

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SHARON L. PULLER,

Complainant,

v.

DOCKET NUMBER: ERREP-328-96

WAL★MART STORES, INC.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on May 26 and May 27, 1999, and reconvened on June 24, 1999 in Berkeley County, at the Berkeley County Planning Commission Meeting Room at 119 West King Street, in Martinsburg, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Sharon L. Puller, appeared in person and by counsel, Keith L. Wheaton. The respondent, Wal★Mart Stores, Inc., appeared by its representative, Monte Fink, Co-Manager of the Martinsburg store, and by its counsel, Christopher K. Robertson, with the firm of Jackson & Kelly PLLC.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been

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

A.

FINDINGS OF FACT

1. The complainant, Sharon Puller (“Complainant”), was initially employed by Wal★Mart Stores, Inc. (“Wal★Mart” or “Respondent”) on or about July 25, 1995, as a part-time jewelry associate in Martinsburg, West Virginia. (Sharon Puller, Transcript, May 26, 1999, (“Vol. I”), pp. 16 and 17; Catherine Teal, Tr. Vol. I, p. 186; Joint Ex. No. 1). Complainant is an African-American female, residing at Kearneysville, West Virginia; and was forty-seven (47) years of age when hired. (Joint Ex. No. 1, Puller, Tr. Vol. 1, p. 16). Respondent, Wal★Mart Stores, Inc., is a person and an employer as those terms are defined in W.Va. Code §§ 5-11-3(a) and 5-11-3(d) respectively. (Miller, Transcript, May 27, 1999, (“Vol. II”), p. 209). Complainant was interviewed and hired by Ms. Catherine Teal, the manager of the jewelry department, and received the part-time position because there were no full-time positions available at that time. (Puller, Tr. Vol. I, p. 86; Teal, Tr. Vol. I, pp. 185 and 186). Ms. Teal is a white female, forty-five (45) years of age. (Teal, Tr. Vol. II, p. 64).

2. Complainant remained in the position of part-time jewelry associate until February 1996, when she transferred to the front as a cashier. (Puller, Tr. Vol. I, p. 134; Joint Ex. No. 1) In May 1996, complainant was promoted to full-time cashier, where she remained until she took a leave of absence in October 1996. (Joint Ex. No. 1). Complainant is currently still on leave of absence

from Wal★Mart and has never been terminated. (Deposition of Donna Foster, Joint Ex. No. 3, p. 32; Joint Ex. No. 1).

3. Complainant received a copy of the Wal★Mart employee handbook when she was hired. (Puller, Tr. Vol. I, pp. 103 and 114). The handbook contains a policy that an employee may be moved to different departments within the store and there is no guarantee that the employee will remain in the department into which he or she was initially hired. (Puller, Tr. Vol. I, pp. 103 and 115). Furthermore, it is Wal★Mart policy that employees are promoted based upon job performance, not seniority. (Teal, Tr. Vol. I, p. 193; Laura Hayes, Tr. Vol. II, p. 108; Foster, Joint Ex. No. 3, p. 15; Deposition of Kim Fisher, Joint Exhibit No. 7, p. 39).

4. As a jewelry associate, complainant was required to be able to perform a number of tasks, including waiting on customers, running the engraver, processing jewelry returns, changing watch bands and batteries, and acquiring a working knowledge of the Telxon, a hand-held computer that is used to order merchandise, process claims for damages, run monthly inventory, check merchandise in and out, process layaways, verify counts of merchandise, and perform price checks. (Teal, Tr. Vol. I, pp. 190 and 191, Vol. II, p. 56; Hayes, Tr. Vol. II, pp. 99 and 100). Jewelry associates must also gain sufficient product knowledge to assist customers in their purchases. (Teal, Tr. Vol. II, pp. 32-33). All training in jewelry was on-the-job training. (Teal, Tr. Vol. II, p. 62). The jewelry associates needed to be able to perform all tasks quickly and efficiently, especially during the Christmas season, because of the volume of customers in jewelry. (Teal, Tr. Vol. I, p. 189, 205 and 206, Vol. II, p. 57; Hayes, Tr. Vol. II, pp. 113 and 114; Janice Whiteacre, Tr. Vol. II, p. 191).

5. The Telxon was a very important tool in the jewelry department, and the associates

needed to be able to operate it because it was utilized in almost every transaction that occurred in jewelry with regards to the merchandise. (Teal, Tr. Vol. I, p. 190; Hayes, Tr. Vol. II, p. 111). All associates received on-the-job training on the Telxon, watching someone else run it and then trying it themselves, because the Telxon did not contain a training mode. (Teal, Tr. Vol. II, pp. 23 and 58; Fisher, Joint Ex. No.7, p. 41).

6. While complainant was employed in the jewelry department, according to the white supervisors and co-employees, she had extensive difficulties in performing many aspects of her position, even after several months. (Teal, Tr. Vol. II, pp. 7, 38 and 39). Although she was willing and, indeed, eager to learn, she continually had difficulty performing all but the most routine tasks of her position. (Teal, Tr. Vol. II, pp. 7, and 38; Hayes, Tr. Vol. II, p. 95; Whiteacre, Tr. Vol. II, pp. 179, 191 and 192). Complainant continuously had to ask questions to be able to perform the responsibilities of her position, even after having been shown how to perform the task several times. (Teal, Tr. Vol. II, p. 7). In fact, complainant never reached the point where she could perform most of her responsibilities without assistance. (Teal, Tr. Vol. II, p. 7; Hayes, Tr. Vol. II, p. 95).

7. For instance, these white supervisors and employees contend that, although complainant was able to wait on customers and ring up their purchases on the cash register, she was unable to complete a return on her own or recall how to ring up special orders. (Teal, Tr. Vol. I, p. 189, Vol. II, pp. 15 and 16; Hayes, Tr. Vol. II, pp. 96, 100 and 101).

8. A major task performed by jewelry associates was changing watch bands and batteries. (Hayes, Tr. Vol. II, p. 101). However, these same individuals contend, complainant had difficulty performing this task, continuously requiring assistance from another associate in the department. (Teal, Tr. Vol. II, p. 46). If it were possible, complainant would simply pass the

customer on to one of the other associates in the department to handle it. (Hayes, Tr. Vol. II, p. 101). She also was unable to run the engraver, which was an important task, especially during the Christmas season. (Teal, Tr. Vol. I, p. 190). Nor did she gain the product knowledge required to be able to assist customers, even after asking the same questions numerous times. (Teal, Tr. Vol. II, pp. 34 and 35).

9. Complainant also needed to perform tasks at a more rapid pace and in a more timely manner. (Teal, Tr. Vol. I, p. 206; Hayes, Tr. Vol. II, p. 114). It is important in the jewelry department for associates to perform their job duties as quickly as possible in order to accommodate the number of customers. (Teal, Tr. Vol. I, p. 206; Hayes, Tr. Vol. II, pp. 113 and 114; Whiteacre, Tr. Vol. II, p. 191).

10. According to the white employees of respondent working in the Jewelry Department, in addition, although she had the same on-the-job training on the Telxon that was received by all associates, she failed to grasp how to perform the most simple tasks on it. (Teal, Tr. Vol. I, p. 190, Vol. II, p. 22; Hayes, Tr. Vol. II, p. 101). In order to sign on to the Telxon, the associate need only enter their initials and the first four digits of their social security number. (Teal, Tr. Vol. I, p. 192, Vol. II, p. 12). Yet, complainant continuously required assistance to sign on because she had trouble remembering how to do so. (Teal, Tr. Vol. I, pp. 191 and 192, Vol. II, p. 12). Complainant was the only person in the department who could not operate the Telxon. (Teal, Tr. Vol. II, p. 13). The undersigned finds as a matter of fact that complainant never received the same training as other employees on Telxon. Complainant testified credibly that Ms. Teal once or twice showed her how to use Telxon at which time she moved very quickly and spoke very fast. (Puller, Tr. Vol. 1, p. 92). Furthermore, Ms. Teal admitted that she had never had the time to take complainant aside and show

her how to use the Telxon, because of the way they were scheduled in Jewelry. (Teal, Tr. Vol. 2, p. 22). Furthermore, as part of complainant's duties, she was to receive CBL (computer based learning) training during her regular schedule of work hours, which apparently her supervisor, Ms. Teal never allowed her to take. (Teal, Tr. Vol. II, pp. 29 and 30; Foster Tr. Vol. III, pp. 28 and 29).

11. It is further contended that, complainant also lacked confidence in her ability to handle situations which may have arisen in the jewelry department, even after having been there for several months. (Teal, Tr. Vol. II, p. 31). She was uncomfortable being in the department by herself with no one available in the event that she had a question or could not handle a situation that arose. (Teal, Tr. Vol. II, p. 31). In fact, at times she expressed a desire to transfer from the department because the job responsibilities became too confusing and she felt she would be unable to perform those responsibilities. (Teal, Tr. Vol. II, p. 39). However, she was encouraged by all members of the jewelry department to stay and endeavor to learn the tasks. (Teal, Tr. Vol. II, p. 39).

12. Complainant received her ninety (90) day evaluation approximately September 6, 1995. (Puller, Tr. Vol. I, p. 112, Respondent Ex. No. 1). The evaluation was completed by Ms. Teal. (Respondent Ex. No. 1). The evaluation indicated that, although complainant was a dependable, honest person, dressed appropriately, and was very polite with customers, she lacked confidence in performing the duties of her position, lacked product knowledge, failed to notice customers when working on other projects, and required improvement in the areas of confidence, speed, product knowledge, and use of the Telxon. (Puller, Tr. Vol. I, pp. 112 and 113; Respondent Ex. No. 1). All of the comments listed on complainant's evaluation were performance-based criticisms. (Puller, Tr. Vol. I, p. 113). Complainant signed the evaluation without comment. (Puller, Tr. Vol. I, p. 113; Respondent Ex. No. 1).

13. Ms. Hayes, although she did not have the opportunity to evaluate complainant, agreed, months later, that complainant would have received a below expectations rating from Ms. Hayes for job performance because complainant was still unable to grasp the responsibilities of her position. (Hayes, Tr. Vol. II, p. 109).

14. In August 1995, a full-time position became available in the jewelry department. (Puller, Tr. Vol. I, p. 17; Teal, Tr. Vol. I, p. 188). Complainant and Kim Barrett, another part-time jewelry associate, were the only ones to express an interest in the position. (Teal, Tr. Vol. I, p. 188). At that time, the jewelry department was gearing up for the beginning of the Christmas season, which usually began in October. (Teal, Tr. Vol. I, p. 189, Vol. II, pp. 44 and 57). Kim Barrett was originally hired into Wal★Mart as a full-time dressing room attendant. (Teal, Tr. Vol. I, p. 186). As a dressing room attendant, Ms. Teal assumed Ms. Barrett had experience with the Telxon. (Teal, Tr. Vol. I, p. 191). A few months before the full-time position came open in jewelry, Ms. Barrett was transferred to the jewelry department as a part-time associate, at Ms. Barrett's request. (Teal, Tr. Vol. I, pp. 186-188). She was given a part-time position when she transferred because there were no full-time positions available. (Teal, Tr. Vol. I, p. 187).

15. After careful consideration, Ms. Teal chose Ms. Barrett to fill the full-time position. (Teal, Tr. Vol. I, p. 188). Ms. Teal felt that Ms. Barrett had picked up on the responsibilities of the position quicker than complainant and that Ms. Barrett's performance of the duties of the position was superior to the complainant's, making Ms. Barrett the better candidate for the position. (Teal, Tr. Vol. I, p. 189). Ms. Barrett had previous experience on the Telxon and was able to utilize it without difficulty. (Teal, Tr. Vol. I, p. 191). Among numerous other advantages, this meant that merchandise that was received in the evening when Ms. Teal was not present could be checked in

by Ms. Barrett when received rather than waiting until the following morning. (Teal, Tr. Vol. I, p. 191). Quite simply, Ms. Barrett required no further training in order to be able to step into the position and fulfill its requirements, whereas complainant did require that training according to Ms. Teal. (Teal, Tr. Vol. I, pp. 189 and 192).

16. Furthermore, the department was preparing to enter the Christmas season, and Ms. Teal needed a person that she felt confident she could leave in charge of the department and that person could handle the responsibility, including possessing the ability to use the Telxon. (Teal, Tr. Vol. I, p. 189, Vol. II, p. 13). Ms. Barrett had previous experience using the Telxon when she worked in the dressing room, and was able to competently use it. (Teal, Tr. Vol. I, p. 21). Complainant, on the other hand, could not recall even the simple instructions needed to sign on the Telxon, let alone the ability to utilize any of its functions, according to Ms. Teal, which testimony is not deemed credible in light of other testimony stating that the sign on procedure required only that the person enter their initials, hit enter and enter the first four numbers of their social security number. (Teal, Tr. Vol. I, p. 191; Tr. Vol. II, p. 12).

17. Ultimately, although complainant's lack of computer experience and competency played a large role in Ms. Teal's decision to promote Ms. Barrett over complainant, Ms. Teal determined that Ms. Barrett was the better candidate overall because Ms. Barrett was able to perform all of the responsibilities of the position better than complainant. Ms. Barrett was able to use the Telxon without supervision, and Ms. Teal felt confident in leaving Ms. Barrett in charge of the department because she felt Ms. Barrett could handle any situation that might arise. (Teal, Tr. Vol. I, pp. 189 and 191, Vol. II, pp. 13, 21, 43 and 44).

18. In contrast, complainant still required further training in all aspects of her job

responsibilities and was simply not ready for a full-time position, especially with the busy Christmas season right around the corner. (Teal, Tr. Vol. I, p. 189). Complainant required more training not only on the Telxon, but also on changing watch batteries and bands and using the engraver, and needed to improve her speed in waiting on customers and performing other responsibilities of the position, such as checking in merchandise and processing refunds. (Teal, Tr. Vol. I, pp. 189, 190, 205 and 206, Vol. II, pp. 15, 16 and 46; Respondent Ex. No. 1). In addition, complainant needed more confidence in her own ability to handle the responsibilities of her position and needed to acquire more product knowledge. (Teal, Tr. Vol. II, pp. 31 and 35; Respondent Ex. No. 1). Complainant also needed to increase her speed in performing tasks and waiting on customers. (Teal, Tr. Vol. I, p. 205). In short, complainant was told that she failed to receive the full-time position for all of the reasons that were enumerated on her evaluation. (Puller, Tr. Vol. I, p. 118). Neither complainant's age or race played any part in Ms. Teal's decision, according to Ms. Teal. (Teal, Tr. Vol. I, pp. 192 and 193). The decision was based solely upon job performance. (Teal, Tr. Vol. I, pp. 193, 204 and 205). Yet when cross examined by counsel for complainant, Ms. Teal could not identify any complaints directed toward the complainant by the customers for being slow to serve them although customers would occasionally complain about slow service. (Teal, Tr. Vol. II, pp. 8 and 9). Complainant testified credibly, that prior to hiring Ms. Barrett full time in Jewelry, Ms. Teal had attempted to hire another candidate full time from outside the store. She stated that Ms. Teal declined to discuss the opening with her and that she simply arrived one day to see that the new hire had been placed on the schedule for that week full time. This individual could not be retained because the hire violated store policy, whereupon, Ms. Teal sought out Ms. Barrett to apply for a position in Jewelry. This despite the strong interest shown in full time status by complainant and

the failure of Ms. Teal to ever state that Telxon experience was necessary, it being the observation of complainant that such inventory work was generally performed almost exclusively by Ms. Teal herself. (Puller, Tr. Vol. I, pp. 19 and 20).

19. Ms. Teal informed complainant that she chose Ms. Barrett for the position because complainant required more training for a full-time jewelry position, especially on the Telxon. (Teal, Tr. Vol. I, p. 192, Vol. II, p. 21). Ms. Teal then offered to give complainant one-on-one training after the Christmas season was over. (Teal, Tr. Vol. I, p. 189).

20. After complainant was denied the full-time position, her attitude changed. (Teal, Tr. Vol. I, p. 198). Complainant began to take everything personally, believing that everyone was talking about her. (Teal, Tr. Vol. I, 199, Vol. II, p. 37). At one point, Ms. Hayes, the jewelry department manager at the time, called in to the store to check with Ms. Teal on the status of the department. (Hayes, Tr. Vol. II, pp. 102 and 103). Shortly after complainant failed to obtain the full-time position, Ms. Teal stepped down as jewelry manager and Ms. Hayes was hired to replace her. (Teal, Tr. Vol. I, pp. 194 and 195). Ms. Hayes had been the jewelry manager prior to taking maternity leave, and, when Ms. Teal stepped down, Ms. Hayes was interviewed and offered the position. (Hayes, Tr. Vol. II, p. 91; Fisher, Joint Ex. No. 7, p. 23). Ms. Teal became backup to Ms. Hayes. (Teal, Tr. Vol. I, p. 195; Hayes, Tr. Vol. II, p. 102). Complainant never expressed an interest in this position and it is not part of the complainant's complaint. (Puller, Tr. Vol. I, pp. 27 and 89). No other full-time positions in jewelry became available while complainant was employed in that department. (Teal, Tr. Vol. I, p. 194). Complainant was present and seized the phone from Ms. Teal. (Hayes, Tr. Vol. II, p. 103). Complainant proceeded to curse at Ms. Hayes, who was her immediate supervisor at the time, and accused Ms. Hayes of talking about complainant behind

complainant's back and criticizing her work performance. (Hayes, Tr. Vol. II, p. 103). In fact, Ms. Hayes had simply called Ms. Teal to check on the status of lists that were left of things that needed to be done in the department, according to Ms. Hayes. (Hayes, Tr. Vol. II, p. 103). Ms. Hayes did not call to check on complainant. (Hayes, Tr. Vol. II, p. 104). It was common for Ms. Hayes to call in to check on the department. (Hayes, Tr. Vol. II, p. 104). All the foregoing was according to the white supervisors and co-employees. Complainant, testified credibly, however, to several events that create a strong inference of racial discrimination. These include the fact that at the time Ms. Barrett was hired, Ms. Teal stuck the schedule book under complainant's nose and stated, "see, we don't need you anymore." (Puller, Tr. Vol. I, pp. 20 and 21). That was just after the prior full time Jewelry employee, Ms. Crawford had been fired after a couple months, based on what others had told Ms. Teal, not based on any observation by Ms. Teal herself. (Puller, Tr. Vol. I, p. 22; Teal, Tr. Vol. II, pp. 23-25). Ms. Barrett is white, Ms. Crawford is African American. Ms. Fisher the District Manager for seven stores for the Jewelry and Shoe Departments, testified credibly that she became District Manager in October 1996 and that no African Americans were hired in the Jewelry Department for respondent during her tenure in that position. (Fisher, Joint Ex. No. 7, p. 36). Ms. Teal testified that another African American man named William had worked there prior to complainant being hired but that she could not remember his last name. Ms. Teal represented that they got along fine and that he left to take a better paying job and that an African American woman had been hired after complainant left. (Teal, Tr. Vol. I, pp. 201-203, Vol. II, pp. 25 and 26). There were no African American managers at respondent's store in Martinsburg during the period when complainant worked there. (Foster, Joint Ex. No. 3, pp. 29 and 30). Complainant testified credibly that when Ms. Hayes came back to work in Jewelry she had a bad attitude toward complainant. She

testified that she had left her glasses on a table at work and came in the next day and asked where her glasses were, to which neither Ms. Hayes nor Ms. Teal responded but rather she looked and saw that her glasses were on the floor at the feet of Ms. Hayes, and complainant had to bend over to pick them up. On another occasion Ms. Puller's two daughters and grandchildren had been in a car accident, and had called from the Emergency room at the hospital in Charles Town while complainant was on lunch break. Her daughter had left a message with Ms. Teal, but Ms. Teal never relayed the message to the complainant, who remained at work and was not aware of the accident until she had returned home in the evening. (Puller, Tr. Vol. I, pp. 27-29). Complainant testified credibly, that she had heard of the African American employees at respondent's place of business in Martinsburg referred to as being slow and that it was being used to describe her by Ms. Teal, while no-one else was being referred to as slow, this upset complainant. Complainant had heard Glenda Troy an African American woman in Mens' department referred to as slow by a manager named Margie; as well as another manager in Foods refer to an African American gentleman in maintenance as slow. (Puller, Tr. Vol. I, pp. 30, 93 and 94). Complainant testified credibly that when a new part time position came open around Christmas time in Jewelry, a white woman, Brenda Everhart got the position and was immediately given more hours on the schedule than complainant. (Puller, Tr. Vol. I, p. 30). Complainant testified credibly that on another occasion, Beth Stickle, a co-worker who had been made assistant manager of Jewelry according to what complainant had been told, made a comment to the effect that "you see, every time you do something for your race of people, you see what happens"; when complainant and a co-worker were discussing two young African American men who had just been terminated. Although Ms. Stickle denied making this comment, her testimony was not as credible as that of complainant. (Tr. Vol. I, p. 31). Complainant

testified credibly that after being transferred to cashier she had not been given a full time position at cashier until May when she asked for the full time work from her supervisor Dawn Phalen upon learning that people were being hired in at full time, and was required to re-interview before she was given full time status. Complainant testified that she had trouble receiving her evaluation in July, because she was told that Mr. Fink had to be present for her evaluation with Ms. Phalen, while every one else did not have to have Mr. Fink present and had received their evaluation already. During this evaluation she was told that it was because everyone was afraid of her, and that she would be getting the minimum \$0.15 per hour raise. This was different from what many long term employees were getting. One African American Ms. Troy, refused to sign her evaluation when she noted she was given the \$0.15 raise while another white employee received the maximum \$0.40 raise. (Puller, Tr. Vol. I, pp. 51-53).

21. In January 1996, Complainant filed a complaint through Wal★Mart's Open Door Policy. (Puller, Tr. Vol. I, p. 34). Wal★Mart's Open Door Policy allows an employee who may have a complaint, problem or idea to take it to a "Coach" to talk about it without fear of retaliation. (Respondent Ex. No. 2). The employee may take his or her problem all the way to the top management of Wal★Mart. (Respondent Ex. No. 2). However, although the policy promises the employee will always be heard, it also states that the employee may not always prevail. (Respondent Ex. No. 2). On January 25, 1996, a meeting was held with J. T. Wheeler, the assistant manager of the Martinsburg Wal★Mart, and Kim Fisher, the district manager for jewelry, concerning complainant's complaints. (Puller, Tr. Vol. I, p. 35; J.T. Wheeler, Tr., June 24, 1999, ("Vol. III"), p. 84; Fisher, Joint Ex. No. 7, pp. 6 and 9). Complainant brought to the meeting a friend who was not an employee of Wal★Mart, Ramon Lee Johnson. (Puller, Tr. Vol. I, pp. 34 and 35; Wheeler,

Tr. Vol. II, p. 85; Fisher, Joint Ex. No. 7, p. 10). During the meeting, complainant gave Mr. Wheeler a note allegedly outlining her complaints. (Puller, Tr. Vol. I, p.35; Wheeler, Tr. Vol. II, p. 85). Mr. Wheeler does not believe that the typed note, with the date handwritten in, that is attached to the transcript as Complainant's Ex. No. 1 is the same note that complainant gave to him during this meeting. (Wheeler, Tr. Vol. II, p. 108).

22. Mr. Wheeler, believing that the non-Wal★Mart employee should not be present at the meeting, called Wal★Mart legal department to ask for advice. (Wheeler, Tr. Vol. II, p. 85). When he was unable to contact a legal advisor, he left a message and returned to the meeting. (Wheeler, Tr. Vol. II, p. 85). Subsequently, a person from the legal department contacted Mr. Wheeler and informed him that non-Wal★Mart employees should not be present in Open Door meetings. (Wheeler, Tr. Vol. II, p. 85). When informed of that policy, complainant chose to end the meeting rather than continue without Ms. Johnson present. (Puller, Tr. Vol. I, p. 35; Wheeler, Tr. Vol. II, pp. 85 and 86; Fisher, Joint Ex. No. 7, p. 12). Complainant took the written complaint with her and did not leave a copy. (Puller, Tr. Vol. I, p. 35; Wheeler, Tr. Vol. II, p. 89). No one ever subsequently received a copy of that written complaint. (Foster, Joint Ex. No. 3, p. 35; Wheeler, Tr. Vol. II, p. 89; Jim Waters, Tr. Vol. II, p. 18). It is unclear whether, in fact, Ms. Fisher retained a copy of the letter after the meeting. Ms. Fisher testified that she got a copy of it during the meeting (Fisher, Joint Ex. No. 7, p. 13) but complainant testified that she took all copies of the letter with her when she terminated the meeting. (Puller, Tr. Vol. I, p. 35). Complainant further testified that she gave copies of the complaint to Ms. Foster to distribute to various persons. (Puller, Tr. Vol. I, pp. 151 and 152). However, Ms. Foster testified that she never received any copies of a written complaint from Complainant. (Foster, Joint Ex. No. 3, pp. 34 and 35).

23. During the shortened meeting, complainant voiced complaints concerning her failure to receive the full-time position that had been awarded to Ms. Barrett and a few other general complaints about the jewelry department. (Wheeler, Tr. Vol. II, p. 89; Fisher, Joint Ex. No. 7, p. 10). She also complained about her hours having been cut back. (Wheeler, Tr. Vol. II, p. 90; Fisher, Joint Ex. No. 7, p. 8). Mr. Wheeler explained that January is the slowest time of the year in retail and all hours are cut back, making it difficult for part-time employees to receive hours. (Wheeler, Tr. Vol. II, p. 90). Ms. Fisher also indicated that January is a very slow month. (Fisher, Joint Ex. No. 7, p. 8). However, Ms. Fisher, in response to the complaint, reviewed the jewelry schedule and determined that complainant's hours had not been cut any more or less than anyone else's. (Fisher, Joint Ex. No. 7, p. 8). At no time did she complain of race or age discrimination, according to most of the respondent's white supervisory personnel. (Wheeler, Tr. Vol. II, p. 89; Fisher, Joint Ex. No. 7, p. 32). Indeed, both Mr. Wheeler and Ms. Fisher determined Complainant's complaints centered on her failure to receive the full-time position in jewelry and her lack of hours. (Wheeler, Tr. Vol. II, p. 103; Fisher, Joint Ex. No. 7, p. 31). The undersigned found this testimony, that no complaint was made on the basis of race or age, to be patently ridiculous. Complainant testified credibly that she had been talking with Donna Foster in Personnel, Marlene Hunter, who had hired her, and J. T. Williams (Mr. Wheeler in fact) after Christmas and prior to the January 25, 1996 meeting, specifically complaining about petty harassment on the basis of race and age at the hands of Ms. Hayes, Ms. Teal and Ms. Everhart. (Puller, Tr. Vol. I, p. 32). Shortly after the meeting she filed her complaint with the State Human Rights Commission. Complainant's testimony that she had informed members of management of the nature of her discrimination based complaints is further bolstered by the testimony of the District Manager for the Jewelry and Shoe Departments for a seven

store areas during this time, Kimberly Fisher. Ms. Fisher testified credibly, that when she came into the store on January 22, 1996, Ms. Hayes informed her that complainant had been meeting with J. T. Wheeler, the store Assistant Manager about wanting to file a complaint, and that she needed to go speak with Mr. Wheeler. Ms. Fisher learned from Mr. Wheeler that complainant wanted to file a grievance, discrimination suit against Ms. Hayes. They arranged the January 25, 1996 meeting, prior to which, Ms. Fisher received a copy of the letter complainant claims to have distributed. That meeting went on for some 20 to 30 minutes listening to complainant talk about her problems before the meeting was terminated. (Fisher, Joint Ex. No. 7, pp. 6 and 7, 13 and 24). Furthermore, Ms. Teal acknowledges that she was aware that complainant had filed a written grievance and that it had something to do with a racial issue (although she does not remember meeting with upper management concerning the allegations); and, that it was common knowledge that complainant had filed a discrimination complaint based upon talk around the whole store by within a month after filing the complaint. (Teal, Tr. Vol. II, pp. 28, 41 and 42).

24. After a second meeting with complainant on February 5, 1996, during which complainant talked about specific instances of harassment, Ms. Fisher conducted an investigation and questioned Ms. Hayes, Ms. Teal and, briefly, Brenda Everhart, a part-time associate in jewelry. (Fisher, Joint Ex. No. 7, pp. 14 and 15). Because the investigation was inconclusive, boiling down to a he said-she said situation, Ms. Fisher determined to speak with the store manager, Jim Waters concerning the situation. (Fisher, Joint Ex. No. 7, p. 16). This is in sharp contrast to the respondent's decisive action in terminating a white manager trainee when he admitted that he had made a racially derogatory and offensive statement to an African American manager trainee. (Kirk, Tr. Vol. III, pp. 225 and 226).

25. Because complainant felt that she was being discriminated against because of her failure to get the full time position, and it was very difficult to receive that status in jewelry, Ms. Fisher believed that the best course of action would be to transfer complainant to the position of front end cashier, where her chances of receiving full-time hours were greatly increased. (Fisher, Joint Ex. No. 7, pp. 31 and 32). Mr. Wheeler, also believing complainant's main complaint was full-time status, informed her at the meeting on her complaints that perhaps he could move her to Division I to get her more hours. (Wheeler, Tr. Vol. II, pp. 90 and 91). Wal★Mart is made up of separate divisions. (Waters, Tr. Vol. II, p. 12). Jewelry is basically its own division and Ms. Fisher is responsible for everything that occurs in jewelry. (Waters, Tr. Vol. II, p. 12). The jewelry department is not directly supervised by the store manager. (Waters, Tr. Vol. II, pp. 12 and 13). Division 1 encompasses other areas of the store, including the front cashiers. (Waters, Tr. Vol. II, p. 12).

26. Shortly thereafter, all of the employees of the jewelry department received a pink slip for a register shortage from Cathy Robinson, who worked in the accounting office. (Cathy Robinson, Tr. Vol. II, pp. 55 and 56). Wal★Mart's cash register shortage/overage policy states that, if an employee had operated a register that subsequently was either short or over more than five dollars (\$5.00), the employee received a pink slip. (Puller, Tr. Vol. I, pp. 96 and 97; Robinson, Tr. Vol. II, p. 56). It is part of Ms. Robinson's job in the accounting department to issue pink slips. (Robinson, Tr. Vol. II, pp. 58 and 62).

27. Ms. Robinson had issued pink slips to all the employees in the jewelry department except for complainant for a register shortage, because Ms. Robinson had not seen complainant in order to issue her one. (Robinson, Tr. Vol. II, p. 57). On the day in question, Ms. Robinson was in

the jewelry department, saw complainant, and inquired if complainant would be working that evening so that Ms. Robinson could issue her the pink slip. (Robinson, Tr. Vol. II, pp. 57 and 58). Complainant got upset and immediately left the department. (Robinson, Tr. Vol. II, p. 60). That was her last day in the jewelry department. (Teal, Tr. Vol. I, pp. 199 and 200; Hayes, Tr. Vol. II, p. 107).

28. Complainant sought out the store manager, Jim Waters, to complain about receiving the pink slip. (Puller, Tr. Vol. I, p. 100). Mr. Waters allowed her to go home for the day because she was so upset. (Puller, Tr. Vol. I, p. 100).

29. It was at that point that Mr. Waters became aware that complainant was unhappy in the jewelry department. (Waters, Tr. Vol. II, p. 12). Prior to this incident, he had never received any complaints from complainant. (Waters, Tr. Vol. II, p. 24). Mr. Waters had no direct supervisory control over that department. (Waters, Tr. Vol. II, p. 12). It was his understanding that complainant was not getting along with the other associates in the department, she was not happy with the leadership in the department, and she was dissatisfied with the hours that she was receiving. (Waters, Tr. Vol. II, p. 14). Mr. Waters, based upon that information, decided to offer complainant a transfer to Division I where he could oversee her and respond to and address any problems she may have. (Waters, Tr. Vol. II, p. 15). This is a common way to handle persons that are not satisfied in the department in which they work. (Waters, Tr. Vol. II, p. 15). Furthermore, Mr. Waters acted within days to try to rectify complainant's situation. (Waters, Tr. Vol. II, pp. 27 and 28).

30. Mr. Waters is a people oriented person, "willing to bend over backwards to help people out." (Wheeler, Tr. Vol. II, p. 102). Therefore, when he learned of complainant's dissatisfaction with her position in the jewelry department, he wanted to transfer her to Division I

where he would be able to address her dissatisfactions, work out the problems and create a “win-win situation for all parties involved.” (Waters, Tr. Vol. II, p. 21). Mr. Waters believed that bringing complainant into his area of supervision would be best for everyone so that he could deal with any problems she may have because he truly just wanted to help her. (Waters, Tr. Vol. II, p. 21).

31. Mr. Waters never received a copy of the typed note and complainant never raised any complaint with Mr. Waters that she was being discriminated against on the basis of her age or race. (Waters, Tr. Vol. II, p. 15-16, and 18). In fact, Mr. Waters testified that he never perceived her complaints to be based upon either race or age. (Waters, Tr. Vol. II, p. 52).

32. Because these events occurred right after Christmas when the store is slow, there were not very many options as to where complainant could be placed in Division I. (Waters, Tr. Vol. II, p. 21). Consequently, complainant was offered a position of cashier in order to bring her under the supervision of Mr. Waters so that he could address her problems and resolve them. (Waters, Tr. Vol. II, p. 22). Complainant was not required to accept the position. (Wheeler, Tr. Vol. II, p. 92; Waters, Tr. Vol. II, p. 22). To the contrary, according to Mr. Waters and Mr. Wheeler, it was Complainant’s decision whether to accept the position, although the employee handbook states that the associate may be transferred at anytime by respondent. (Waters, Tr. Vol. II, p. 52; Wheeler, Tr. Vol. II, p. 105).

33. Complainant subsequently transferred to the position of part-time cashier in February 1996; it was not until May 1996 however, until she received a full-time position. (Puller, Tr. Vol. I, p. 134; Waters, Tr. Vol. II, p. 47; Joint Ex. No. 1). Respondent contends that this fact is not significant in light of the fact, that within one day of complainant requesting a full-time position from Mr. Waters, he granted the request. (Waters, Tr. Vol. II, p. 53). Complainant’s transfer was

not a demotion, as there are many job opportunities that extend from the cashier position. (Waters, Tr. Vol. II, p. 29). Indeed, many of the management positions have been promoted from a front end cashier. (Waters, Tr. Vol. II, p. 29). There was also a much greater opportunity to obtain a full-time position as a front end cashier than there was as a jewelry associate. (Waters, Tr. Vol. II, p. 30; Fisher, Joint Ex. No. 7, p. 17). Complainant did not receive a reduction of her wages when she transferred. (Puller, Tr. Vol. I, p. 103). Furthermore, she was granted special scheduling considerations. (Puller, Tr. Vol. I, p. 129). Complainant herself considered this a change in her employment condition as she had hired in to work in the jewelry department specifically and had not desired a cashiers position. (Puller, Tr. Vol. 1, pp. 42, 104 and 138).

34. When the Charles Town Wal★Mart was preparing to open, complainant applied for a transfer to that store. (Puller, Tr. Vol. I, p. 59). She was interviewed for the transfer by Clint Miller, the store manager. (Puller, Tr. Vol. p. 59; Clint Miller, Tr. Vol. II, pp. 204 and 205). Although Mr. Miller contemplated offering her a position as a telephone operator in his store, he never offered her that position. (Puller, Tr. Vol. 59; Miller, Tr. Vol. II, p. 207). After her interview, but before she was offered a position, she called the Charles Town Wal★Mart to speak to Mr. Miller. (Puller, Tr. Vol. I, p. 62; Jim Severn, Tr. Vol. II, p. 195). Mr. Jim Severn, the co-manager of the Charles Town Wal★Mart, answered the phone. (Severn, Tr. Vol. II, p. 195). Complainant requested to speak to Mr. Miller and, when informed that he was not present, she got very abrasive, rude and offensive to Mr. Severn, accusing Mr. Miller of ducking her calls, which Mr. Severn stated amounted to, in essence, calling him a liar. (Severn, Tr. Vol. II, pp. 196 and 198). Even after being informed that she was speaking to the co-manager of the store, her manner and tone were abrasive and rude according to Mr. Severn. (Severn, Tr. Vol. II, p. 202).

35. When Mr. Miller returned the next day, Mr. Severn informed him of his telephone conversation with the complainant and complainant's totally unprovoked and unprofessional attitude on the phone. (Severn, Tr. Vol. I, p. 199; Miller, Tr. Vol. II, p. 208). In Mr. Severn's opinion, she failed to display the sort of demeanor required of a phone operator. (Miller, Tr. Vol. II, p. 208). Based upon that phone conversation between Mr. Severn and complainant, Mr. Miller determined not to hire complainant for the position of telephone operator. (Miller, Tr. Vol. II, pp. 209 and 220).

At the time he made the decision, Mr. Miller claims he was not aware of any problems that complainant was experiencing at the Martinsburg Wal★Mart and his decision was not based on either her age or race. (Miller, Tr. Vol. II, p. 209). Mr. Miller indicated that Wal★Mart receives four to six hundred phone calls per day in one store, and it was his desire that the first contact a customer had with his store be the best. (Miller, Tr. Vol. II, p. 211). In testifying regarding his decision not to hire complainant, Mr. Miller stated, "Well, he's the one that notified me about the telephone call, and that's what I--- you know, I just said I don't really need that answering the telephone, so that was--- He informed me and I made the decision." (Miller, Tr. Vol. II, p. 220). Mr. Miller hired only six transfers from Martinsburg, none of which were African American, as only complainant was African American on the transfer list. (Miller, Tr. Vol. II, p. 219).

36. Complainant went on a medical leave of absence on October 2, 1997. (Puller, Tr. Vol. I, p. 124; Joint Ex. No. 1). She has never returned to work at Wal★Mart, but she is still technically on a medical leave of absence. (Foster, Joint Ex. No. 3, p. 32).

37. Complainant subsequently filed for social security disability benefits. (Puller, Tr. Vol. I, p. 74). On March 10, 1999, Complainant was awarded social security benefits, the Social Security Administration finding her to be totally disabled as of July 1, 1997. (Puller, Tr. Vol. I, pp.

75, 79; Complainant Exhibit No. 4; Joint Ex. No. 1). Complainant is currently disabled and receiving social security disability benefits. (Puller, Tr. Vol. I, p. 79).

38. Complainant has had a long history of mental health problems, stretching from 1980 to present. Complainant asserts that as a consequence of the discriminatory treatment by respondent, she was rendered incapable of working by her mental health problems, for which she seeks consequential damages. The undersigned let in all the medical records of complainant, but did not permit any expert testimony regarding the allegation that the alleged discriminatory treatment was the proximate cause of her total disability. (Joint Ex. No. 2). This testimony and evidence was excluded by the undersigned due to his belief that he did not have the authority to award consequential damages in the nature of lost earning potential and investment income under this theory of recovery. (Hearing Officer, Tr. Vol. 1, p. 210).

B.

DISCUSSION

In order to make out a prima facie case of employment discrimination the complainant 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; and,
- (3) But for the plaintiff's protected status, the adverse decision would not have been made.

Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W. Va. 1986).

West Virginia Code § 5-11-9(7)(C) declares it unlawful for any employer to engage in any form of reprisal or to otherwise discriminate against any person because he or she has opposed any practices or acts which are forbidden under the West Virginia Human Rights Act or because he or

she filed a complaint, testified or assisted in any proceeding under said act. West Virginia Code § 5-11-9(1) declares it unlawful for any employer to discriminate against an individual with respect to...conditions or privileges of employment. Thus the West Virginia Supreme Court has recognized a cause of action for the creation of a hostile work environment through discriminatory harassment by supervisory employees of an employer in Westmoreland Coal v. Human rights Commission, 382 S.E.2d 562, at 565 footnote 3 (W.Va. 1989); stating that the appropriate standard is whether such behavior effects the terms and conditions of employment, thus the harassment must be sufficiently “severe or pervasive”. Meritor Savings Bank v. Vinson, 477 U.S. 57, at 66-67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

The complainant may make out a prima facie case of discrimination 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 the West Virginia Supreme Court in Shepardstown Volunteer Fire Dept. v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). The complainant must first establish a prima facie case of discrimination. Once the complainant establishes a prima facie case of discrimination the burden shifts to the respondent to offer evidence that the adverse decision was for a non discriminatory reason, which must be clear and reasonably specific. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

Finally, the complainant may show that the proffered reason was not the true reason for the decision but rather pretext for discrimination. The term “pretext” has been held to mean an ostensible reason or motive assigned as a color or cover for the real motive; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383

S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway, supra. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Where pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 3457 S.E.2d 152, at 160 and 164 n. 19 (1995). Although 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).

There is also the “mixed motive” analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268 (1989); and, recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. “Mixed motive” analysis applies where the respondent articulates a legitimate non discriminatory reason for its decision which is not pretextual, but where discriminatory motive plays a part in the adverse decision. Under the “mixed motive” analysis, the complainant needs only show that unlawful discriminatory motive played some role in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant’s protected status. Barefoot, supra, 457 S.E.2d at 162, n.16; 457 S.E.2d at 164, n. 18.

The complainant has made a prima facie case for racial discrimination in that she was a member of a protected class, that being the African American race; she was denied a promotion to full time employment in the Jewelry department ; and, that position was given to a new hire with less seniority who was a member of the white race. The respondent has articulated a non discriminatory reason for the promotion of the white employee to full time status, that being that she was more qualified to handle the responsibilities of full time employment which would have required her to

work alone on certain shifts. Complainant has advanced several incidents and facts which tend to demonstrate that racial discrimination played some part in the employment decisions being made by respondent.

These include the fact that the person promoted to the full time slot in Jewelry was hired just two weeks prior to that promotion on a part time basis in Jewelry. This was after the complainant had made her desire for a full time position known to Ms. Teal, and Ms. Teal had attempted to hire from outside only to have that hire rescinded from higher up. Although Ms. Teal had hired an African American to work full time prior to complainant being hired, that individual was fired after a relatively short period of time, after being complained about by the other white co employees in the Jewelry department, not on the basis of Ms. Teal's own observations. At the time the person hired full time was initially hired in Jewelry part time, complainant was shown the schedule with Ms. Everhart's name and told by Ms. Teal, "see, we don't need you." Subsequent to Ms. Hayne's return to Jewelry, the treatment of complainant became bad. Examples cited by complainant included an incident when her glasses were placed on the floor, and neither Ms. Haynes nor Ms. Teal told her where they were after complainant inquired as to there whereabouts. On another occasion, she was never given the message that her family had been involved in a car accident and were at the emergency room, when that message had been left with Ms. Teal while complainant was off on lunch break. Further incidents, included the frequent use of the performance based evaluation of African American employees as being too slow in the performance of their duties; while being given smaller raises than those being given to white employees. After Ms. Everhart had received the promotion to full time in Jewelry, respondent hired another part time employee in Jewelry during the Christmas rush, who was given more hours on the schedule than complainant, that employee was

white. These things give rise to the inference that race was playing some part in what decisions were being made in regards to complainant's employment.

Although complainant was unable to offer such numerous examples to indicate that a racially hostile work place was created in the Jewelry Department, the undersigned concludes that such treatment was both severe and pervasive. This is based upon the incident with the glasses which indicates a malevolent intent on the part of Ms. Teal and Ms. Haynes in their treatment of complainant and the credible testimony of complainant indicates that this was done primarily to humiliate her. The failure to inform her of the fact that her family had been involved in a car accident and were at the emergency room is as callous and uncalled for as anything the undersigned has ever heard, clearly rising to the level of severe treatment of complainant. These specific examples do not indicate the nature of the everyday attitude exuded which complainant indicated was "bad". This can be conveyed by looks and tone of voice, as well as demeanor, which is not susceptible to being conveyed to the trier of fact in any specific examples. Nevertheless, the undersigned is convinced by the credible testimony of complainant that this treatment was pervasive in the Jewelry department and that it was motivated in part by the race of complainant.

The respondent has put forth substantial evidence that it would have made the same decision to promote someone else to the full time position in Jewelry to the satisfaction of the undersigned. The complainant had clearly not developed the skills on the Telxon that Ms. Teal felt were necessary to take a full time slot. This inability was not complainant's fault, but rather was a product of the desire of Ms. Teal to schedule the complainant to help cope with the volume of traffic in Jewelry during the Christmas season, and Ms. Teal's unwillingness to allow complainant the time to take CBL training during her work hours, which she should have done according to store policy. Other

credible testimony also suggests that complainant may not have been as familiar with the refunding procedures and other duties such as changing watch bands, etc. These factors taken together, make it more likely than not that Ms. Everhart would have been promoted to full time employment rather than complainant despite any race based discrimination which may have entered into the decision.

The complainant also alleges retaliation for claiming race base discrimination through the open door policy with respondent. The undersigned concludes that such retaliation did in fact occur. Regardless of the sequence of events during which complainant made known her complaints about treatment in Jewelry in January of 1996, at some point in time it must have been apparent to those in management that complainant's complaints had something to do with the fact that she was African American. The undersigned does not believe that the letter briefly handed out in advance of the meeting on January 25, 1996 did not contain any reference to race based discrimination. That this was the basis of the complaints made is further confirmed by the testimony of Ms. Fisher, which indicates that Mr. Wheeler informed her about complainant's wanting to file a grievance, discrimination against Ms. Haynes, when she arrived at the store on January 22, 1996. The response of the store manager Mr. Waters was to move complainant to the front of the store where she could work under his supervision and would have a greater opportunity to be promoted to full time. This occurred after Ms. Fisher turned up no confirmation of the complainant's allegation because they basically boiled down to a he said she said standoff situation. This may be contrasted to the respondent's firm action where a management trainee was summarily terminated after admitting to making a racially offensive statement involving the use of the "n" word. Nevertheless, even after being transferred to the Front with the ostensible purpose of getting full time status, complainant was not given full time status until May after being transferred in early February. She was not given her

evaluation as was everyone else, but had to wait for a manager to sit in with her supervisor when she gave the evaluation, further she was not given the full time slot until after she had to go through another interview, even though new hires were being hired in as full time prior to her promotion. The undersigned is unable to come up with any exact number to reflect the damages she would have sustained in lost back pay as a result of the difference between her full time hours and her part time hours and concludes that to the best of his estimation such difference would have resulted in a difference of at least \$1,000.00. The undersigned does not believe that remand to the undersigned for further evidence as to this amount would result in any better evidence upon which to make this estimate.

The undersigned finds that complainant is entitled to an award of incidental damages in the amount of \$3,277.45, for humiliation, embarrassment and emotional and mental distress and loss of personal dignity. Pearlman Real Estate Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977). A cap on incidental awards for a non jury trial is set at \$3,277.45 in cases before the Human Rights Commission as adjusted to conform to the consumer price index pursuant to the West Virginia Supreme Court's decision in Bishop Coal Company v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989).

Prior to trial the undersigned concluded as a matter of law that he was without authority to grant damages resulting as a consequence of the unlawful discrimination by respondent against complainant, which may have proximately caused her total disability by aggravating her psychiatric problems. The undersigned did not permit the complainant to introduce evidence to establish proximate causation of the total disability or the consequential damages attributable thereto because the undersigned could not find precedent for such an award sounding in tort as intentional infliction

of emotional harm, under the West Virginia Human Rights Act in a case tried before an Administrative Law Judge. Were such an award within the Commission's jurisdiction to award, it is unclear whether such damages would be subject to the cap on incidental damages under Bishop Coal, supra, for non jury awards.

C.

CONCLUSIONS OF LAW

1. The complainant, Sharon L. Puller, 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. The respondent, Wal★Mart Stores, Inc., is an employer as defined by W. Va. Code § 5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.

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

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W. Va. Code § 5-11-9 et seq.

5. The complainant has established a prima facie case of race discrimination and retaliation.

6. The respondent has articulated a legitimate non discriminatory reason for its actions toward the complainant, that it did not discriminate against complainant because of her race or age, and did not discriminate against complainant for having filed a Human Rights complaint or for complaining about discriminatory practices under the respondent's open door policy. Complainant has demonstrated by the preponderance of the evidence that such reasons were pretextual for

discrimination in regards to complainant's application for a full time position in respondent's jewelry department, although respondent has demonstrated by a preponderance of the evidence that complainant would not have been hired for that position in any event. Complainant has demonstrated by a preponderance of the evidence that she was subjected to a hostile work environment in the respondent's jewelry department because of her race; and, that she was retaliated against because of her complaints in being moved from jewelry to the front check out position (without being given full time status until almost four months later, while other associates were being hired in full time).

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an undeterminable amount of back pay for the delay in being given full time status; for which the undersigned assigns back pay in the amount of \$1,000.00, as that amount is not determinable but would certainly have exceeded that amount for a period of four months as full time and part time status would result in losing at least ten hours per week.

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

9. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of reasonable attorney's fees and costs in the aggregate amount \$7,987.50 for 106.5 hours of representation at a rate of \$75.00 per hour. The objection of the respondent that counsel for complainant has failed to serve the fee petition within the time frame required and the failure to provide a certificate of service is noted, however, the undersigned cannot find any indication that the respondent has been prejudiced in any fashion by reason of the facts cited as the

basis for objection to the fee request.

D.

RELIEF AND ORDER

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

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

2. Within 31 days of the receipt of this decision, the respondent shall pay back pay to complainant in the amount of \$1,000.00, plus statutory interest.

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

4. Within 31 days of receipt of the undersigned's order granting reasonable attorneys the respondent shall pay attorney's fees and costs in an aggregate amount \$7,987.50.

5. The respondent shall prepare a report detailing the hires of the respondent in the district covered for respondent's jewelry and shoe departments, showing the new hires for each store in each department from 1995, till the present, and in each year thereafter, broken down by race of applicants, and showing the length of time before those hired as part time attain full time status; as well as the promotions in management within that district for jewelry and shoe divisions by race of successful applicant.

6. The respondent shall further, prepare a report for each store in West Virginia showing the new hires and promotions within those stores, and showing the length of time before those hired

as part time attain full time status, by race, for each year from 1995 until the present, and for each year thereafter. Said report shall also show transfers of management level employees by race from various stores in the state, indicating the stores and locations by city and state to which said individuals are transferred.

7. 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, Norman Lindell, Deputy Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 23rd day of September, 1999.

WV HUMAN RIGHTS COMMISSION

BY: 
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 29th day of September, 1999 to the following:

SHARON L PULLER
30 MEGAN ST
KEARNEYSVILLE WV 25430

KEITH WHEATON ESQ
203 W JOHN ST #4
MARTINSBURG WV 25401

WAL MART STORES INC
MARTINSBURG MALL
800 FOXCROFT AVE
MARTINSBURG WV 25401

CHRISTOPHER K ROBERTSON ESQ
JACKSON & KELLY PLLC
PO BOX 1068
MARTINSBURG WV 25402

MARY C BUCHMELTER
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
PO BOX 1789
CHARLESTON WV 25326-1789

BY *R. B. Wilson*
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE