasons in its Statement of Position: (1) Total Distribution had never dealt with a situation where an administrative employee transferred into an operational position before Miller and wanted to be "straightforward and fair;" and (2) Total Distribution did not want an administrative employee to be in a position to "bump" persons already employed in the warehouse. (Commission's Exhibit 7). At the public hearing testimony, Gibson and Hamm indicated that the purpose of the letter was to document the situation. (Hr. Tr. Vol. I, at 200; Hr. Tr. Vol. II, at 16).

The legitimate, nondiscriminatory reasons Total Distribution provided for creating the warehouse seniority system and using Miller's transfer date for purposes of layoff are similar to the reasons Total Distribution gave for requiring Miller to sign the letter. Total Distribution asserted that it did not believe Miller, who was transferring from an administrative position, should be in a position to "bump" or affect the layoff status of

persons already working in the warehouse. (Commission's Exhibits 7; 9 at p. 2, p. 3; and 11 at p. 3, p. 6). Total Distribution wanted to ensure that existing warehouse workers (who are all male) would be retained ahead of Miller in the event of a layoff. Furthermore Total Distribution's reason for having Miller's seniority on her transfer date is two-fold: concern about fairness to the existing work force and the need to retain experienced workers in the event of a layoff. (Respondent's Reply Brief to Commission's Proposed Findings of Fact, Conclusions of Law and Memorandum of Law). At the public hearing, Hamm suggested that the rationale for adopting Miller's transfer date as her seniority date was because this was a unique situation and because Miller lacked forklift qualification when she moved into the warehouse. (Hr. Tr. Vol. I, at 195-196). But this testimony is not credible because Miller was forklift certified prior to moving into the warehouse.

Gibson testified that she believed the seniority decision was made on the basis of fairness to other warehouse employees. Stemple alleged in his testimony that another Peoples Services company had implemented similar seniority policies in three instances in Parkersburg when administrative or supervisory employees moved into the warehouse. However, Gibson and Stemple's testimonies in this regard are not credible. The reason offered by Total Distribution are pretextual.

3. THE LEGITIMATE, NONDISCRIMINATORY REASONS WHICH THE TOTAL DISTRIBUTION ARTICULATED ARE PRETEXTUAL.

Even if Total Distribution can articulate a legitimate, nondiscriminatory reason for its rejection of Miller, the Commission and the Complainant may still prevail if they establish that the articulated reason is pretext.

The record establishes that the alleged reasons for Total Distribution's failure to transfer Miller are pretextual.

First, the evidence in the record taken as a whole, substantiates the following. Miller tried for years to get a transfer to the Nitro warehouse. Second, she spoke to all her

supervisors, everyone in the chain of supervision, including the Sibilas, who are the owner and the president of Total Distribution. They ignored her requests. Miller's statements in this regard were not denied. Hodges and Hamm admitted that she spoke to them about a transfer.

Third, Miller was approved to take forklift certification and actually became certified so that she would be eligible to work in the Nitro warehouse. Fourth, Total Distribution did not follow its own personnel policies when Miller transferred to the warehouse. The evidence in the record support a finding that no male warehouse employees were required to sign a letter that required them to have a new hire date for purposes of seniority in the warehouse, a new probation period, a wage freeze and be subjected to lay off provisions that ensured the continued employment and seniority of every male employee in the warehouse and that would result in Miller being the first person laid off if and when lay offs in the warehouse occurred. Fifth, When Miller lost a day of work and pay under the discriminatory lay off policy, she sent a written complaint to Stemple, Gibson, Neal, Hamm and Don Sibila. She mailed her complaint to Total Distribution offices in Canton, Ohio; Parkersburg and Nitro, West Virginia. Miller's complaint was directed to Corporate Counsel and the Human Resources Manager. But Miller never received any response from Total Distribution. At the public hearing, Stemple, Hamm and Gibson did not deny that Miller forwarded the complaint to them or that they received the complaint and did not respond to the complaint. (Hr. Tr. I, at 68).

Sixth, Total Distribution retaliated against Miller for filing a sex discrimination complaint with the West Virginia Human Rights Commission. Hamm, Gibson, Neal and Stemple were all aware of Miller's April 2, 2004 discrimination complaint. Neal prepared the Statement of Position submitted to the Commission shortly after the Complaint was filed. (Commission's Exhibit 7). Gibson participated in providing investigatory responses to the Commission, and was aware that Neal intended to speak with Nitro employees about the complaint. (Commission's Exhibit 9; Hr. Tr. Vol. II, at 24-25). As of March 2004, Stemple was aware that Neal intended to speak with the Nitro warehouse employees about

the complaint. (Hr. Tr. Vol. II, at 46).

Seventh, new hires into Total Distribution's company or any Peoples Services company were not presented with letters to sign like the one given to Miller. (Hr. Tr. Vol. I at 241-242, (Hr. Tr. Vol. II at 16, 18-19.)). Loftis, Miller's Shift Supervisor, credibly testified at the public hearing that no other male warehouse employees signed a letter like the one Miller signed in order to be transferred to the warehouse. (Hr. Tr. Vol. I at 63).

B. THE WEST VIRGINIA HUMAN RIGHTS ACT PROHIBITS AN EMPLOYER OR A PERSON FROM ENGAGING IN ANY FORM OF REPRISAL OR OTHERWISE DISCRIMINATING AGAINST A PERSON FOR FILING A COMPLAINT OF DISCRIMINATION WITH THE WEST VIRGINIA HUMAN RIGHTS COMMISSION OR ENGAGING IN OTHER PROTECTED ACTIVITIES.

The West Virginia Human Rights Act sets out a separate and distinct cause of action for retaliation, or reprisal. It is a violation of the Act for an employer to retaliate against any employee for engaging in a protected activity, such as filing a complaint with the West Virginia Human Rights Commission ("Commission").

By not making relief available to persons who are victims of retaliation, the effectiveness of the Act as a means to eliminate discrimination is undermined. "The legislative purpose in including the anti-retaliation provision was obviously to encourage people to come forward and expose unlawful employment practices and to do so without fear of reprisal." Hanlon v. Chambers, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995).

The Act specifically provides that it is unlawful for any person or employer to "[e]ngage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss. . . ." W. Va. Code § 5-11-9(7)(A). Subpart (c) of the same section provides that it is unlawful for any person or employer to "[e]ngage in any form of reprisal or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this article. . . ." W. Va. Code § 5-11-

9(7) (c).

To establish a retaliation claim by circumstantial evidence, Miller must adduce facts sufficient to raise an inference that retaliatory motive played a part in her removal. Hanlon, 464 S.E.2d at 753. In addition to circumstantial evidence, the Commission may also prove discrimination by direct evidence of discriminatory intent. " Proof of this type shifts the burden to the Respondent to prove by a preponderance of the evidence that it would have taken the actions complained of against the Complainant even if it had not considered the illicit reason." Trans World Airlines v. Thurston, 469 U.S. 111, 36 Fair Empl. Prac. Cas. 977 (1985). The Commission and Miller established inferential, direct and circumstantial evidence of Total Distribution reprisal actions.

1. THE COMMISSION AND MILLER HAVE ESTABLISHED A PRIMA FACIE CASE OF REPRISAL.

The West Virginia Supreme Court first addressed the issue of retaliation in Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986). The Court, adopting the standard of proof scheme established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), set out the prima facie standard for retaliation claims. A Complainant must prove by a preponderance of the evidence (1) that the Complainant engaged in a protected activity; (2) that the Complainant's employer was aware of the protected activity; (3) that the Complainant was subsequently discharged and (absent other evidence tending to establish retaliatory motivation); (4) that Respondent's adverse action followed her protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store, 365 S.E.2d at 259; Conrad v. ARA Szabo, 198 W. Va.362, 480 S.E.2d 801 (1996); Hanlon v. Chambers, 195 W. Va. 288, 464 S.E.2d 741 (1995); West Virginia Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994); Brammer v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1990).

The Commission and the Complainant have presented credible evidence of each of

the elements of the prima facie case for reprisal and therefore have proved by a preponderance of the evidence the following.

a. Miller was engaged in a protected activity.

Miller was engaged in a protected activity from the time she filed her sex discrimination claim with the Commission until the date of the Public Hearing.

Miller contacted the Commission in early 2003 after she was subjected to layoffs utilizing her transfer date for the purposes of "warehouse seniority." The Commission issued a Notice of Discrimination Complaint and docketed Miller's sex discrimination complaint on or about February 24, 2003. (Commission's Exhibit 2). Throughout 2003, Miller's claim was in the investigatory process with the Commission.

On December 15, 2003, the Commission issued a Letter of Determination with regard to Miller's sex discrimination complaint, Docket No. ES-289-03, finding probable cause to believe discrimination had occurred. (Commission's Exhibit 24). Pursuant to this Notice, Miller's case was set for public hearing before the Commission.

As the public hearing grew closer, Total Distribution began to take measures adverse to Miller including threatening to tell Miller's co-workers about her complaint and the Commission's discovery requests and then ultimately laying her off from work.

On or about March 29, 2004, Hamm notified Miller that Neal, Total Distribution's in-house counsel, was going to come to Nitro to speak with her co-workers about her Human Rights complaint and that Neal might want Miller there. Hamm also mentioned that the Commission had requested contact information for Miller's co-workers. (Hr. Tr. Vol. I, at 86-88). Miller credibly testified that after the meeting with Hamm, she felt "violated" and "[m]aybe that they were trying to come down and sway the employees to maybe turn against me to where they wouldn't keep an open mind, to where I'd be treated differently in the workplace." (Hr. Tr. Vol. I, at 89).

Miller contacted Commission's counsel about the conversation with Hamm and the proposed Diane Neal staff meeting. (Commission's Exhibit 16). On March 31, 2004, counsel for the Commission contacted counsel for Total Distribution regarding Hamm's

conversation with Miller, and raised concerns about the proposed meeting and the effect it could have on Miller's continued employment with Total Distribution, influencing witnesses and potential reprisal. (Commission's Exhibit 16).

In response to the March 31, 2004 letter, counsel for Total Distribution sent a letter to the Commission's counsel. In this letter, counsel for Total Distribution stated that the purpose of the proposed meeting was to address "Miller's right to pursue her claim and the company's expectation that employees refrain from any conduct towards Miller that might be considered harassing." Total Distribution provided the Commission with a copy of a script, but a meeting with the employees did not occur. The meeting was with Supervisory employees. (See Commission's Exhibit 15).

Whether the meeting occurred or not, it is immaterial. A reading of the text of the script reveals that Total Distribution intended to go well beyond just notifying the male employees in the Nitro warehouse that Miller had filed a complaint with the Commission. For example, Total Distribution stated that it made seniority decisions to "be fair to the others already working in the warehouse" and to make sure Miller "did not displace or bump any employees." (Commission's Exhibit 15). This articulated reason, however, is pretextual.

b. Total Distribution was aware of the protected activity.

Total Distribution knew of the protected activity. Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986). Hamm was aware of Miller's Human Rights complaint because he participated in the provision of information to the Commission during the investigation of Miller's claim. Hamm provided information in the investigatory process in response to the Commission's written questions. (Commission's Exhibit 9, p. 2, Answer to Interrogatory No. 1; Commission's Exhibit 14; Hr. Tr. Vol. I, at 86-88). Hamm raised issues related to Miller's complaint in the March 29, 2004, conversation about Neal's impending meeting with Nitro employees. (Commission's Exhibit 14; Hr. Tr. Vol. I, at 86-88). Gibson participated in the provision of investigatory responses to the Commission and was aware that Neal intended to speak with Nitro

employees about the complaint. (Commission's Exhibit 9; Hr. Tr. Vol. II at 24-25).

Neal prepared the Statement of Position submitted to the Commission shortly after the complaint was filed. (Commission's Exhibit 7).

As of March 2004, Stemple was aware that Neal intended to speak with the Nitro warehouse employees about the complaint. (Hr. Tr. Vol. II at 46). Therefore, Gibson, Neal and Stemple were all aware of Miller's complaint prior to April 2, 2004.

Also, prior to the April 2, 2004, layoff, Total Distribution was aware of the concerns and objections Miller and the Commission raised with regard to the planned meeting. (Commission's Exhibit 17).

c. Total Distribution took an adverse action against Miller.

Miller satisfied this element of the prima facie case. The traditional formulation of the third prong is that subsequent to engaging in the protected activity, the individual was discharged from employment. Frank's Shoe Store, 365 S.E.2d at 259. This formulation was developed in the context of a retaliatory discharge case. Id. The anti-retaliation provisions of the West Virginia Human Rights Act do not limit reprisal actions to cases of termination. The clear language of the Act prohibits an employer or a person from engaging in "any form of threats or reprisal." W. Va. Code §§ 5-11-(9)(7)(A)&(C) (emphasis added). While such prohibition is certainly inclusive of a retaliatory discharge, it is not limited to that specific form of reprisal.

On Friday, April 2, 2004, just days after the meeting with Hamm about the planned session with her co-workers, and the correspondence between counsel, Miller was informed of a pending lay off from her employment with Total Distribution. The layoff became official on April 5, 2004. (Hr. Tr. Vol. I, at 90-91). It is undisputed that the layoff decision was made after Miller's March 29, 2004 conversation with Hamm. (Hr. Tr. Vol. I, at 223). She remains laid off from her employment to this date. Total Distribution's actions in laying off Miller are clearly adverse to her interests and are sufficient to sustain the prima facie case on this element.

d. Total Distribution's conduct in laying off Miller is directly related to Miller's participation in the protected activity of filing and pursuing a complaint under the West Virginia Human Rights Act.

The crucial component of the prima facie case in a retaliatory discharge action is the identification of a causal connection, or linkage, between the protected activity and the adverse action. The causal link between the protected activity and the adverse employment decision "can be proven by direct or circumstantial evidence, or by inferential evidence, or by a combination of evidence." Fourco Glass Co. v. West Virginia Human Rights Commission, 179 W. Va. 291, 367 S.E.2d 760, 762 (1988). The most obvious causal connection between the retaliatory conduct and impermissible motive is a "temporal proximity." Conrad v. ARA Szabo, 198 W. Va. 362, 375, 480 S.E.2d 801, 814 (1996). However, as established in the prima facie case, "temporal proximity" is not the only method of establishing a causal connection. The Commission meets its burden with respect to this element through direct, inferential and circumstantial evidence.

Total Distribution's efforts to intimidate Miller occurred after it responded to the Commission's first set of discovery in mid-March 2004 (Commission's Exhibit 11), and its retaliatory efforts came to a head after the March 29, 2004 meeting between Hamm and Miller. On April 5, 2004, Miller was officially laid off by Total Distribution. The timing connection between the escalating preparation for the rapidly approaching public hearing and the layoff decision cannot be ignored, particularly in light of the Hamm's conversation and Neal's proposed meeting with employees about Miller's complaint.

Miller learned about her pending layoff from a co-worker in the warehouse, Duane Shue. Miller tried to speak with Hamm, but he had already left for the day. Miller called Hamm on his cell phone during her lunch break and asked if she was to be laid off. He confirmed the layoff. (Hr. Tr. Vol. I, at 91-93).

The Commission has established by a preponderance of the evidence a prima facie case of reprisal.

B. TOTAL DISTRIBUTION PROFFERED A LEGITIMATE, NON-DISCRIMINATORY DEFENSE.

Even if Miller and the Commission establish a prima facie case, Total Distribution may still avoid liability if it articulates a legitimate, nondiscriminatory defense. Brammer v. West Virginia Human Rights Commission, 183 W. Va. 108, 394 S.E.2d 340 (1994).

Total Distribution articulated only one, nondiscriminatory reason to support its layoff of Miller: a decline in business at the Nitro warehouse.

3. THE LEGITIMATE, NONDISCRIMINATORY REASON ARTICULATED BY TOTAL DISTRIBUTION IS PRETEXTUAL.

Even if Total Distribution can articulate a nondiscriminatory reason for its layoff decision, the Commission and the Complainant may still prevail if they establish that the articulated reason is pretext. Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995); Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996). The credible evidence of record establishes that Total Distribution's articulated reasons are, in fact, pretext.

Total Distribution's asserted that the reduction in the receipt of inbound drums to the Nitro warehouse was a major factor in deciding to layoff Miler. This assertion is not credible. Hamm's testimony in this regard is not credible.

The receipt of inbound drums is a large factor in determining whether or not layoffs are necessary. (Hr. Tr. Vol. I, at 247). The Nitro warehouse receives chemicals from Dow locations around the world. (Hr. Tr. Vol. I, at 189). Total Distribution asserted that when Dow's Building 131 closed down at the end of March 2004, it would lose some volume of its inbound drum shipments that originated from that location. (Hr. Tr. Vol. I, at 296). Hamm asserted that because the closure of Building 131 at the end of March 2004, the number of inbound drums per day substantially decreased and suggested that there was a drop-off in April, May, and June 2004. (Hr. Tr. Vol. I, at 211-212).

However, Total Distribution's inbound drums in April, May and June 2004 were comparable or greater than the inbound drums for January, February and March 2004.

(Respondent's Exhibit 3).

Miller was laid off effective April 5, 2004. She worked the months of January, February and March 2004. The total number of drums received by Total Distribution in April 2004 did not justify a layoff. In fact, even July total inbound numbers were not significantly lower than any other months of 2004. (Hr. Tr. Vol. I, at 245-246).

For the month of April 2004, Total Distribution received 21,049 inbound drums from Dow. This total was greater than the number received by Total Distribution in February and within approximately 350 drums of the January total. In May, Total Distribution received 22,022 drums from Dow. This total is greater than the number of drums received by Total Distribution in January or February 2004. In June 2004, Total Distribution received 24,725 inbound drums from Dow. This total was greater than the number received by Total Distribution in January, February or March 2004. This evidence is credible and supported by the record. (Respondent's Exhibit 3).

Total Distribution received as many or more inbound drums in the first three months of Miller's layoff as it did in months where Miller was not laid off. Clearly, Total Distribution's proffered reason for the layoff of a downturn in business is pretextual.

V.

DAMAGES

Miller is entitled to such relief as will effectuate the purposes of the West Virginia Human Rights Act and "make persons whole for injuries suffered on account of unlawful employment discrimination." Albermarle Paper Co. V. Moody, 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). The injured party is to be placed, as near as possible, in the situation which she would have occupied had she not been discriminated against.

Miller, under the "make whole" rule, is entitled to receive back pay including benefits with prejudgment interest at ten percent per annum. Also, she is entitled to receive the maximum available incidental damages for each of her two claims against Total Distribution. She is entitled to be reinstated in the Nitro warehouse with a seniority date of November

1, 1998, and awarded front pay until she is reinstated in her warehouse position.

The Commission and Miller are entitled to a cease and desist order. The Commission's counsel and Miller are awarded their costs and expenses associated with the prosecution of Miller's two claims, sex discrimination: Docket No. ES-289-03 and reprisal: Docket No. EREP-406-04

A. REINSTATEMENT

Miller is entitled to reinstatement in the Nitro warehouse under her sex discrimination claim and her reprisal claim. She is entitled to a warehouse seniority date for all purposes including layoffs, of November 1, 1998. This is Miller's full-time employment date. Gino's Pizza of West Hamlin v. West Virginia Human Rights Commission, 187 W. Va. 318, 418 S.E.2d 764 (1992); Casteel v. Consolidation Coal Co., 181 W. Va. 501, 383 S.E.2d 305, 311 (1989) W. Va. Code § 5-11-13, 181 W. Va. 501, 383 S.E.2d 305 (1989).

Also, Miller is entitled to front pay until she is reinstated in an amount equal to the difference between the salary of such position and Miller's mitigation.

Front pay is available under W. Va. Code §5-11-13. See also Casteel v. Consolidation Coal Co., 181 W. Va. 501, 383 S.E.2d 305 (1989); Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d 494 (1992).

Miller's reinstatement and award of front pay as to the sex discrimination claim will make her whole with respect to the reprisal claim.

B. BACK PAY AND BENEFITS and INTEREST ON BACK PAY

Miller is entitled to interest and benefits on her sex discrimination claim and her reprisal claim. Interest is payable on back pay awards at a rate of ten percent (10%) per annum. Rodriguez v. Consolidation Coal., 206 W. Va. 317, 524 S.E.2d 672 (1999); Hensley v. West Virginia Dep't of Health and Human Resources, 203 W. Va. 456, 508 S.E.2d 616

(1998); . Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986); Bell v. Inland Mutual Ins. Co., 175 W. Va. 165, 332 S.E.2d 127 (1985); W. Va. Code §56-6-31.

It has been the policy of the Commission, in keeping with the "make whole" objective of the Act, to calculate back pay awards on a periodic basis, and to calculate interest on back pay at a ten percent simple interest rate as back pay accrues. The Commission does not compound interest.

As Miller has been laid off from her employment with Total Distribution since April 5, 2004, and is subject to recall, the question if mitigation is not the same as it would be in a case of termination or constructive discharge.

Generally speaking, discrimination complainants have a duty to mitigate their damages by accepting equivalent employment. Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990). An individual is required to mitigate damages by being reasonably diligent in seeking employment substantially equivalent to the position she was denied. Smith v. American Service Company of Atlanta, Inc., 796 F.2d 1430, 1431 (5th Cir. 1986). However, the burden of raising the issue of mitigation is on the employer. Mason County Board of Education v. State Superintendent of Schools, Syl. pt. 2, 170 W. Va. 632, 395 S.E.2d 719 (1982).

In any event, the record reflects that Miller has met her duty to mitigate her damages. Miller has not been employed since Friday, April 2, 2004. (Hr. Tr. Vol. I, at 104). Despite the fact that the Complainant was laid off, and not terminated, she has made reasonable efforts to seek other employment. Miller looked for work every week after her official layoff date of Monday, April 5, 2004. She looked in the newspaper, on the computer and on the internet. (Hr. Tr. Vol. I, at 137). Miller has diligently sought other work while being on layoff from Total Distribution. Miller contacted companies, including warehousing businesses such as Pepsi, Coca Cola and Jefferds. Where applications were being taken, Miller submitted applications to businesses, including grocery stores and restaurants. (Hr. Tr. Vol. I, at 105-106).

In June 2004, Total Distribution offered the Complainant a job located at the DuPont Plant in Belle, West Virginia, which involved driving tractor trailers. Miller declined that placement, as she had no CDL license and was told that she would have to obtain a CDL license to maintain the job. Miller resides 50 miles from the DuPont Plant in Belle. Miller lives 13.6 miles from Total Distribution's Nitro warehouse. (Hr. Tr. Vol. I, at 106-107, 109). The DuPont job is primarily a truck driving job. Miller did not drive trucks in the Nitro warehouse. (Hr. Tr. Vol. I, at 247-248).

Although Total Distribution subsequently disputed that Miller would have had to obtain a CDL license for the In-Plant Utility position (Commission's Exhibit 19, Answer to Interrogatory No. 18; Hr. Tr. Vol. I, at 214), it did assert to the Commission that a CDL was required when the issue was initially raised during the Commission's investigation. Total Distribution then asserted in Investigatory Interrogatory Answers, provided with the assistance of Hamm, that individuals who did not have a CDL license were required to obtain one for the In-Plant utility position at DuPont: "Those individuals that did not have a CDL license would be required to obtain such a license within a reasonable time. Each individual would be required to obtain a CDL license at his or her own expense." (Commission's Exhibit 18, Answer to Investigatory Interrogatory No. 12).

Despite Hamm's subsequent testimony that the DuPont Plant job in Belle, West Virginia, did not require a CDL license, three of the four employees working in that position have their CDL license, and the fourth individual, Donnie Jordan, was currently working towards his CDL license. It is clear that Total Distribution wants CDL-licensed workers in these positions, and that pursuing the license is a requirement of the job.

Miller credibly explained that she was uncomfortable with driving a semi truck, whether it carried hazardous materials or other materials since she did not have a CDL license. (Hr. Tr. Vol I at 129-130, 138-139).

At the public hearing, Hamm credibly admitted that he had concerns with a person who has no CDL license or training operating a rig on behalf of Total Distribution, and that he understood how Miller might have a similar concern. (Hr. Tr. Vol. I, at 236).

The West Virginia Bureau of Employment Programs declined to disqualify Miller from receiving unemployment compensation benefits related to her decision not to accept the In-Plant Utility position. (Commission's Exhibit 23). The driving position was not comparable to her previous position.

In the instant case, Total Distribution offered no evidence that comparable positions were available for which the Miller could have applied and did not apply. Nor did Total Distribution present any evidence that Miller rejected any offers of *comparable* employment.

Miller's testimony that she looked for work diligently is uncontested and credible. Miller's decision not to accept the DuPont In-Plant driving position did not affect her lost wage damages, as the position was not comparable, the Complainant had no experience driving tractor trailers and CDL licenses were required for the position.

Miller has refused no work, other than the DuPont plant position offered by Total Distribution, since her April 2004 layoff. (Hr. Tr. Vol. I, at 105-106). Miller's efforts to mitigate her damages were reasonable and sufficient.

Miller was laid off from employment by Total Distribution December 5, 2002; December 15, 2002, through January 12, 2003; January 29, 2003, through March 22, 2003; and April 5, 2004, through the present. (Hr. Tr. Vol. I, at 76-78; Commission's Exhibits 9, 11 and 12; see also Joint Stipulation 4). The Nitro warehouse runs two 8- hour shifts, Monday through Friday, for 40-hour work weeks. (Hr. Tr. Vol. II, at 19).

Miller's hourly wage history with Total Distribution is as follows: prior to November 11, 2002 - \$9.30; as of November 11, 2002 - \$11.61; as of March 2003 - \$11.85; as of March 2004 - \$12.85. (Joint Stipulation No. 3).

It is Total Distribution's policy that persons who work less than 10 days or 80 hours in a month do not receive health care coverage for that month. In the event of a temporary layoff, the Company will continue to pay its portion for an employee's health insurance coverage for those employees who work a minimum of 10 days/80 hours during the month, with the employee being responsible for his/her contribution portion. In a month in which an employee works less than 10 days/80 hours or has been put on indefinite layoff, the

Company will not contribute its portion of the insurance premium and the employee will then be eligible to continue their coverage through COBRA. (Commission's Exhibit 10, p. 12, Section 10.1.2.2). In 2002, the cost to Total Distribution of providing benefits to the Complainant was \$6.48 per month. In 2003, the cost to Total Distribution of providing benefits to the Complainant was \$317.60 per month. In 2004, the cost to Total Distribution of providing benefits to the Complainant was \$346.68 per month. (Joint Stipulations Nos. 5-7). Subsequent to her April 2004 layoff, Miller has not had medical coverage or life insurance. (Hr. Tr. Vol. I, at 80-81).

With regards to the reprisal claim, Miller is entitled to back pay. Because Miller prevailed on her sex discrimination claim, she will be made whole with respect to the reprisal claim.

C INCIDENTAL DAMAGES

Miller is entitled to incidental damages with respect to her two claims against Total Distribution. Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977); Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989). Bishop Coal provides that the \$2,500 cap on incidental damages may be adjusted from time to time to conform to the Consumer Price Index. Bishop Coal, 380 S.E.2d at 247. In keeping with this language, the Commission has periodically raised the cap on incidental damages. The Commission has raised the cap on incidental damages to \$5,000.00.

The West Virginia Supreme Court of Appeals has held that the cap on incidental damages applies per case. Frye v. Future Inns of America-Huntington, Inc., Syl. pt. 3, 211 W. Va. 350, 566 S.E.2d 237 (2002). Miller has two separate and distinct cases against Total Distribution before the Commission, Docket No. ES-289-03 and Docket No. EREP-406-04. The two claims were consolidated only for the purpose of public hearing. The two claims arise from different underlying facts, and they matured at different times. Miller is therefore entitled to receive an award of incidental damages for each of her two claims. Miller has

prevailed on each claim is entitled to the maximum award for each claim.

Certainly this record establishes that Miller suffered injury well in excess of the available damages with respect to each of her two claims. Accordingly, Total Distribution should be charged with the maximum available award for Docket No. ES-289-03, and the maximum available award for Docket No. EREP-406-04.

D. CEASE AND DESIST ORDER

The Commission and Miller are entitled to a cease and desist order. The order may make provisions which will aid in eliminating future discrimination. The cease and desist order may require an affirmative action program and a sworn affirmation from a responsible officer of the Total Distribution that the Commission's order has been implemented and will continue to be implemented. Whittington v. Monsanto Corp., Docket No. ES-2-77, and Pittinger, et al. v. Shepherdstown Volunteer Fire Dep't, Docket No. PAS-48-77; see also Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983). Miller is entitled to a cease and desist order.

This cease and desist authority is always consistent with a make whole remedy, because the charging party is never made whole when the real possibility of future discrimination remains following resolution of the individual charge. A cease and desist order is particularly warranted in this case because of Total Distribution's discriminatory actions against Miller.

A cease and desist order against Total Distribution is appropriate to protect present and future female employees of Total Distribution against sex discrimination and reprisal.

E. COSTS

The Complainant and the Commission are entitled to reimbursement of their costs and expenses associated with prosecuting this claim. The Commission has incurred or expended a total of \$1,815.10 in deposition and hearing transcript costs and witness fees, and the Office of the Attorney General, Civil Rights Division, has incurred travel expenses in the amount of \$37.52. These costs are assessed against Total Distribution.

VI.

CONCLUSIONS OF LAW

DOCKET NO. ES-289-03

1. The Complainant, Deborah L. Miller, is an individual aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act. W. Va. Code § 5-11-10.

2. At all times relevant hereto, the Complainant is a person within the meaning of W. Va. Code § 5-11-3(a), and was an employee of the Respondent, as defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(e).

3. The Respondent, Total Distribution, Inc., is an employer as defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(d), and is therefore subject to the provisions of the West Virginia Human Rights Act. The Respondent is also a person within the meaning of W. Va. Code § 5-11-3(a).

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

5. The Complainant met her prima facie burden and proved that the Respondent engaged in unlawful discrimination, in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-9(1).

6. The nondiscriminatory defense to the Complainant's charge of discrimination

articulated by the Respondent is pretextual.

7. The Commission proved by a preponderance of the evidence that the Respondent unlawfully considered gender in its layoff decisions, in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-9(1).

8. The Respondent has discriminated against the Complainant in the terms, conditions or privileges of employment within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 *et seq.*

9. The Respondent is liable for back pay, benefits and prejudgment interest for its illegal layoff process.

10. As a result of the discriminatory actions of the Respondent, the Complainant is entitled to:

(a) Reinstatement to the position from which the Complainant has been laid off, and restoration of her company and warehouse seniority date back to November 1, 1998, or front pay until such time as reinstatement is effectuated;

(b) Back pay and benefits, plus prejudgment interest thereon at the rate of ten percent (10%) per annum, through judgment;

(c) Incidental damages in the amount of \$5,000.00 for the humiliation, embarrassment and emotional distress suffered by the Complainant as a result of the discriminatory actions of the Respondent;

(d) Reimbursement of travel and deposition and hearing transcript costs associated with prosecuting this claim.

(e) A cease and desist order aimed at preventing the Respondent from continuing the illegal discriminatory practices evidenced in its actions; and

(f) An order requiring Respondent's human resources and supervisory employees who have managerial responsibilities of any kind with regard to Respondent's West Virginia operations to undergo training related to discrimination and the requirements of the West Virginia Human Rights Act and its implementing legislative regulations; and

DOCKET NO. EREP-406-04

11. The Complainant, Deborah L. Miller, is an individual aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act. W. Va. Code § 5-11-10.

12. At all times relevant hereto, the Complainant is a person within the meaning of W. Va. Code § 5-11-3(a), and was an employee (or former employee) of the Respondent, as defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(e).

13. The Respondent, Total Distribution, Inc., is an employer as defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(d), and is therefore subject to the provisions of the West Virginia Human Rights Act. The Respondent is also a person within the meaning of W. Va. Code § 5-11-3(a).

14. The Complaint in this matter was timely filed in accordance with W. Va. Code § 5-11-10.

15. The Complainant met her prima facie burden and proved that the Respondent engaged in unlawful discrimination and reprisal, in violation of the West Virginia Human Rights Act, W. Va. Code §§ 5-11-9(1) and 5-11-9(7).

16. The nondiscriminatory defense to the Complainant's charge of discrimination articulated by the Respondent is pretextual.

17. The Commission proved by a preponderance of the evidence that the Respondent unlawfully committed an act of reprisal in the layoff of the Complainant on or about April 5, 2004, in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-9(7).

18. The Respondent has discriminated against the Complainant in the terms, conditions or privileges of employment within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 *et seq.*

19. The Respondent is liable for back pay, benefits and prejudgment interest for the illegal layoff of the Complainant.

20. As a result of the discriminatory actions of the Respondent, the Complainant

is entitled to:

(a) Reinstatement to the position from which the Complainant has been laid off, and restoration of her company seniority and warehouse seniority date back to November 1, 1998, or front pay until such time as reinstatement is effectuated;

(b) If not satisfied by the damages awarded in association with Docket No. ES-289-03, back pay and benefits, plus prejudgment interest thereon at the rate of ten percent (10%) per annum, through judgment;

(c) Incidental damages in the amount of \$5,000.00 for the humiliation, embarrassment and emotional distress suffered by the Complainant as a result of the discriminatory actions of the 00;

(d) Reimbursement of travel and deposition and hearing transcript costs associated with prosecuting this claim.

(e) A cease and desist order aimed at preventing the Respondent from continuing the illegal discriminatory practices evidenced in its actions; and

(f) An order requiring Respondent's human resources and managerial employees with responsibilities related to Respondent's West Virginia operations to undergo training related to discrimination and the requirements of the West Virginia Human Rights Act and its implementing legislative regulations; and

VII.

RELIEF AND ORDER

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

1. The above-named Respondent, Total Distribution, is ORDERED to cease and desist from engaging in unlawful discriminatory practices immediately.

2. Respondent, Total Distribution, is ORDERED to pay the Complainant, Deborah L. Miller, a back pay award that includes the value of lost benefits from the date of its illegal

layoff, through the date of this Final Decision plus statutory interest at ten percent simple interest per annum. Complainant shall submit the final calculations to me and the Respondent by August 25, 2006. Respondent shall file its objection to the Complainant's calculations with me by September 15, 2006. Complainant's Reply brief is due September 25, 2006. Respondent's Reply brief is due October 6, 2006. A Supplemental Final Decision on Damages will be issued by October 31, 2006. Please submit any documentation you are relying on to support your calculations.

3. Respondent, Total Distribution, is ORDERED to reinstate the complainant, Deborah L. Miller to a position from which she was laid off, restoration of her company and warehouse seniority date to November 1, 1998 and front pay with statutory interest at the rate of ten percent simple interest per annum until such time she is reinstated to a comparable position like the one she was laid off from.

4. The Respondent Total Distribution, is ORDERED, within thirty-one days of receipt of this Final Decision to conduct appropriate awareness training regarding sex discrimination for all its employees including human resources and management employees in West Virginia. All training shall be approved by the West Virginia Human Rights Commission through Mr. Bearfield. Documentation to this effect shall be provided to Mr. George Bearfield, compliance officer at the Commission within 60 days of the receipt of this Final Decision.

5. As a result of Total Distribution's unlawful discriminatory conduct, Respondent is ORDERED to pay Mrs. Deborah L. Miller an award of \$5,000.00 plus statutory interest at the rate of 10 percent simple interest per annum for humiliation, embarrassment, and emotional distress for Docket No. Es-289-03 and \$5,000.00 plus statutory interest at the rate of 10 percent simple interest per annum for humiliation, embarrassment, and emotional distress for Docket No. EREP-406-04 each for a total of \$10,000.00 within thirty-one days of receipt this Final Decision.

6. The Commission is entitled to its deposition and transcript costs in the amount of \$1,815.10. The Respondent is ORDERED to pay the Commission, within thirty-one days

of this Final Decision, \$1,815.10 and to sent this amount to the Commission at 1321 Plaza East, Room 108A, Charleston, West Virginia 25301-1400. The check should be made payable to the West Virginia Human Rights Commission.

7. The Attorney General's Office is entitled to its travel expense in the amount of \$37.52. Respondent is ORDERED to pay the Attorney General, within thirty-one days of receipt of this Final Decision, \$37.52 and to sent this amount to the Attorney General's Office c/o Assistant Attorney General Paul Sheridan at P. O. Box 1789, Charleston, West Virginia 25326-1789.

8. In the event of failure of the Respondent to perform any of the obligations hereinbefore set forth, Complainant is directed to immediately so advise the West Virginia Human Rights Commission, Ivin B. Lee, Executive Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616

It is so **ORDERED**.

Entered this 4th day of August 2006.

WV HUMAN RIGHTS COMMISSION

BY:


PHYLLIS HARDEN CARTER
CHIEF ADMINISTRATIVE LAW JUDGE