STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

December 28, 1993

Barbara Schick
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Dave Sugar, Inc.
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Re: Schick v. Dave Sugar, Inc.
ESA-43-92

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved,

all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yours truly,

Gail Ferguson
Administrative Law Judge

GF/mst

Enclosure

c: Glenda S. Gooden, Legal Unit Manager

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BARBARA SCHICK,

Complainant,

v. DOCKET NUMBER(S):

DAVE SUGAR, INC.

Respondent.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on July 23, 1993, in Braxton County, at the Braxton County Courthouse, Sutton, West Virginia, before Administrative Law Judge Gail Ferguson.

The complainant, Barbara Schick, appeared in person and by counsel for the commission, Senior Asst. Attorney General Paul R. Sheridan and Legal Intern Creola Johnson. The respondent, Dave Sugar, Inc., appeared by its representatives, Office Manager Paula Gerkin and Project Superintendent Lee Kerr and by counsel, J. David Cecil, Esq. Briefs were submitted by the parties through October, 1993.

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 pplicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance

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

A.

FINDINGS OF FACT

1. Barbara Schick, the complainant in this action, is a woman.

2. The respondent, Dave Sugar, Inc., is a construction company incorporated in the State of Ohio and licensed to do business in West Virginia, and is an employer within the meaning of the West Virginia Human Rights Act.

3. On April 2, 1991, the complainant went to the local office of the respondent to apply for a job. She spoke to the job foreman, Lee Kerr, who was the superintendent for the job and did all the hiring. She told Kerr that she was looking for work as a laborer, flagman or seeder. Kerr laughed at her and asked her rhetorically, "Can you lift a bale of hay?"

4. When the complainant asked Kerr for an application, he refused. He told complainant that the respondent was not hiring. He referred complainant to a sign that said respondent was not taking

any applications. The complainant had with her an old, out-of-date resume. This resume was not specifically prepared for application for this particular employment. The complainant testified, "I kind of pressed it into his (Kerr's) hands so at least he'd have my name and address and phone number. You know, it was something, that I had been there, and maybe he'd keep me in mind."

5. The complainant went back to respondent's office a week later, on April 9, 1991, to try again to get hired by the respondent. Shirley Cutlip went with her. This time complainant spoke with Paula Gerkin, the respondent's office manager. Gerkin told the complainant and Ms. Cutlip that she did not have any applications and that the respondent was not hiring. Gerkin also told complainant and Cutlip that the company was experiencing delays because the wrong pipe had been ordered and that it would be a while before they would begin work.

6. In the course of the conversation with Ms. Gerkin on April 9, 1991, Shirley Cutlip wrote her name, address, and telephone number on a piece of paper, and a brief reference to her work experience, and left the paper with Gerkin.

7. The positions of laborer, including flagperson and seeder, do not require any particular experience. While reluctant to admit it, Lee Kerr was forced on cross-examination to acknowledge that there were no particular requirements for the positions in question, and that in any case, every indication was that complainant could perform the duties of those positions as well as anyone. Paula Gerkin similarly admitted this, reluctantly, on cross-examination. In a March 3, 1993 letter written on behalf of the respondent to the

Ohio Dept. of Administrative Services, respondent holds up its "no experience required" practice as a policy which "opens the door to females who in the past have not received training and experience in this field."

8. The complainant was well qualified for the jobs of general laborer, flagperson or seeder. While not a requirement, she had extensive experience doing physical labor. Since 1979, the complainant has operated a 31-acre farm with 72 head of cattle. Among the regular chores which she and her partner accomplished were loading, transporting, unloading, stacking and distributing 75-pound bales of hay--enough to feed the cattle 35 bales a day. She regularly operated and worked around farm equipment, and had done so for years without an accident. Had the respondent given the complainant one of its standard application forms, or asked about her qualifications and experience, things which it did in the case of male applicants, it would have been aware of her qualifications and experience.

9. The respondent did not hire the complainant and did not give her any serious consideration for employment. Complainant was not interviewed, and respondent made no effort to check her employment references.

10. The complainant's experience and qualifications, or lack thereof, had no bearing on the failure of respondent to hire her. Had the lack of labor experience reflected on complainant's resume been the critical factor, then the respondent would be expected to have shown interest in Ms. Cutlip, who had such experience, and put

respondent on notice of it. However, like all the other woman applicants, Ms. Cutlip received no consideration.

11. Kerr testified that he was familiar with federal hiring requirements which established procedures and targets in the cases of federally funded construction projects. Kerr testified that his understanding was that with regard to hiring "minorities," whom he characterized as women, blacks, and hispanics, "on some jobs you're required to hire them and on some jobs you're not." He testified that on jobs where they "do have to worry about hiring minorities," that they do hire them.

12. Kerr testified that it was his understanding that on the Flatwoods-Canoe Run project "that we didn't have to hire them." It appears that Kerr was in error, and that Executive Order 11246 applied to the Flatwoods-Canoe Run project, as the project was federally funded.

13. Sixteen women applied for jobs with the respondent at the Flatwoods-Canoe Run project. Like the complainant, many of these women were not given application forms. None of the women who applied were interviewed, and none were hired. Only male applicants were asked questions about their experience and qualifications upon turning in their applications.

14. The complainant sought a copy of the EEO file kept in connection with the Flatwoods-Canoe Run project. In response to this, respondent produced EEO reports it filed with the Ohio Dept. of Administrative Services Equal Opportunity Center.

15. The dearth of female employees on respondent's projects in Ohio is relevant to the West Virginia project in several ways.

First, the evidence reveals that most of the workers on the West Virginia jobs are brought in from respondent's jobs in Ohio and Pennsylvania. Respondent's own witnesses characterized the company as a "regional operator." To the extent that respondent does its hiring on West Virginia projects from people who are already employed with respondent's jobs in other states, the absence of female employees on these out-of-state jobs ensures that there will be no women at its West Virginia jobs. Most of the workers on the Flatwoods-Canoe Run project were brought in from other jobs with respondent in Ohio and Pennsylvania.

16. The only records provided by the respondent regarding employment of women indicate that it had no female laborers or operators on any of its jobs in Ohio during the entire time of the Flatwoods-Canoe Run project.

17. There is no doubt that for respondent to hire on its West Virginia jobs exclusively or even predominantly from its other jobs would have a disparate impact on women. Since there were at the time no women working on these jobs, and since respondent had admitted that the construction industry is "notoriously" male, it is clear that such a practice virtually excludes women.

18. On January 1, 1991, only four months prior to the complainant's application for employment, the respondent represented its EEO/affirmative action policy as follows: "Dave Sugar, Inc. is committed to equal opportunities for all applicants, participants and employees in all facets of its operations; and where deficiencies are noted to take affirmative action to correct such deficiencies." The respondent was not in compliance with Ohio's "work hour utilization

goals" in June 1991, and remained out of compliance during 1991 and 1993. In July 1992, the Ohio Dept. of Administrative Services Equal Opportunity Center wrote to the respondent seeking information regarding "any good faith action steps we should consider relative to hiring, recruitment, and training of minorities and females." In response to the July 1992 letter, Dave Sugar, Inc. represented to the Ohio Dept. of Administrative Services, regarding good faith action steps, "(1) Our advertisements for employees state that we are an equal opportunity employer. (2) We specify in our advertisements that experience is preferred, but not required. (Due to the fact that the construction industry has notoriously employed males, this opens the door to females who in the past have not received training and experience in this field.)" It is clear that, despite these representations at least with regard to the Flatwoods-Canoe Run project, respondent believed itself to be free from any obligation to give consideration to female applicants.

19. The payroll records of the respondent indicate that the project was active from December 17, 1990 through September 25, 1992, with substantial payroll as late as July 1992. According to Paula Gerkin, in testimony which confirmed the recollections of the complainant, the project experienced a delay during the spring of 1991 because of a problem with the size of pipe. Gerkin testified that the project was gearing up during June 1991, and that the company brought in more people during June 1991.

The majority of the workers who worked for respondent on the Flatwoods-Canoe Run project did not begin work on the project until after the complainant had attempted to be hired by the respondent.

It was not until June that the project really geared up. Gerkin acknowledged that at the time complainant sought to apply, the respondent anticipated that "we would be hiring a seeding crew."

20. Lee Kerr claimed that he reviewed all of the applications on file each time he made a hiring decision; however, the evidence indicates that this is actually not the way in which hiring decisions were made. Kerr claimed that before he hired Timothy Dennison, he went through all of the applications on file and compared the qualifications of Dennison with those of the other applicants, and found Dennison to be more suitable. However, Dennison testified that Kerr told him to come to the job site ready to go to work and that he might get hired if someone did not show up. According to Dennison, this is what he did, and this is how he got hired. On cross-examination, Lee Kerr specifically denied ever telling Dennison to come to the job site ready to go to work.

21. On or about March 7, 1991, Timothy Dennison was hired as a flagman/laborer. Paula Gerkin explained Timothy Dennison's having been hired by noting that he was persistent about repeatedly showing up seeking employment. According to Gerkin, this persistence made a difference. However, persistence did not make any difference for female applicants, who got no consideration regardless of how persistent they were. Debra Junk of Sutton testified that she applied to work for respondent early in 1990. She applied because she heard "they might need flagmen or something." She went to the respondent's office in Gassaway, was told that they were not hiring, and that they did not have any application forms. She was told that she could call the main office and have an application form mailed

and that she could come back in three to four weeks. She called the main office and was sent an application form. She applied in the beginning of 1991. Then she went to the job site twice a week over a period of four or five months seeking to be hired. During that time, she saw Tim Dennison working, "and that's when I got mad, because he was flagging and I thought, 'What are you doing with my job? That's my job.'" Dennison was hired on March 7, 1991. Although Debra Junk made herself available at the job site for days at a time, over a long period of time, she was never even considered for employment.

22. Lester Michael Wimer applied and was hired in June 1991, well after the complainant applied and performed the job of flagperson. According to Wimer, he was hired within two or three days of turning in his application, putting in serious doubt Kerr's epresentation that he reviewed all of the applications on file and selected Wimer because he was the most qualified. Contrary to Gerkin's claim, Wimer's only application to respondent was submitted after complainant had attempted to apply.

23. Kerr and Gerkin repeatedly insisted that Wimer was hired because of some training and brief experience as a surveyor's assistant, and Kerr even went so far as to claim that Wimer used surveying skills on the job. These claims were not supported by evidence.

First, Wimer's application indicates that in reality he participated in but did not complete a program in land surveying and had only two to three months' experience with a survey crew.

Second, Kerr's testimony to the contrary, Wimer did not perform illed work for the respondent. Wimer himself testified that he

never did any surveying. He testified, "I flagged a lot and did some clean-up work and, more or less, just routine miscellaneous stuff." He was consistently paid at the minimum labor rate--that rate applicable to flagpersons. It is clear from the evidence that Wimer was no more qualified to do the work that he actually performed than was the complainant.

Finally, the respondent's claim that Wimer was hired with the intent of putting him to work using surveying skills, even though this plan never came to fruition, is suspect. Wimer testified that Kerr did not tell him in advance of being hired what duties he might be hired for. He testified, "I didn't have any idea what I would be doing," and that Kerr "just told me to come out to work."

24. Paula Gerkin testified that Wimer had applied first, prior to the beginning of the Flatwoods-Canoe Run project, and that he later submitted another application at the Flatwoods-Canoe Run job site after the complainant had submitted her application. Gerkin testified that she did not have a copy of the first application. Wimer, on the other hand, testified that his application of June 1991 was the only application he submitted to respondent. In addition, it appears that the date on Wimer's application was originally dated 6/8/91, which is consistent with Wimer's testimony as to when he submitted the application. However, the "1" of the "91" appears to have been changed to a "0." Wimer testified that he did not change it. While Wimer testified that he might have misdated it, this appears unlikely in light of the fact that he correctly dated his job experience at another place on the application, including 1991 dates.

25. The evidence in the record clearly suggests differential treatment between men and women with regard to the seriousness with which their applications are treated. Wimer testified that he was asked by Kerr regarding his qualifications. Dennison testified that when he submitted his application, Kerr asked him about his qualifications. Richard Cook, a male who submitted his application on or about April 7, 1989 also testified that Kerr asked him about his qualifications. In contrast, Kerr never asked complainant about her qualifications, nor did he ever interview any women applicants in connection with a job on this project.

26. The complainant was never provided with an application form, which the respondent acknowledges was specifically designed to elicit the relevant information about an applicant. The respondent claimed that its failure to provide complainant with an application form was merely the result of not having forms on the occasion when complainant went to the office. While it is conceivable that the respondent ran out of application forms on occasion, the evidence strongly suggests that it had forms available at times proximate to when complainant sought one, and further suggests that respondent was actively seeking to discourage complainant from applying.

On the two occasions when complainant went to the office of respondent seeking employment, April 2 and April 9, 1991, she was told that the respondent was not accepting applications and had no application forms to provide. Gerkin testified that respondent was simply out of applications on those two dates. However, the evidence belies this claim and suggests instead an intent to discourage the plainant, and Shirley Cutlip, from applying.

Regarding the April 2 incident, while Paula Gerkin asserts firmly that there were no applications on hand throughout that period and gives this as the reason complainant was not given one, Lee Kerr explains the April 2 encounter without referring to an absence of forms. Kerr testified that he referred complainant to a sign respondent had posted in its office that said "not accepting applications."[1/]

Paula Gerkin, who was a more astute witness than Kerr, and seemed to understand respondent's vulnerability in making a claim to have refused or discouraged applications, testified that on her own initiative, she accepted applications, even when respondent told her not to, because, she explained, "I felt that we should because it was a federal project and we could get in trouble if we didn't." She gave no explanation for why she did not refer complainant to the central office to have a form mailed.

Both Gerkin and Kerr initially testified that they were sure that respondent was out of applications on April 2 and April 9, 1991; however, later, on cross-examination, both admitted that they really did not know when respondent might have been out of applications. When pressed, Kerr could not narrow it down any further than between February and June 1991, which was virtually the entire start up period for the Flatwoods-Canoe run project. Kerr said, "One time we

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[1/] Kerr testified that the sign was up for two or three days, or perhaps a week, a bizarre claim which appears to be an attempt to set up another defense to why complainant received no serious consideration when male applicants who applied before and after complainant did.

were out of applications," While Gerkin said that respondent "ran out of applications a lot."

Richard L. Cook submitted an application dated 4/7/91, five days after complainant's first visit to respondent's office and two days before her second visit. Cook testified that although he could not recall the date on which he submitted his application, he submitted it within a week of when he picked it up at respondent's office. This means he obtained an application form during precisely the same period when the complainant was refused one. In addition, it is clear that respondent distributed and received numerous applications after the complainant attempted to apply and had been refused an application.

27. The majority of workers who worked for respondent on the Watwoods-Canoe Run job began after the complainant attempted to be hired. The respondent claimed that most of these workers were "transferred," however, there is no evidence that there was any continuing obligation to employ them. To the contrary, Paula Gerkin testified that each job is considered separate. She acknowledged that "in the construction business, you use each job as a different company." The respondent has no collective bargaining agreement with its workers, and the workers had no right to continuing employment, bidding or the like.

28. Complainant's testimony was very credible and internally consistent and consistent with that of Shirley Cutlip. In addition, on most of the important points, it was bolstered as well by the testimony of respondent's witnesses. Complainant recalled being told details about the causes of temporary delays, details which Paul

Gerkin corroborated and details that complainant would not have known unless she had recalled well the interactions of those occasions. Gerkin even corroborated Kerr's having ridiculed complainant when she tried to apply, although Gerkin tried to cast the event in a different light. Gerkin admitted that Kerr "smiled" at complainant when he talked to her about lifting a bale of hay, although Gerkin testified she was sure that Kerr meant nothing derogatory by it.

29. On the other hand, the testimony of Lee Kerr and Paula Gerkin contains many contradictions and conflicts. Paula Gerkin initially testified that she was sure that female applicants Cheryl Jack, Betty Hoover and Alicia Ann Gillespie did not apply before Tim Dennison; however, on further cross-examination, she acknowledged that they might have sought an application from the main office and applied as early as 1990. However, then she went back to claiming adamantly that, despite that fact that many of the applications from women were undated, she was absolutely sure that none of them applied prior to Tim Dennison.

Debra Junk testified that she had an application sent to her from Ohio, something which Gerkin was sure that only male applicants had done. She said that she applied "in the beginning of '91 sometime." Furthermore, she had been seeking a job for a few months when she saw Tim Dennison working there. Dennison applied on February 4, 1991 and was hired on March 7, 1991.

Gerkin testified that Wimer had applied on one occasion prior to June 1991. Wimer testified that his June 1991 application was the only one he filed with respondent.

Lee Kerr began by asserting that "one time we was out of applications" and he thought it was in early April 1991 but then retreated to admitting that he did not know when between February and June 1991 it might have been. Gerkin, on the other hand, suggested that respondent "ran out of applications a lot."

Kerr was adamant that he was absolutely sure that he never told Dennison that he should hang out at the job site ready to go to work, while Dennison testified that this is precisely what Kerr suggested to him.

30. Working as a flagperson between 6/24 and the end of the calendar year 1991, Lester Michael Wimer earned a total of $13,168.92 from respondent. He averaged wages of $212.74 per month and benefits of $561.19 per month. Robert Wyant, who began work for the espondent at the Flatwoods-Canoe Run project in June 1991, earned $6,293.22 from the respondent in 1991, and $11,931.97 from the respondent in 1992.

31. If complainant had been hired by respondent at the time Wimer was hired and remained employed in his position through the life of the project, she might reasonably have expected to have earned wages of $25,532.88, benefits of $6,734.28 and interest of $6,964.44, for a total of $39,231.60 as of the end of 1993.

32. As a result of the respondent's discriminatory failure to hire the complainant, the complainant suffered embarrassment, humiliation and anger.

33. After being denied employment with the respondent, the complainant made diligent but unsuccessful efforts to find ployment. These included making and maintaining active job

applications with Job Services, taking Civil Service examinations, and submitting resumes in response to advertisements in local newspapers.

34. As calculated in the attachment labled as Appendix A, complainant is entitled to: Back pay, benefits and prejudgment interest from July 1991 through the end of December, 1993, for a total back pay award of $39,231.60.

B.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. WV Code §§5-11-1 to -19. Section 5-11-9(a)(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...."

The term "discriminate" or "discrimination" as defined in WV Code §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of...sex...." Given this statutory framework to recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful sex discrimination, or the commission acting on her behalf, must ultimately show by a preponderance of the evidence that: (1) the employer excluded her from, or failed or refused to extend to her, an equal opportunity; and (2) sex was a motivating or substantial factor causing the employer to exclude the complainant from, or fail or

refuse to extend to her, an equal opportunity, Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed.2d 258, 109 S. Ct. 1775 (1989); and (3) the equal opportunity denied a complainant is related to any one of the following employment factors: compensation, hire, tenure, terms, conditions or privileges of employment.

A discrimination case can be proved under either a disparate treatment theory or a disparate impact theory. Guyan Valley Hospital, Inc. v. WV Human Rights Commission, 181 WV 251, 382 S.E.2d 88 (1989). A disparate treatment case requires proof (at least inferential proof) of discriminatory intent. Disparate impact has no intention requirement, but rather a showing that a facially neutral employment practice has a disproportionate adverse impact on a protected class.

There are three different analyses which may be applied in evaluating the evidence in a disparate treatment discrimination case. The first, and most common, uses circumstantial evidence to prove discriminatory motive. Since discriminating employers usually hide their bias and stereotypes, making direct evidence unavailable, a complainant may show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), and adopted by our Supreme Court in Shepherdstown Volunteer Fire Dept. v. State Human Rights Commission, 172 WV 627, 309 S.E.2d 342 (1983). The McDonnell Douglas method requires that the complainant or commission first establish a prima facie case of discrimination. The burden of production then shifts to respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the

complainant or commission must show that the reason proffered by respondent was not the true reason for the employment decision, but rather a pretext for discrimination. The term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." WV Institute of Technology v. Human Rights Commission, 181 WV 525, 383 S.E.2d 490, 496 (1989), citing Black's Law Dictionary, 1069 (5th ed. 1979). A proffered reason is pretext if it is not "the true reason for the decision." Conaway v. Eastern Assoc. Coal Corp., 174 WV 164, 358 S.E.2d 423, 430 (1986).

Second, there is a the "mixed motive" analysis. This analysis may also work with circumstantial evidence; the difference is that here the pretext aspects of the McDonell Douglas analysis are not applicable. Where an articulated legitimate, nondiscriminatory motive is shown by the respondent to be nonpretextual, but in fact, a true motivating factor in an adverse action, a complainant may still prevail under the "mixed motive" analysis. This analysis was established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed.2d 268, 109 S. Ct. 1775 (1989), and recognized by the West Virginia Supreme Court of Appeals in West Virginia Institute of Technology v. WV Human Rights Commission, 181 WV 525, 383 S.E.2d 490, 496-97, n.11 (1989). If the complainant proves that her sex played some role in the decision, the employer can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant's sex.

Finally, if it is available, a complainant or the commission may prove a disparate treatment claim by direct evidence of discriminatory intent. Proof of this type shifts the burden to the respondent to to prove by a preponderance of the evidence that it would have rejected the complainant even if it had not considered the illicit reason. Trans World Airlines v. Thurston, 469 U.S. 111, 36 F.E.P. Cases 977 (1985). This analysis is similar to that used in mixed motive cases.

In addition to disparate treatment, a complainant may recover by proving disparate impact discrimination. Guyan Valley Hospital, Inc. v. WV Human Rights Commission, 181 WV 251, 382 S.E.2d 88 (1989). A disparate impact theory requires a showing that a facially neutral employment practice of the respondent has a disproportionate adverse impact upon members of a protected class, in this case women. Griggs v. Duke Power Co., 401 U.S. 424, 28 L.Ed. 158, 91 S.Ct. 849 (1971). If this is proved, the respondent can avoid liability only by proving that its practice is justified by a business necessity. Griggs, 401 U.S. at 431.

Complainant has established, through circumstantial evidence, a prima facie case of sex discrimination. Establishment of a prima facie case raises an inference that respondent has discriminated against complainant on the basis of her sex.

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

> In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, WV Code §5-11-1 et seq.

(1979), the plaintiff must offer proof of the following:

(1) That the plaintiff is a member of a protected class;

(2) That the employer made an adverse decision concerning the plaintiff; and

(3) But for the plaintiff's protected status, the adverse decision would not have been made.

Conaway V. Eastern Assoc. Coal Corp., 178 WV 164 358 S.E.2d 423, 429 (1986); Kanawha Valley Regional Transportation Authority v. WV Human Rights Commission, 181 WV 675, 383 S.E.2d 857, 860 (1989).

Criterion number three of this formulation has engendered some confusion because of the use of the words "but for," whereas other formulations have required a showing that other similarly situated individuals not in the protected class have been treated differently. But it is clear that it was not the intent of the West Virginia Supreme Court to tighten the standard. In Kanawha Valley Regional Transportation Authority v. WV Human Rights Commission, 181 WV 675, 383 S.E.2d 857, 860 (1989), the Court said:

> However, it is clear that our formulation in Conaway was not intended to create a more narrow standard of analysis in discrimination cases than is undertaken in the federal courts. This is manifested by our reliance on applicable federal cases as illustrated by WV Institute of Technology v. WV Human Rights Commission, 181 WV 525, 383 S.E.2d 490, 495 (1989), where we cited a number of federal cases and described the type of evidence required to make a Conaway prima facie case:
>
> [B]ecause discrimination is essentially an element of the mind, there will normally be very little, if any, direct evidence available. Direct evidence is not, however, necessary. What is required of the complainant is to show some circumstantial evidence which would sufficiently link the employer's decision and the

> complainant's status as a member of a protected class so as to give rise to an inference that the employment related decision was based upon an unlawful discriminatory criterion.
>
> KVRTA, 383 S.E.2d 860. See also Holbrook v. Poole Associates, Inc., 184 WV 428, 400 S.E.2d 863 (1990); WV Institute of Technology v. WV Human Rights Commission, 181 WV 525, 383 S.E.2d 490-495 (1989).

This requirement that there be evidence of a "link" between the employer's decision and the employee's status may be satisfied by circumstantial evidence of various kinds, including evidence that other similarly qualified individuals not in the protected class were treated differently.[2/]

Subsequent to Conaway, in O.J. White Transfer v. WV Human Rights Commission, 181 WV 519, 383 S.E.2d 323 (1989), the West Virginia Supreme Court outlined a prima facie test specifically tailored to the failure to hire situation. In such a case, the prima facie burden:

> is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination, which burden may be carried by showing (1) that the complainant belongs to a protected group under the statute; (2) that he or she applied and was qualified for the position or opening; (3) that he or she was rejected despite his or her qualifications; and (4) that after the rejection, the respondent continued to accept applications of similarly qualified persons.
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> O.J. White Transfer, 383 S.E.2d at 324, Syl. pt. (1986); see also Pride v. WV Human Rights Commission, 176 WV 565, 346 S.E.2d 356 (1986).

[2/] See also Powell v. Wyoming Cabelvision, Inc., 184 WV 700, 403 S.E.2d 717, 721-722 (1991), for further discussion of the type of evidentiary link required to make a prima facie case in discrimination cases.

The complainant has clearly established a prima facie case of failure to hire sex discrimination. There is no dispute that complainant is a member of a protected class in that she is a woman. Second, it was admitted that complainant applied for, or at least attempted to apply for, employment. It is also beyond serious contention that she was qualified. By respondent's own admission, the positions of flagperson and laborer do not require any special experience, and complainant had already demonstrated an ability to do hard physical labor.[3/] Third, it is clear that complainant suffered an adverse employment decision by respondent in that she was not hired to work on the project and others were. Indeed, she was not even given a real opportunity to apply. Fourth, respondent accepted other applications from similarly qualified candidates. At least one male applicant was provided an application in the same time frame in which complainant was denied one. Over half of its workforce for this job was brought in after the complainant's attempted application, and one applicant, Lester Wimer, was hired off the street after complainant applied. He was put to work doing flagging, a job complainant was at least as qualified to do as he was.

Furthermore, in addition to meeting the requirements of the O.J. White test, there is ample additional evidence of the "but for" nexus required by the Conaway test. It is clear that respondent routinely

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3/ Respondent claims that it was unaware of complainant's experience doing farm labor because it was not reflected on her resume; however, respondent should be estopped from relying on this excuse when it was respondent's own failure to provide complainant with an application and to ask her about her qualifications, as it did with male applicants, which resulted in respondent's incomplete picture of complainant's experience.

ignored applications from female applicants, particularly when it believed that it was not required on the particular project to meet federally set hiring goals. While the qualifications of men applicants were explored, those of women applicants were not. And this reality is reflected in the available statistics[4/] which suggested that women were grossly under represented in respondent's workforce across many of its jobs.

Clearly, under any articulation of the test, the complainant has exceeded her burden of proving a prima facie case.

The establishment of a prima facie case creates a "presumption that the employer unlawfully discriminated against" the complainant. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981); Shepherdstown V.F.D. v. WV Human Rights Commission, 172 WV 627, 309 S.E.2d 342, 352 (1983). The circumstantial evidence of a "link" was sufficient that "the burden then shifted to the defendant...to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254. Though the burden on respondent under this test is only one of production, not persuasion, to accomplish it a respondent "must clearly set forth through the introduction of admissible evidence the reason for the [complainant's] rejection." Burdine, 450 U.S. at 254. The explanation provided "must be legally sufficient to justify a

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4/ The only data respondent would provide the commission in response to its discovery requests.

judgment for the defendant," and it must be both legitimate and nondiscriminatory. Burdine, 450 U.S. at 254.

If the respondent (1) clearly articulates a legitimate, nondiscriminatory reason for rejecting the complainant, "then the complainant [or the commission] has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for unlawful discrimination." Shepherdstown, 309 S.E.2d at 352. The commission "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. See also, O.J. White Transfer v. WV Human Rights Commission, 181 WV 519, 383 S.E.2d 323, 327 (1989).

In addition, if the evidence shows that sex was at least part of the motivation for the adverse action, that is, there was a mixture of motives and the complainant's sex was at least a factor, then the respondent can avoid liability only if it carries the burden of proving that it would have taken the same adverse action even if sex had not been given any consideration.

In the case at bar, respondent made several attempts at articulating a defense. While not clearly articulated, and therefore somewhat resistant to being summarized and addressed, the various excuses provided or hinted at can be thought of as fitting into three claims.

First, there is the respondent's claim that it didn't need additional workers; essentially that it had done all its hiring as of the time complainant had applied, or at least, that it had enough

applications as of that point that it was not accepting additional applications. In its original response to the complaint, the respondent asserted "We had all the employees we needed at the time," and that it only "continued to accept resumes as a gesture of good faith." Respondent also had posted a sign that said it was not accepting applications. In a similar vein, the respondent claimed that all those hired had previously worked for respondent or had applied before complainant. What these claims have in common is that they all seek to excuse respondent's obvious failure to give any consideration to hiring the complainant.

Second, there was respondent's claim that complainant was not as qualified as other candidates, in particular Lester Wimer. This claim is addressed to the fact that Wimer applied and was hired after he complainant sought to apply. This claim rests on Kerr's testimony that Wimer was hired as a surveyor's helper, even though he never worked in this role. Kerr testified that he actually compared Wimer as a candidate to all those who had applied and found him to be more qualified than that others, and specifically more qualified than complainant.

Thus, the respondent claimed that complainant is unqualified because of her work record and because of alleged inaccuracies in her resume.

Each of these excuses will be addressed below and shown to be pretext. What is more, the evidence discussed below clearly reflects that respondent actively disfavored women. Inasmuch as sex was clearly at least a factor in respondent's "decision" to not hire the complainant, respondent must do more than simply produce an

explanation for its action; it must prove that it would not have hired the complainant even if sex had not been considered. This it failed to do.

The respondent has put forth a series of excuses for not hiring complainant. Not only do respondent's shifting approaches to a defense indicate pretext, but each explanation, in its own terms, lacks credibility.

The respondent's first excuse for not hiring the complainant was that it did not need any more workers. Respondent's evidence was that for two or three days in April, or perhaps for a whole week[5/] respondent had posted a sign that said it was not accepting applications. Gerkin testified that she continued accepting applications on her own initiative, even though instructed not to, because of her concern about complying with federal guidelines. The advantage to respondent of asserting this claim of no need for more workers is that it purports to explain respondent's total lack of seriousness about complainant's application. The problem is that this proffered explanation does not square with the facts.

This supposed lack of need for workers is belied by the fact that respondent had barely started the job as of April 2, 1991. Over half of its workforce for the job started after that date.[6/] And

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[5/] Apparently during the time complainant made both of her April 2 and April 9 visits to respondent's office.

[6/] While most of these workers had worked for respondent previously, there was no evidence that respondent had any continuing obligation to hire its previous or laid off employees. On the contrary, Gerkin testified that the respondent considered "each job as a different company." Furthermore, there was no evidence as to how previous employment might be factored in as a preference in hiring decisions. In addition, it is clear that respondent did some local hiring.

respondent continued making applications available to and accepting them from men, and even followed up on some applications which were submitted by men by inquiring about their qualifications. It appears that respondent made application forms available to at least one male candidate in precisely the same time frame in which complainant was told that respondent did not have any more. And others were provided forms subsequently. Included among those who were hired after April 2 was Lester Mike Wimer, who worked doing flag and clean up work, for which complainant clearly was well qualified.

Respondent's cause would be greatly helped if it could argue that Wimer's application actually came in before complainant's. This must have been apparent to those of respondent's employees involved in its defense. Interestingly, Gerkin testified that Wimer had previously applied to respondent, although Wimer denied this. Gerkin said the earlier application had not been found. In addition, Wimer's application[7/] appears to have been altered as to its date, from June 8, 1991 to June 8, 1990. This appears to have been an aborted attempt on the part of someone to support the claim that Wimer applied before complainant. But it must have later been recognized that this application could not have passed for a 1990 application when some of the employment experience dates on the application occurred after the supposed application date.

Courts have been highly suspicious of altered and backdated documents when they are offered as part of a defense to

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[7/] The only one by his testimony.

discrimination, Townsend v. Grey Line Bus Company, 597 F. Supp. 1287, 36 F.E.P. Cases 577 (D. Mass. 1984), aff'd 767 F.2d 11 (1st Cir. 1985), and have held that backdated documents can "strongly suggest discriminatory animus." Roberts v. Fri, 23 E.P.D. ¶¶31,048, 31, 049, 29 F.E.P. Cases 1445 (D. D.C. 1980). Certainly such is the case here.

The claim that complainant was not hired because respondent needed no additional workers is obviously false; respondent did the hiring after complainant applied. What is actually more likely is that respondent had no "need" of additional female workers. Kerr testified that he believed the federal hiring guidelines to be inapplicable to this job; and while the respondent hired "minorities" such as women when it was required to, he had concluded that on this job "we didn't have to hire them."

Respondent made an issue of complainant's qualifications as a fall back defense to its defense that it did not need any more workers. However, the evidence clearly reveals both that complainant was well qualified for the positions of flagperson, laborer and seeder, and that her relative qualifications played no actual part in respondent's decision to reject her for a position.

There is no serious question that complainant was well qualified to work as a general laborer, flagperson or seeder. Indeed, she was at least as qualified for those positions as several of the men who were hired by respondent to do them.

First, it is important to begin by noting that there are no specific requirements or qualifications for these positions. This fact is specifically referred to by the respondent in its

representations to the Ohio Department of Administrative Services as an explanation of how respondent was opening the door of employment to women.

> "We specify in our advertisements that experience is preferred, but not a requirement." (Due to the fact that the construction industry has notoriously employed males, this opens the door to females who in the past have not received training and experience in this field.)[8/]

Kerr did not concede this point gracefully on cross-examination, insisting initially that complainant's resume indicated that she was not qualified.[9/] But eventually Kerr admitted that there really are not any qualifications for flag work, other than "you have to be able to read and write and you've got to be able to stand up on the road and flag cars and know what to do." Again, reluctantly, Kerr admitted that even based upon what he knew of her from her application, he would have to conclude that complainant could probably adequately perform the necessary duties.[10/]

Ironically, complainant did have significant experience doing heavy physical labor. For years she and her partner had operated a cattle farm. She had transported and "put up" 75-pound bales of hay,

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[8/] Obviously this only creates an "open door" for women if respondent is truly willing to hire people without experience.

[9/] It is as if he was willing to assume that because she was qualified to do clerical work, she was not qualified to do labor.

[10/] It is interesting that the only specific skill that Kerr identified as required of a flag person was the ability to read and write. This is a skill that complainant's resume suggests she possessed. It is also a skill which Ms. Gerkin's testimony suggests was not strong among many male applicants. Gerkin testified that typically men took application forms home so that they could be filled out by their wives. Apparently this skill deficiency counted little against the male applicants; indeed, it appears that the possession of such skills counted more against complainant.

fed cattle, fertilized fields, worked around farm equipment, and done a variety of other tasks associated with cattle farming. Had respondent given complainant an application form or discussed her qualifications with her, as it did with other male applicants, it would have learned that complainant had indeed much experience with hard physical labor.

However, it is equally clear that the respondent never gave complainant's qualifications the slightest thought at the time she applied, or while it was hiring, because it was not interested in hiring a woman. Since Kerr's understanding was that "minority" hiring was not required on this job, he believed that on the Flatwoods-Canoe Run project "we didn't have to hire them." Consistent with this belief, he gave women no consideration.

Of course, respondent does not readily admit that it gave complainant no consideration; however, the fact could hardly be more obvious. The respondent's own evidence is not even consistent on the question of whether it ever gave the complainant consideration for the positions she sought. In response to a pointed question as to whether respondent ever gave complainant any consideration, Gerkin testified: "I think the sign [which said "not taking applications"] said most of it." At another point, the respondent suggests that it considered complainant only for clerical positions. In response to the complaint, as an explanation for its rejections of complainant, respondent claimed, "We did not need a person of clerical, bookkeeping experience."

However, respondent knew complainant was looking for work as a laborer, since this was what she asked for when she came to the

office. Respondent has acknowledged that complainant asked about a laborer position and talked with Kerr about seeking work. And respondent was forced to admit that it could be discerned from her resume that she met the basic requirements. Respondent later claimed, repeatedly through its superintendent Lee Kerr, that each and every application on file was considered for each and every opening, a claim which challenges the imagination, even standing on its own. Juxtaposed with its earlier claim that the complainant did not not get a job because respondent did not need a clerical person, it is even clearer that respondent's offered explanations are pretext.

Respondent also argues that Wimer is not a valid person against whom to compare the complainant, claiming that Wimer was hired for a specialized position, a surveyor's helper, for which the complainant would not have been qualified. Respondent asserts that it was only because plans changed that Wimer ended up doing flagging work, a job which although occasionally disputed by respondent, complainant was clearly qualified to do. However, respondent's claim of a specialized position does not stand up to scrutiny.

First, respondent produced no job descriptions, job announcements, or anything else to suggest that it even had a position of surveyor's helper, much less that Wimer was hired to fill it. When Wimer is first listed on the payroll, in the period ending July 2, 1991, and for each period after, he is listed as a "laborer-flag/class 6," the lowest classification of workers on the job. The only support for the claim that Wimer was hired to do survey work was the testimony of Kerr and Gerkin. Gerkin, who denied having any direct involvement in hiring decisions, claimed it was

common knowledge that Wimer was hired as a surveyor's helper. Gerkin was adamant and certain that Wimer was not hired as a flagperson. But if Wimer was hired as a surveyor's helper, he knew nothing of it. Certainly it is not credible that a person hired into such a specialized job would not even know of it.

There are other inconsistencies as well. Kerr testified that Wimer actually used his surveying skills, while Wimer denied that he ever did any surveying, testifying instead that he did flagging and some clean up work. In addition, respondent misrepresents the extent of Wimer's qualifications. At one point, Paula Gerkin represented Wimer's experience as two to three years of experience as a surveying helper, while his application reflects that it was actually two to three months. In addition, the schooling he had in that field was incomplete.

Finally, respondent resorted to attacking complainant's qualifications and in particular, her resume. Ironically, not only did respondent make no attempt to check complainant's references prior to its decision not to hire her, but it did not even check the references of those people it did hire. Nevertheless, nothing in evidence indicates that complainant was unqualified for the jobs for which when applied.

While not asserted in its initial response to the complaint, as this case neared hearing, the respondent developed a new explanation for why complainant had not been hired. In its answers to interrogatories, respondent indicated that it had checked

complainant's references and found them to be poor.[11/] Respondent went on the explain, "At the time we were not in need of anyone with Ms. Shick's qualifications per resume. Additionally there were female and male applicants with qualifications that met our need with good references prior to Ms. Shick's." However, it is obvious that this is pure pretext and an attempt to shore up another explanation.

First, it is clear that complainant's references played no role in its decision not to hire her, one way or the other. The respondent admits that it made no effort to contact her references at the time she applied and gave her no consideration.

Second, the suggestion that respondent already had both male and female applicants "with good references" is unbelievable in light of the fact that respondent apparently never checked the references of any of its applicants. Respondent acknowledged that it never checked the references of any female applicants, and did not even check the work references of either Wimer and Dennison both of whom respondent hired.

Third, there was no evidence at all that complainant actually did have bad references. No one called at hearing commented adversely upon the complainant's work record, although the respondent made a misguided effort to suggest that complainant had misdescribed

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[11/] The supposed reference check was conducted in May 1993 only after the case was set for hearing.

a previous position as an administrative secretary when in fact her actual title was secretary/bookkeeper.

Respondent also sought to make an issue regarding the "qualifications" reflected on complainant's resume. The respondent put on the testimony of June Bragg, an employee of the complainant's former employer, Braxton Health Care Center. Ms. Bragg testified that complainant had been employed by the Center as a "secretary-bookkeeper," and technically not an "administrative assistant" as complainant had characterized the position on her resume. However, it was clear that complainant did perform duties which might reasonably be characterized as administrative, and that it was a reasonable description of the job even if not the technical title of the position. Any inference which might reasonably have been drawn from Ms. Bragg's testimony does not impugn the complainant or in any way suggests that complainant was less than fully qualified for the work for which she applied.

The respondent's claims are not consistent. On the one hand, respondent claimed that it did not need any more workers and only accepted applications as a courtesy or to meet federal requirements. But the evidence made it clear that that job was just getting underway and that it did more hiring subsequently. Respondent claimed that it already had enough qualified applicants prior to complainant's application; however, the evidence revealed that it later hired a male who applied subsequently to do a job complainant was well qualified to do. In order to explain this fact, respondent claimed that Wimer was hired to do a specialized job which would draw on his two to three months of specialized experience, but Wimer

himself testified that he knew nothing of this and never performed any services more skilled than flagging. Finally, respondent tried to attack complainant's job references, despite the fact that job references were not checked on any applicants, even those who were hired.

Courts have been extremely skeptical of stated reasons which are not asserted until "late in the game." Gallo v. John Powell Chevrolet, Inc., 61 F.E.P. Cases 1121, 1129 (M.D. Pa. 1991); Foster v. Simon, 467 F. Supp. 533, 19 F.E.P. Cases 1648 (W.D. N.C. 1979); Johnson v. University of Pittsburgh, 359 F. Supp. 1002, 5 F.E.P. Cases 1182 (W.D. Pa. 1973). Likewise, shifting reasons or defenses between the time of the adverse action and the time of the hearing are strong evidence of pretext. Smith v. American Service Company of Atlanta, Inc. 611 F. Supp. 321, 35 F.E.P. Cases 1552 (N.D. Ga. 1984); Townsend v. Grey Line Bus Company, 597 F. Supp. 1287, 36 F.E.P. Cases 577 (D. Mass, 1984), aff'd, 767 F.2d 11, 38 F.E.P. Cases 463 (1st Cir. 1985). Respondent's asserted defenses have the unavoidable look and feel of a "product of hindsight."

"[I]t is incumbent upon [the factfinder] to make the ultimate determination whether there was intentional discrimination on the part of the respondent." Shepherdstown Volunteer Fire Dept. v. State Human Rights Commission, 172 WV 627, 309 S.E.2d 342 (1983). In short, the factfinder "must decide which party's explanation of the employer's motivation it believes." United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 75 L.Ed.2d 403, 103 S.Ct. 1478, 1482 (1983). "In this regard, the trier of fact should consider all the evidence, giving it whatever weight and credence it

deserves," 103 S.Ct. at 1481, n.3, and decide whether, in the final analysis, respondent treated complainant "less favorably than others" because of her [sex]. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978).

In determining which side to believe, it is up to the factfinder to assess the credibility of witnesses and the persuasiveness of the evidence. Westmoreland Coal Co. v. Human Rights Commission, 181 WV 368, 382 S.E.2d 562, 567, n.6 (1989).

The complainant's testimony was very credible and deserves to be credited. While the respondent attempted to attack her credibility by putting on evidence that a prior employment position was technically a "secretary-bookkeeper" and not an "administrative assistant" as complainant had characterized it, it was clear that as a generic description she was not even misleading. The position contained duties which might reasonably be characterized as administrative, and there was no claim that complainant misrepresented those actual job duties (which were listed out on on her resume), and no basis for concluding that there was any intent by complainant to deceive by her use of the term "administrative assistant." On cross-examination, before respondent had given any indication as to where it was going with its questions regarding her prior employment, complainant revealed her generic rather than technical use of the term when she characterized the job as "administrative assistant, or office manager or secretary, or whatever you want, you know." Indeed, the respondent's extensive but ineffective efforts along these lines to impeach the complainant's credibility have the appearance of grasping at straws for a defense.

Complainant's testimony was internally consistent and consistent with that of Shirley Cutlip. In addition, on most of the important points, it was bolstered as well by the testimony of respondent's witnesses. Complainant recalled being told details about the causes of temporary delays, details which Paula Gerkin corroborated, and details which complainant would not have known unless she had recalled well the interactions of those occasions. Gerkin even corroborated Kerr's having ridiculed complainant when she tried to apply, although Gerkin tried to cast the event in a different light. Gerkin admitted that Kerr "smiled" at complainant when he talked to her about lifting a bale of hay, although Gerkin testified she was sure that Kerr meant nothing derogatory by it.

On the other hand, the testimony of Lee Kerr and Paula Gerkin contains many contradictions and conflicts. Paula Gerkin initially testified that she was sure that female applicants Cheryl Jack, Betty Hoover and Alicia Ann Gillespie did not apply before Tim Dennison; however, on further cross-examination, she acknowledged that they might have sought an application from the main office and applied as early as 1990. However, then she went back to claiming adamantly that despite the fact that many of the applications from women were undated that she is absolutely sure that none of them applied prior to Tim Dennison. Ms. Gerkin replied affirmatively to a questions as to whether she could say "with absolute certainty that no women applied before Mr. Dennison applied," and with the interjected encouragement of counsel added, "I meant it, it's the truth."

Debra Junk testified that she had an application sent to her from Ohio, something which Gerkin was sure that only male applicants

had done. She said that she applied "in the beginning of '91 sometime." Furthermore, she had been seeking a job for a few months when she saw Tim Dennison working there. Dennison applied on February 4, 1991 and was hired on March 7, 1991.

Gerkin testified that Wimer had applied on one occasion prior to June 1991. Wimer testified that his June 1991 application was the only one he filed with respondent.

Lee Kerr began by asserting that "one time we was out of applications" and he thought it was in early April 1991 but then retreated to admitting that he did not known when between February and June 1991 it might have been. Gerkin on the other hand, suggested that respondent "ran out of applications a lot."

Kerr was adamant that he was absolutely sure that he never told Dennison that he should hang out at the job site ready to go to work, while Dennison testified that this is precisely what Kerr suggested to him.

In conclusion, the record as a whole establishes that the complainant was not hired much less considered for employment with respondent because of her sex. The complainant, Barbara Schick, has sustained her burden of establishing gender discrimination by a preponderance of the evidence.

C.

CONCLUSIONS OF LAW

1. The complainant, Barbara Schick, is an individual claiming to be aggrieved by an unlawful discriminatory practice and is a

proper complainant for the purposes of the West Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Dave Sugar, Inc., is and was at all time relevant hereto, an employer as defined by WV Code §5-11-3(a).

3. The complaint in this matter was timely filed pursuant to WV Code §5-11-10.

4. The Human Rights Commission has jurisdiction over the parties and the subject matter of this complaint.

5. The complainant is a member of a protected class in that she is a woman.

6. Complainant has established a prima facie case of sex discrimination in that she has proved that the respondent denied her an equal employment opportunity by failing to hire her for a position for which she sought to apply and was qualified on the basis of her sex, female.

7. Respondent's articulated nondiscriminatory reasons for its failure to hire complainant (a) that it did not need more workers, (b) that the male applicant hired in lieu of the complainant was more qualified, and (3) that the complainant had poor references have all been shown to be pretextual.

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. Further, the respondent shall post a brightly-colored, unobstructed and prominently displayed notice at its premises indicating that the respondent is an equal opportunity employer and that violations may be reported to the West Virginia Human Rights Commission. Respondent shall submit copies of all of its federal and state EEO reports to the Human Rights Commission for the next two years, along with a list of the name and gender of all applicants for employment. Finally, the commission, by its designee, shall be allowed access to respondent's premises on a periodic unannounced basis for up to two years to determine whether respondent is complying with its posting requirement.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant back pay in the amount of $39,231.60.

3. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

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

5. Within 31 days of receipt of this decision, the respondent shall pay the commission reimbursement of witness fees, hearing transcript costs and travel expenses associated with prosecuting this claim.

6. The complainant's attorney shall, within ten (10) days receipt of this decision, submit to the commission and respondent an

itemized statement of compensable expenses associated with prosecution of this case.

7. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Legal Unit Manager, Glenda S. Gooden, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 28 day of December, 1993.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE