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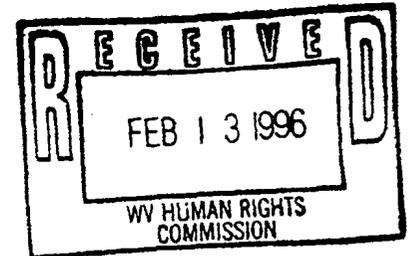
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NOTICE OF FINAL DECISION



PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, **WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION**, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

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

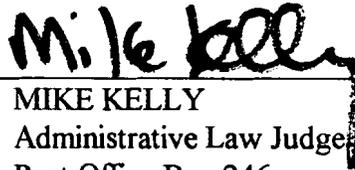
All documents shall be directed to:

Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 104-106
Charleston, WV 25301

Dated this 8th day of February, 1996.

WV HUMAN RIGHTS COMMISSION

BY:



MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

cc: Norman Lindell, Assistant Executive Director
West Virginia Human Rights Commission

**BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

JEROME PIETAK,

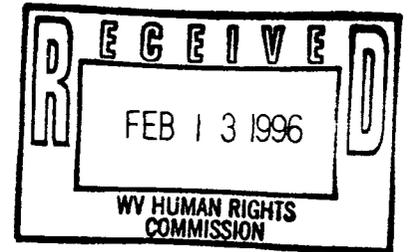
Complainant,

v.

Docket No. EH-278-92

**PONDEROSA-ONE JEFFCO LTD., and
AUBREY E. HENRY, partner,**

Respondents.



FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

THIS MATTER matured for public hearing on 10 February 1995. The hearing was held at Shepherd College, Shepherdstown, Jefferson County, West Virginia. The complainant, Jerome Pietak, appeared in person and his case was presented by the West Virginia Human Rights Commission and its counsel, Susan Elizabeth Jewell. The respondents appeared by Aubrey E. Henry, and by their counsel, Robert J. Schiavoni and Hammer, Ferretti & Schiavoni.

In making this decision, I considered the following documents: the two volume, 311 page transcript (read four times in its entirety), plus all exhibits; all written proposed findings and argument of counsel; and the evidentiary deposition of Dr. Frederic T. Farra.

I can honestly state that this case has presented the most difficult decision of any HRC matter that I have heard over the last two years. I apologize to the parties and their counsel for the delay

in rendering it.¹ It should also be noted that both Ms. Jewell and Mr. Schiavoni did excellent jobs for their respective clients, making my decision all the more difficult.

I. ISSUE TO BE DECIDED

Whether respondents discriminated against complainant by constructively discharging him because of his handicap in violation of W.Va. Code §5-11-9(1).²

II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the

¹ Henceforth I will keep in mind U.S. District Court Chief Judge Charles H. Haden, II's admonition that it is the job of the factfinder to decide cases; it is the job of the appellate courts to decide them right.

² Aubrey E. Henry is named as a respondent in his individual capacity as a partner of Ponderosa-One Jeffco Ltd. The complaint was filed solely pursuant to W.Va. Code §5-11-9(1), which limits liability for discrimination to an "employer" and Mr. Henry was not charged with aiding and abetting an act of unlawful discrimination as prohibited by W.Va. Code §5-11-9(7)(A).

transcript of the proceedings, the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true.³

A. Stipulated Facts

The parties stipulated that the following facts are true:

1. Complainant Jerome M. Pietak is a white male who timely filed a complaint alleging discrimination in the terms and conditions of his employment on the basis of his handicap, constituting a violation of the West Virginia Human Rights Act, W.Va. Code §5-11-9 (hereinafter "Act").

2. The complainant is a member of a protected class under the Act due to his handicap, a heart condition, which has been classified as atherosclerosis. This means that the complainant is a "handicapped person" as that term is defined in §77-1-2.1. of the West Virginia Human Rights Commission's Rules Regarding Discrimination Against the Handicapped, 6 W.Va. C.S.R. §77-1-1 et seq. (1991).

³ To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented.

3. Mr. Pietak was the general manager of the respondents' Ponderosa restaurant located at Route 340 at Marion Road, Charles Town, Jefferson County, West Virginia, beginning July 1, 1991.

4. Respondent Ponderosa-One Jeffco Ltd. is a person and an employer as those terms are defined by W.Va. Code §5-11-3(a) and (d), respectively, and is subject to the jurisdiction of the West Virginia Human Rights Act.

5. Respondent Aubrey Eugene Henry is a person as that term is defined by the W.Va. Code §5-11-3(a), and is subject to the jurisdiction of the West Virginia Human Rights Act.

6. Edmund S. Baxter, Douglas S. Rockwell, Richard L. Phelps or his estate and Aubrey E. Henry were general partners of Ponderosa-One Jeffco Ltd. at all relevant times, up to and including the present.

7. Mr. Pietak and his family moved to Charles Town from Buffalo, New York, on or about July 1, 1991, in order for Mr. Pietak to work as the general manager of the respondents' Ponderosa restaurant. Mr. Pietak was salaried and earned \$550 (gross) per week.

8. On September 20, 1991, Mr. Pietak suffered a heart attack at a local car dealership. He was transported to the Jefferson Memorial Hospital by his wife, Cynthia Pietak, who was called by the salesman when Mr. Pietak reported severe chest pain.

9. Mr. Pietak was transported by the local hospital to the Winchester Medical Center in Winchester, Virginia, where he received specialized care for his heart condition.

10. Mr. Pietak was discharged from the Winchester hospital one week later, on September 27, 1991, and he convalesced thereafter at his home.

11. In late October, Mr. Pietak's physician provided Mr. Pietak with a release to return to work on Monday, November 4, 1991. The doctor's note states that Mr. Pietak "May return to work 11/4/91. One week of mild or administrative activities." It is signed by his treating physician, Dr. Farra. (See Joint Exhibit A).⁴

B. Mr. Pietak's Personal and Medical History

12. Mr. Pietak has a history of medical problems in addition to his heart condition. He has not had use of his bladder for more than 25 years. He had a kidney transplant in 1983, which required that he be hospitalized for three months. At the time of hearing in February 1995, he was 41 years old and was 37 or 38 years old at the time of the alleged discriminatory act.

⁴ At hearing, the Commission moved to amend the complaint to reflect a date of incident of 4 November 1991 instead of 10 October 1991. The motion was granted without opposition.

13. During his job interview with respondent Henry, Mr. Pietak told Mr. Henry about his bladder and kidney conditions. Mr. Henry did not appear at that time to be prejudiced against Mr. Pietak because of his disabilities and expressed no reluctance in hiring him.

14. Mr. Pietak and his spouse, Cynthia Ann Pietak, are natives of New York State and have lived there almost their entire adult lives. The Pietak's were married in New York on 19 April 1991 and are raising a daughter by Ms. Pietak's first marriage.

15. Moving to West Virginia, Ms. Pietak testified, was a "very big decision" and was the equivalent to "starting a new life, the three of us." She was very homesick at first and the transition was "very difficult" until "my family came down to visit us, which helped make things easier."

C. Complainant's Work History for Ponderosa

16. Mr. Pietak has been employed in the fast food restaurant business since 1972. As general manager for respondents, he was responsible for the total operation of the restaurant, which included customer service, serving a quality product, restaurant cleanliness, inventory, purchasing, payroll, employee training and personnel matters. He supervised over 50 employees.

17. Mr. Pietak testified credibly that prior to actually starting work for respondents on 1 July 1991, he asked Mr. Henry if he could be off over Thanksgiving weekend in order to attend a 20-year school reunion in New York. Mr. Henry granted the request.

18. Mr. Pietak had his heart attack on 20 September 1991, less than three months after moving to West Virginia and beginning work with respondents and five months after his marriage. Up until that time, he felt that he and Mr. Henry had a good working relationship.

19. On 23 October 1991, complainant's treating physician, Dr. Frederic T. Farra, gave him a return-to-work slip authorizing his return for "one week of mild or administrative activities" beginning 4 November 1991.

20. Mr. Henry testified credibly that between 20 September 1991, the date of the heart attack, and late October 1991, after the issuance of the return-to-work order, he had no contact with Mr. Pietak: ". . . he hadn't called me and updated me on [his] physical condition during the time that he was convalescing. He only spent a week in the hospital. I had no idea of his medical history, nor did I know what he was going to do or what he wasn't going to do. I did not know." Right after the heart attack, Ms. Pietak had left word for Mr. Henry that her husband had survived, was still in the hospital and that they would be in touch at a later date.

21. Respondents' employees Brenda Doss and Betty Braxton shared the performance of complainant's general manager duties during his hospitalization and convalescence.

22. It was not disputed that upon receiving the return-to-work slip on 23 October 1991, Mr. Pietak repeatedly attempted over the next several days to speak to Mr. Henry by phone to inform respondent that he would be coming back to Ponderosa. Mr. Henry did not return complainant's phone calls.

23. Mr. Pietak and Mr. Henry finally spoke by phone on 29 or 30 October 1991. Complainant testified credibly that he told Mr. Henry that he was ready to return for light duty beginning 4 November 1991 and that Mr. Henry replied that it was his opinion that complainant was not physically capable of performing a general manager's duties. According to Mr. Pietak, Mr. Henry stated that he would talk to his partners and get back to Mr. Pietak.

24. Mr. Henry testified that during his phone conversation with complainant he asked Mr. Pietak to obtain a more specific release from Dr. Farra, outlining what duties complainant should or should not perform. He admitted that without a clarification from the physician, he believed that complainant was not capable of doing the job.

25. Former Ponderosa management employee Brenda Doss testified that while complainant was off work due to the heart attack, she and Mr. Henry had the following conversation:

Ms. Doss: "Well, is he going to be able to work?"

Mr. Henry: "I don't know, it might be the big one."

Ms. Doss: "Well, what are we going to do?"

Mr. Henry: "I've got it covered, don't worry about it."

26. Ms. Doss also recalls that Mr. Henry told her that Mr. Pietak "won't be back" and that prior to complainant's production of the return-to-work slip, Mr. Henry told her that she was not to give him any information about the store. She stated that complainant called the store almost daily for a week or two and that Mr. Henry's response was flippant, joking about all of the messages complainant was leaving. She was never told by Mr. Henry to put complainant on the work schedule. Ms. Doss is familiar with general manager's duties and believed that Mr. Pietak could have been placed on "light duty" restrictions.

27. Betty A. Braxton, another former management employee, testified that she personally told Mr. Henry that complainant had called about returning to work and that Mr. Henry's response was "If Jerry thinks that I am going to return his calls, he's out of his mind. Jerry is history. He can't handle the job."

28. Margaret Day, the third former supervisory employee called by the Commission, verified that about two weeks after Mr. Pietak had his heart attack, Mr. Henry told her that complainant was "out of here" because he could no longer handle the job. Mr. Henry also made reference in Ms. Day's presence to complainant's kidney problems. Finally, she remembers taking a call for Mr. Henry from complainant while respondent was standing near the phone. Mr. Henry refused to talk to complainant, stating "I don't have anything to say to him."

29. The testimonies of Ms. Doss, Ms. Braxton and Ms. Day are specifically credited as being true. I further find as fact that Mr. Henry did not intend to reinstate Mr. Pietak to his former

position and that in refusing reinstatement, he was motivated by an unlawful discriminatory animus against Mr. Pietak because of his disability and not because the physician's return to work slip was unclear or vague.

30. Mr. Pietak testified that when he did not hear back from Mr. Henry after their one telephone conversation, he took his return-to-work slip to the restaurant and left it in the office in an envelope addressed to Mr Henry. When he still did not hear from Mr. Henry, he assumed that he had been terminated. I find as fact that Mr. Pietak was constructively discharged by respondents.

31. Sometime after 4 November 1991, complainant applied for unemployment compensation benefits and began looking for other work. He applied for jobs at two Charles Town area restaurants, Pizza Hut and Golden Corral. He was not offered a position by either employer.

32. Mr. Henry testified that on or about 11 November 1991, he was eating lunch at Ponderosa when Mr. Pietak came into the store. Mr. Pietak walked over to his table, handed respondent the keys to the restaurant and said "I'm leaving and going back to New York." Mr. Henry said that a few days before that he had received a phone call from Pizza Hut regarding a reference for Mr. Pietak and that he had responded favorably.

33. On or about 27 November 1991, the Pietaks moved back to New York.

D. The Testimony of Dr. Farra

34. Dr. Frederic T. Farra, Mr. Pietak's treating cardiologist, was called as a witness by respondents. His testimony was in the form of a post-hearing teleconference deposition in which I participated.

35. Dr. Farra first treated complainant on 20 September 1991 as a direct hospital transfer as a result of Mr. Pietak's acute myocardial infarction. He last saw Mr. Pietak at an office visit on 23 October 1991. Dr. Farra's progress notes for the 23 October visit conclude with this paragraph:

Suggested follow-up in three months, but patient states he will return to the Rochester, New York area over Thanksgiving. Suggest follow-up with cardiologist there, and suggested treadmill test in about six months. He may return to work on 11/4/91, with light duties for the first week.

36. Based on his review of his progress notes, Dr. Farra testified that it was his recollection that as of 23 October 1991 Mr. Pietak wanted to terminate their physician/patient relationship and that Mr. Pietak explicitly stated that the reason for doing so was that he and his family would not be living in the Charles Town area, but were returning to New York.

37. Dr. Farra did not recall Mr. Pietak telling him that he was returning to New York over Thanksgiving for a school reunion only and that the Pietaks intended to continue to reside in the Charles Town area.

E. The Reasons the Pietaks Returned to New York

38 The parties offer different reasons for the Pietaks' return to New York. The Commission presents that:

- (a) The Pietaks were committed to remaining in West Virginia;
- (b) Mr. Pietak told Dr. Farra on 23 October that he was returning to New York for a reunion;
- (c) The Pietaks did not decide to return to New York until after Mr. Pietak was refused reinstatement by respondents and could not immediately find suitable, comparable work. Had Mr. Pietak resumed work at Ponderosa, they would not have left; and
- (d) After complainant was denied reinstatement, and after the Pietaks reluctantly decided to return to New York, Mr. Pietak telephoned Dr. Farra to inform him of the pending move. The information given in the telephone call, which allegedly occurred sometime in mid-November 1991, was mistakenly included in the progress notes for 23 October.

39. The respondents argue that as of 23 October 1991, the day complainant last saw Dr. Farra, the Pietaks had already decided to move to New York because of Mr. Pietak's health. This decision, respondents submit, was made prior to and independent of any communication between Mr. Pietak and Mr. Henry regarding a return to work. Evidence supporting this position includes:

- (a) The testimony of Dr. Farra, based on his independent recollection of events;

(b) The corroboration of the testimony of Dr. Farra by an allegedly contemporaneously dictated progress note that indicates that the Pietaks intended to leave West Virginia and implies that this decision was made on or before 23 October 1991; and

(c) The testimony of Ms. Pietak, which revealed a strong and understandable need for family support that continues to this day. At the time of her husband's heart attack, they had been married for only five months. She had a minimum wage job in West Virginia and a daughter to support. Mr. Pietak had a history of serious, life-threatening medical illnesses. She testified that "The heart attack took a big toll on his body and his mental state." She stated that the decision to return to New York was based on several important factors: "We thought the job possibilities for Jerry would be better up there. And he knew a lot of people, he had worked at Ponderosa up there before, maybe he could get back into Ponderosa. Like I say, I lived there all my life, so -- we had the support of our families, emotionally and financially, if we needed it. It was a very emotional time for the whole family. So to be around people, you know, . . .".

40. I find that more likely than not Jerome Pietak would have stayed, or attempted to stay, in West Virginia and at Ponderosa if given the opportunity to return to work. I base this finding on the following facts:

(a) It was undisputed that he made great efforts to communicate with Mr. Henry regarding his return to work and persisted in those efforts despite Mr. Henry's refusal or reluctance to speak with him;

(b) Mr. Pietak looked for work in West Virginia with other employers, a task he would not have undertaken if he had already decided to return to New York; and

(c) Mr. Pietak obtained a release to return to work for one week of light duty, clearly indicating a desire on his part to return to his former position.

41. I find as fact, after weighing all of the evidence and assessing the credibility of the witnesses (especially complainant himself), that more likely than not Jerome Pietak did not make a final decision to return to New York until after his efforts to return to work were rebuffed by Mr. Henry in late October, early November 1991.

F. Post-Discrimination Facts

42. Upon returning to New York, Mr. Pietak attempted to look for other work. He eventually found and lost (through no fault of his own) a series of jobs in the fast food industry. As of the date of hearing, Mr. Pietak was working at Yogurt International, earning a gross weekly wage of \$350.00.

43. As of the date of hearing, Mr Pietak had suffered a net loss of back pay in the amount of \$49,540.38, calculated from 4 November 1991 up to 10 February 1995. (See Attachment C to the HRC's post-hearing submission).

III. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

A. Discrimination Vel Non.

This case having been heard in its entirety, with all evidence submitted and considered, it is not necessary to address whether the Commission established a *prima facie* case. Once all the evidence has been heard, and the "defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether plaintiff really did so is no longer relevant." *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482 (1983). The job of the factfinder, after taking all of the evidence, is to address "the ultimate question of discrimination *vel non*." 103 S.Ct. at 1481.⁵

In other words, I must now determine, on the basis of all of the record, whether the Commission has proven by a preponderance of the evidence that an illicit motive contributed to respondents' refusal to reinstate Mr. Pietak. I find that the Commission met its burden and showed by direct and circumstantial evidence that Jerome Pietak was not reinstated because of his disability and because of respondents' lay perception, without any basis in fact, that he could not perform the job of Ponderosa general manager. In this case, liability is, and has been since the date of hearing, clear.

⁵ The *Aikens* standard for assessing evidence was recently adopted by the West Virginia Supreme Court of Appeals for application in cases brought under the HRA. *Barefoot v. Sundale Nursing Home*, ___ W.Va. ___, 457 S.E. 2d 152 (1995).

B. Back Pay

The troubling issue in this case is back pay. Respondents argue that Mr. Pietak should not be awarded back pay for the period after Thanksgiving 1991 if he had already decided to return to New York prior to learning of any discriminatory act or animus of Mr. Henry.

My analysis of this issue must begin with the fact that a discriminatory act occurred. Mr. Henry, with no knowledge of Mr. Pietak's long term intentions, refused to reinstate complainant because of his disability.

Having found unlawful discrimination, "back pay should be denied [in whole or in part] only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, (1975); *W.Va. Institute of Technology v. HRC*, 383 S.E. 2d 490, 501 (1989); *Holbrook v. Poole Associates, Inc.*, 400 S.E. 2d 863, 869 (1990).

In other words, the remedial purposes of the HRA mandate back pay relief in all but special circumstances and that, after a finding of unlawful discrimination, there is a presumption in favor of back pay and in favor of making the victim of discrimination whole. Once the gross amount of back pay allegedly due complainant has been determined, the burden shifts to the respondents to establish a reason or reasons that justify either limiting or cutting off a back pay award. *Paxton v. Crabtree*,

400 S.E. 2d 245 (1990). Any ambiguity or uncertainty in what the net back pay award should be must be resolved against respondents. *Rosimas v. Michigan Dep't. of Mental Health*, 714 F. 2d 614 (6th Cir. 1983), cert. denied 466 U.S. 950 (1984); *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985).

Here, after weighing all of the evidence, I find that respondents did not establish that Mr. Pietak, regardless of discrimination, would have voluntarily quit his job on or near Thanksgiving 1991 in order to return to New York to be closer to family. While the testimony and exhibit of Dr. Farra certainly support respondents' contention, the following evidence creates an ambiguity and uncertainty that must be resolved in complainant's favor:

- (1) Mr. Pietak's persistent efforts to return to work at Ponderosa;
- (2) His search for other similar work in the Charles Town area, which makes absolutely no sense if he intended to stay in the area for only two or three more weeks; and
- (3) The plausible testimony that Dr. Farra confused Mr. Pietak's statement of 23 October 1991 (that the Pietaks were returning to New York over Thanksgiving for the purpose of attending a school reunion) with the later telephone call informing the doctor of their permanent relocation to New York after he was denied reinstatement by Mr. Henry.

I further hold that back pay liability of respondents, which began on 4 November 1991, terminated as of the date of hearing, 10 February 1995. I believe that under the peculiar facts of this case an award of back pay for that period will "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albermarle Paper*, 422 U.S. at 421. Given that Mr. Pietak's

relocation to New York was ultimately in the best interests of himself and his family (at least according to Ms. Pietak), he did not seriously pursue reinstatement with respondents and an award of front pay is, therefore, not appropriate under the facts of this case.

IV. FINDINGS OF ULTIMATE FACTS

1. The Administrative Law Judge finds as fact that complainant, Jerome Pietak, is a qualified handicapped person who was able and competent to perform the job of restaurant manager.

2. The Administrative Law Judge finds as fact that respondent partnership failed to reinstate Mr. Pietak to his former position because of his handicap and that, by doing so, respondent violated W.Va. Code §5-11-9(1).

4. The Administrative Law Judge finds as fact that as a result of respondent's unlawful act complainant suffered lost earnings and is entitled to a "make whole" remedy.

5. The Administrative Law Judge finds as fact that as a result of respondent's unlawful discriminatory act Mr. Pietak suffered hurt, humiliation and emotional and mental distress.

V. CONCLUSIONS OF LAW

1. Respondent Ponderosa-One Jeffco Ltd. is an employer within the meaning of W.Va. Code §5-11-3(d). Mr. Henry is a partner in Ponderosa-One Jeffco Ltd.

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

3. The Human Rights Commission has jurisdiction over this matter, complainant having filed a timely, verified complaint and complied with all procedural requirements of the West Virginia Human Rights Act W.Va. Code §5-11-1, et al.

4. The Commission showed by a preponderance of the direct and circumstantial evidence that respondent denied reinstatement to complainant because of his handicap.

5. Respondent violated W.Va. Code §5-11-9(a) by failing or refusing to reinstate Mr. Pietak because of his handicap.

6. Complainant is entitled to the following relief:

(a) Net back pay of \$49,540.38 for the period of 4 November 1991 through 10 February 1995.

(b) Prejudgment interest on back pay at the rate of 10% per annum, calculated quarterly, from the time it should have been paid to complainant up to the date of this decision, and postjudgment interest at the same terms until paid in full;

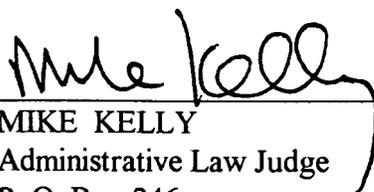
(c) Incidental damages in the total amount of \$2,950.00 for the humiliation, embarrassment and loss of personal dignity suffered by complainant as a result of respondent's unlawful act; and

(d) Out-of-pocket moving expenses in the amount of \$773.24.

7. The respondent shall reimburse the Commission and the Attorney General their costs in the amount of \$4,301.51 and attorney's fees in the amount of \$6,564.17.

8. Finally, a cease and desist Order is hereby directed against Ponderosa-One Jeffco Ltd. to cease and desist from engaging in acts of unlawful discrimination in violation of the West Virginia Human Rights Act. A copy of this decision, when final, shall be posted on the premises of Ponderosa-One Jeffco Ltd. in a place fully accessible to all employees, but not the public.

Decided this 8th day of February, 1996.


MIKE KELLY
Administrative Law Judge
P. O. Box 246
Charleston, WV 25321