



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Governor

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

September 2, 1998

Donna R. Thomas
7134 Beech Dr.
Huntington, WV 25705

North American, Inc.
PO Box 730
St. Albans, WV 25177
C/O Joseph Morris

Paul R. Sheridan
Sr. Asst. Attorney General
Civil Rights Division
PO Box 1789
Charleston, WV 25326-1789

Re: Thomas v. North American, Inc.
ES-32-98

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 an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

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

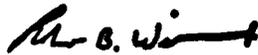
THOMAS V. NORTH AMERICAN, INC.
SEPTEMBER 2, 1998
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10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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

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

Yours truly,



Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Normon Lindell, Acting Executive Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DONNA RUTH THOMAS,

Complainant,

v.

DOCKET NUMBER(S): ES-32-98

NORTH AMERICAN, INC.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on July 21, 1998, in Kanawha County, at the West Virginia Human Rights Commission in Conference Room B, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Donna Ruth Thomas, appeared in person and by counsel for the Commission, Jennifer D. Scragg, a law student certified under Rule 10 of the Rules for Admission to Practice of Law, with Senior Assistant Attorney General, Paul R. Sheridan of the Civil Rights Division of the Office of the Attorney General, supervising. The respondent, North American, Inc. made no appearance either by representative or by counsel, after being sent the Notice of Public Hearing through the West Virginia Secretary of State's Corporate Service of Process Section.

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. Complainant, Donna Ruth Thomas is a female apprentice with Painter's Union, Local No. 813; residing in Huntington, West Virginia. Tr. page 7.

2. Respondent, North American, Inc. was a corporation with its principal place of business in St. Albans, West Virginia; which employed approximately 30 employees in the State of West Virginia at the time of the alleged acts of discrimination; and thus was a person and an employer as those terms are defined under W. Va. Code §§ 5-11-3(a) and 5-11-3(d) respectively. Tr. pages 36 and 45.

3. As an apprentice with the Painters Union, complainant began working for respondent on April 9, 1997. Her job was to slow traffic moving beneath the Twenty-ninth Street bridge in Huntington, West Virginia, as the "flagger" on a painting job for the West Virginia Department of Highways. Tr. pages 9-11; Commission's Exhibit No. 1.

4. Respondent's foreman at the site was a male, L. M. Watts. All the respondent's employees at the site were male except for complainant. Tr. pages 10-11, and 29.

5. While working for respondent, complainant was treated much worse than the men. Throughout her employment she was subjected to verbal abuse by foreman Watts. Although Union employees took their breaks at the same time, foreman Watts yelled only at complainant for taking breaks, saying "Can't you break and fucking flag too." Commission's Exhibit No. 1; Tr. page 29.

6. Once when complainant was unable to loosen a bolt, foreman Watt's yelled "Its just like a fucking woman." When male workers made mistakes, foreman Watts did not personally attack them, as he did complainant. Male worker Eric Pertee testified credibly that foreman Watts frequently said "That's what happens when they send a bitch on the job." Tr. pages 30-31, and 13.

7. When a male went to the Exxon to buy snacks nothing was said to them. However, when complainant had to go to the Exxon to use the nearest restroom, foreman Watts yelled, "From now on if you have to go the fucking bathroom, then you fucking use it in your pants. You don't do it on my time no more." Mr. Pertee testified that the biggest problem Watts seemed to have was with bathroom privileges for complainant. Complainant testified that this was not a problem at other jobs. Tr. pages 8, 12-13, and 29-30.

8. Complainant called Mr. McMillian, Business manager for Painters Union Local 813, a few days after being assigned to work with foreman Watts to complain about bathroom privileges. Mr. McMillian discussed the matter with foreman Watts and was told she could do it in her pants. Mr. McMillian was upset and talked to the owner Joey Taylor who discussed the problem with foreman Watts, but did not relieve him of his job through its completion on May 6, 1997, although the problems persisted. Tr. pages 34, and 43-45.

9. On April 15, 1997, complainant flagged while two male employees set out cones. When foreman Watts realized the cones were not being set out to his satisfaction, he did not yell at the men. Instead he directed his verbal assault at complainant. Because it was not her job to set out cones, complainant did not realize he was talking to her. All of the sudden complainant felt someone grab her by the shoulders from behind real hard and literally jerked her around and throw her toward the cones. All the time Watts continued to yell at her saying "Can't you see the fucking things are messed up. Are you fucking dumb." This was done in front of passing motorists. Rather than quit complainant tried to continue working. Tr. pages 10-11, and 13-15.

10. The following day complainant returned to work. When she asked to use the restroom, foreman Watts yelled "Can't you fucking wait." At that point complainant became fed up with the treatment she had received. As a result of the abuse and harassment, complainant was embarrassed and humiliated. She became sick to her stomach. Unable to tolerate the abuse of foreman Watts any longer, complainant quit. Tr. pages 14-16; Complainant's Exhibit No. 1.

11. Even after complainant had quit, foreman Watts continued his sexual harassment. He called her over to the truck and when she arrived, he urinated in front of her. Then he turned, looked at her and laughed. Tr. page 16.

12. Complainant was constructively discharged. She quit because of unlawful sexual harassment that was incurred because of her sex. Any reasonable person in her situation would also have resigned rather than endure the treatment she received.

13. Complainant would have continued working for respondent for as long as fellow apprentice, Mr. Pertee, had she not been constructively discharged. Mr. Pertee worked through May 6, 1997 for respondent; while complainant was constructively discharged on April 16, 1997.

The best evidence available indicates complainant would have worked another 112 hours for respondent. Complainant would have been compensated at \$14.04 per hour, \$21.06 for any hours beyond 10 hours in a day; and would have received benefits of \$5.85 per hour.

Commission's Exhibit No. 2 and Commission's Exhibit No. 4; Tr. pages 20-22, and 39.

14. Complainant is entitled to back pay in the amount of \$2,297.88, plus statutory interest of \$383.97 calculated through November of 1998. Commission's Memorandum of Law Exhibit A.

15. Complainant was embarrassed and humiliated by the conduct of respondent's foreman L. M. Watts; and suffered emotional distress. She is entitled to the maximum amount the Commission may award by law for such incidental damages in the amount of \$3,277.45.

16. The Commission is entitled to reimbursement of its reasonable costs and expenses incurred in prosecution of this claim, in the amount of \$273.65. Commission's Memorandum of Law, Exhibit B.

B.

DISCUSSION

The West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq., prohibits employers from discriminating against an individual with respect to the terms and conditions of employment because of sex. Following the lead of the United States Supreme Court in Meritor Savings Bank v. Vinson 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), the West Virginia Supreme Court in Westmoreland Coal Co. V. West Virginia Human Rights Commission, 181 W.Va. 368, 382 S.E.2d 562 (1989), recognized that the West Virginia Human Rights Act prohibits sexual harassment. The West Virginia Supreme Court recognizes two types of sexual

harassment: quid pro quo harassment and hostile environment harassment. Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 at 7749 (1995); Westmoreland, 382 S.E.2d at 565, n.3. As such, where employers breach their duty to ensure, as best they can, that their workplaces are free of sexual harassment that creates a hostile or offensive working environment an independent basis for stating a Human Rights Act claim arises. Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 at 809 (1996).

To establish a claim for sexual harassment under the West Virginia Human Rights Act based upon a hostile or abusive work environment, a claimant must prove that:

- (1) the subject conduct was unwelcome;
- (2) it was based on the sex of the complainant;
- (3) it was sufficiently severe or pervasive to alter the terms of employment and create an abusive work environment; and,
- (4) it was imputable on some factual basis to the employer.

Willis v. Wal-Mart Stores, Inc., Syl. Pt. 2, 1998 WL 331510, __ W.Va. __, __ S.E.2d __ (Filed June 24, 1998) (quoting Hanlon, Syl. Pt. 5, Supra; also quoted in Conrad, Syl. Pt. 3, Supra.).

The Commission's Legislative Rules hold "an employer....responsible for its acts and those of its officers, agents and supervisory employees with respect to sexual harassment." 6 W.Va. C.S.R. § 77-4-3.1. Accordingly, the West Virginia Supreme Court, in addressing the issue of employer liability for discriminatory acts of supervisors, has held:

If a discriminatory act has been committed by an officer or a supervisory employee, an employer may be held liable without showing that the employer knew or reasonably should have known of the misconduct, except where the

supervisory employee was acting outside the scope of his employment.

Paxton v. Crabtree, Syl. Pt. 7, 184 W.Va. 237, 400 S.E.2d 245 (1990).

To prove a case of constructive discharge in West Virginia a claimant: must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary however, that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit.

Slack v. Kanawha County Housing and Redevelopment Authority, 188 W.Va. 144, 423 S.E.2d 547 at 558 (1992).

The conduct complained of by complainant was unwelcome, as she early on informed her Union Business Manager of the problem with foreman Watts in regard to bathroom privileges. The conduct was based upon the sex of complainant since foreman Watts made numerous comments derogatory of women working on a job and his treatment of complainant was substantially different than that accorded the men on the job. The nature of foreman Watts' actions were ongoing and were extremely degrading to anyone who would have been required to endure those actions, directly altering the conditions of complainant's employment and creating an extremely abusive work environment. Further, since L. M. Watts was a supervisor for the respondent, acting within the scope of his employment, the respondent is liable for his actions. Furthermore, the owner, Joey Taylor was specifically informed of the problem, yet continued to employ L.M. Watts as foreman though the complainant's problems with him persisted. Thus the complainant has established the elements of a sexually hostile work environment, unlawful under the West Virginia Human Rights Act.

The undersigned is left in no doubt that the working conditions were so intolerable that any reasonable person would be compelled to quit. It must be noted that the most basic need to engage in excretory functions were interfered with for no better reason than foreman Watts' own need to degrade a woman assigned to work for him. Additionally she had been subjected to what is arguably a criminal battery by foreman Watts on the day prior to her quitting. The following morning, foreman Watts again began his unremitting campaign of verbal assaults and denial of bathroom privileges. Such conditions are not to be tolerated by anyone. Thus, complainant has established that she was constructively discharged from her employment by respondent.

C.

CONCLUSIONS OF LAW

1. The complainant, Donna Ruth Thomas, 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, North American, Inc., was 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 sexual harassment under a hostile work place theory and that she was constructively discharged as a reasonable person subjected to the hostile work environment would not have continued working.

6. The respondent did not appear for the Public Hearing either in person or by counsel; and presented no evidence to rebut the commission's case establishing constructive discharge due to a sexually hostile work environment due to the actions of respondent's supervisory employee and agent.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to back pay of \$2,297.88, plus statutory interest of \$383.97 calculated through November of 1998.

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 Commission is entitled to an award of reasonable costs incurred in the amount of \$273.65.

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 complainant back pay in the amount of \$2,297.88, plus statutory interest in the amount of \$383.97, calculated through November 1998.

3. Within 31 days of receipt of this decision, the respondent shall pay reasonable costs

incurred by the Commission in the amount of \$273.65.

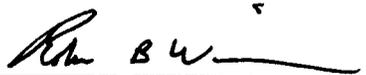
4. Within 31 days of the receipt of this decision, the respondent shall pay the complainant incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

5. 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 2nd day of September, 1998.

WV HUMAN RIGHTS COMMISSION

BY: 
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

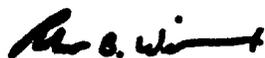
I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing
FINAL DECISION by

depositing a true copy thereof in the U.S. Mail, postage prepaid, this
2nd day of September, 1998, to the following:

DONNA R THOMAS
7134 BEECH DR
HUNTINGTON WV 25705

PAUL R SHERIDAN
SR ASST ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
PO BOX 1789
CHARLESTON WV 25326-1789

ATTN JOSEPH MORRIS
NORTH AMERICAN INC
PO BOX 730
ST ALBANS WV 25177



ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE