



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

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Executive Director

April 24, 1990

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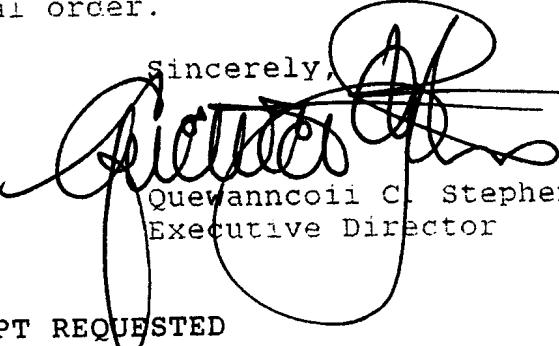
Mike Kelly, Deputy Attorney General
812 Quarrier St.
L & S Bldg. - 5th Floor
Charleston, WV 25301

Re: Tenney v. WV State Armory Board
ES-389-87

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,


Quewannoii C. Stephens
Executive Director

Enclosures
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a non-resident of this state, the non-resident may be required to file a bond with the clerk of the supreme court.

In some cases the appeal may be filed in the Circuit Court of Kanawha County, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

VANESSA TENNY,

Complainant,

v.

DOCKET NO. ES-389-87

WEST VIRGINIA STATE
ARMORY BOARD,

Respondent.

FINAL ORDER

On 14 March 1990 the West Virginia Human Rights Commission reviewed the recommended findings of fact and conclusions of law filed in the above-styled matter by hearing examiner Theodore R. Dues, Jr. After consideration of the aforementioned, and a thorough review of the transcript of record, arguments and briefs of counsel, and the exceptions filed in response to the hearing examiner's recommendations, the Commission decided to, and does hereby, adopt said recommended findings of fact and conclusions of law as its own, with modifications and amendments as set forth below:

1. In the subsection entitled "Proposed Order," paragraph 1 is modified to read:

"Complainant is awarded back pay in the amount of \$1,429.75, which represents back pay for the period of 14 March 1987 to 24 April 1987 calculated on the basis of an

annual wage of \$12,900.00."

2. In the subsection entitled "Proposed Order," paragraph 2 is modified to read:

"Complainant is awarded incidental damages in the amount of \$2,500.00 for emotional and mental anguish suffered by complainant as a result of respondent's unlawful discriminatory practices."

It is, therefore, the Order of the Commission that the Hearing Examiner's recommended findings of fact and conclusions of law, be attached hereto and made a part of this Final Order, except as amended by this Final Order.*

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of the State of West Virginia, the

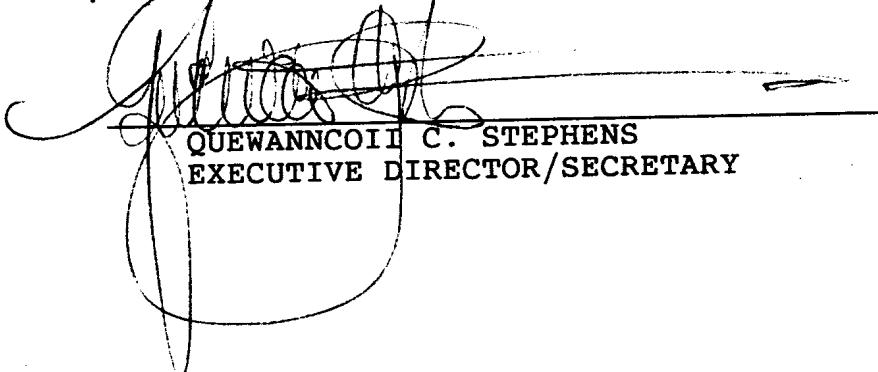
*Though the incidents complained of in this matter were not the most offensive or blatant examples of sexual harassment ever brought before this Commission, this does not mean that they do not rise to the level of discrimination made unlawful by the West Virginia Human Rights Act. As our Supreme Court recently noted, ". . . given the often subtle nature of sexual harassment, evaluation of witness credibility by the trier of fact is given great weight." Roberts v. Greiner, 386 S.E.2d 504 (1989). Citing Westmoreland Coal v. Human Rights Commission, 382 S.E.2d 562 (1989). Here, the hearing examiner found that the complainant's employment was prematurely terminated as a result of her refusal to succumb to the sexual demands of her supervisor, David Wheeler. We find this conclusion to be supported by more than the substantial evidence needed to sustain the examiner's recommendations.

parties are hereby notified that they have ten (10) days to request that the West Virginia Human Rights Commission reconsider this Final Order or they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 30th day of March, 1990, in Charleston, Kanawha County, West Virginia.


QUEWANNCOIE C. STEPHENS
EXECUTIVE DIRECTOR/SECRETARY

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

VANESSA TENNY,
Complainant,

v.

ES-389-87

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WEST VIRGINIA STATE ARMORY BOARD,
Respondent.

WV HUMAN RIGHTS COMM.
Answered _____

**EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter matured for public hearing on November 10 and November 30, 1988. The hearing was held at the Don V. Ray Room, Kanawha County Public Library, Kanawha County, West Virginia and the West Virginia Human Rights Commission Conference Room, 1036 Quarrier Street, Charleston, Kanawha County, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner. The presence of a Hearing Commissioner was previously waived by the parties.

The Complainant appeared in person and by her counsel, Sharon Mullens and Kelli Talbott. The Respondent appeared by its representative, David Wheeler and its counsel, Ed Bullman.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and

conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

ISSUES

1. Was the Complainant discharged by the Respondent as a result of her refusal to submit to certain sexual advances by her supervisor?
2. If so, to what relief is the Complainant entitled to?

FINDINGS OF FACT

1. The Complainant was employed with the Respondent in November, 1985. She was hired in the position of audit clerk.
2. The audit clerk position was a new position in the Respondent's organizational chart. It was contemplated that after 6 months the position would be evaluated to determine if it would continue.
3. The Complainant's duties required considerable interaction with David Wheeler, her supervisor. Mr. Wheeler was also the individual that made the decision to hire the Complainant.

4. The Complainant's duties required her to conduct reviews of the various National Guard Armories around the state.

5. It was this function in the Complainant's job responsibilities that gave rise to the source of the Complainant's problems with Wheeler.

6. On various occasions, during her tenure, the trips she took to other armories required overnight stays. Wheeler would accompany her on these trips.

7. In March 1986, while on such a trip, the Complainant, accompanied by Wheeler, went to Parkersburg. After work hours, Wheeler suggested that the Complainant accompany him to a lingerie show at the Holiday Inn, in Parkersburg. While there, they drank alcohol and danced. The Complainant felt Wheeler danced too close and suggested they leave. Wheeler did not resist the Complainant's suggestion and they did in fact leave promptly.

8. In April 1986, during an overnight business trip to Elkins, the Complainant asked Wheeler to join her and her friend at dinner. Again, she felt he danced to close and requested that she be returned to the hotel. And again, Wheeler accommodated her and promptly left. At the hotel, the Complainant contends that Wheeler insisted that the door to their adjoining rooms be left open.

9. In May 1986, during an overnight trip to Keyser, West Virginia, Wheeler came into the Complainant's room and laid across her bed while she completed combing her hair and

putting on make-up.

10. In June 1986, during a trip to Morgantown, West Virginia, Wheeler physically picked the Complainant up from behind.

11. Later in June, approximately the 11th, during a trip to Kingwood, West Virginia, Wheeler took the Complainant to a stone quarry and while there, told her the next time they came to the area they should bring swimsuits. Later, while in the car, Wheeler asked the Complainant to kiss him, but she refused. Shortly after this incident, the business communications between the two broke down.

12. In September 1986, the Complainant was counseled regarding the fact that Wheeler perceived that things were not progressing, in her job, in a satisfactory manner. At that time, the Complainant indicated that the "kissing" incident was a problem as far as she was concerned. Wheeler responded that had she kissed him it would have been nothing more significant than a handshake.

13. After this point and time, the Complainant continued to travel to the various armories. However, she primarily performed this function alone.

14. In October 1986, the Complainant, Wheeler and Ira Carte, Respondent's personnel property officer, went to Kingwood, for business purposes, unrelated to on-sight auditing.

15. During this trip, the Complainant assisted Ira Carte in performing inventory duties.

16. Upon emerging from one of the buildings, Wheeler asked Carte, in front of the Complainant, if he had "gotten any".

17. In December 1986, the Complainant had another counseling session with Wheeler. Wheeler reiterated that he felt the Complainant's job was not progressing well and that he had written a letter to terminate her, but decided not to give it to her. He concluded by saying that the Complainant, in the future, was to do exactly what he told her to do.

18. As a result of the pressure the Complainant felt she was under at work, she went to counseling sessions at the Women's Counseling Center from December 1986 thru February 1987.

19. Also during the December 1986 counseling session, Wheeler told the Complainant that she was to come into his office at 8:30 every morning and remain in his office until he informed her of her assignment for the day.

20. As a result of this directive, there were times in which the Complainant was required to sit and wait for Wheeler, for as much as, one-half hour.

21. The Complainant became a member of the Army National Guard in November 1986, while still employed with the Respondent.

22. On or about November 1986, the Complainant gave Wheeler a set of orders which included the date that she was to leave for training for the Army National Guard.

23. State law prohibits employers from requiring employees of the Army National Guard to charge annual leave or sick leave time for the period of time that employees are absent due to official Guard duties.

24. Wheeler rejected the documentation provided to him, by the Complainant, regarding the training period. The reason provided to the Complainant was that the documents did not suggest a return date.

25. Notwithstanding the law, Wheeler told the Complainant that she would be required to take annual leave while on leave for training for the National Guard. Wheeler, himself, has been a member of Army National Guard for 26 years. Further, he supervises approximately ten employees who are members of the Guard or some other military branch.

26. None of the other employees, under Wheeler's supervision, and who are members of the Guard, had any problem perfecting their leave from work due to official Guard duties.

27. On or about January 13, 1987, Wheeler requested the Complainant to fill out an annual leave slip for the time required for her Guard training. However, the Complainant refused to complete the same.

28. On or about January 15, 1987, the Complainant was informed by Wheeler that her job was to be eliminated in 60 days.

29. He also informed the Complainant that her

position was no longer required and that it was in the best interest of the Respondent and the state of West Virginia to eliminate her position.

30. During her tenure, the Complainant performed her duties in a satisfactory manner.

31. Contemporaneous in time, Wheeler provided the Complainant a performance evaluation which suggested that she could retain her job beyond the 60 days if certain "corrections" would be made. However, there was no explanation as to what constituted the "corrections" that was perceived to be addressed.

32. In response, on or about January 20, 1987, the Complainant wrote a letter to Wheeler asking him to reduce to writing the factors necessary to be addressed for her to retain her position.

33. Although Wheeler received the Complainant's letter, he did not respond to it.

34. The Respondent experienced budget cuts in 1987. These budget cuts realized by the Respondent during 1987, did not affect the funding for the Complainant's position.

35. After the Complainant's position was eliminated, the funding used for her position was transferred to a maintenance slot. Said maintenance slot has remained unfilled from the time the funds were transferred to the date of hearing.

36. At the time of her discharge, the Complainant was earning \$13,500 per year.

37. As a result of her discharge, the Complainant sustained a loss in wages and benefits.

DISCUSSION

The Complainant has established a prima facie case of sex discrimination by introducing evidence to establish that: she is a member of the protected group; that she performed her duties in a satisfactory manner; that she was a victim of sexual advances by her supervisor, which, upon refusal, resulted in adverse treatment, in the terms and conditions of her employment; and ultimately her refusal resulted in her discharge. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 LED.2d 668 (1973); Shepherdstown Volunteer Fire Department v. Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983); West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (W.Va. 1985).

The Respondent attempted to justify the actions of the supervisor, as the same related to certain sexual advances, by suggesting that the advances raised by the Complainant were either innocent or taken out of context. For example, the Respondent would have the Examiner accept the conduct of Wheeler being on the Complainant's bed, at a time during which she was completing dressing, as insignificant, in as much as, the Complainant was fully clothed and Wheeler made no sexual advances. However, the credible evidence and the reasonable inference to be drawn

therefrom suggest that Wheeler's conduct injected an unlawful element into the Complainant's work environment which caused enhanced stress and problems for the Complainant. Wheeler's cumulative conduct, coupled with the silent treatment he provided, after the kissing incident, as well as, the counseling sessions which cited amorphic and fictitious deficiencies in the Complainant's work product, amounted to a systematic form of conduct, by him, which clearly violates the provisions of the West Virginia Human Rights Act. Accordingly, the reasons articulated by the Respondent for its actions are rejected as pretext for unlawful sex discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); State of West Virginia Human Rights commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d. 77 (1985).

It is interesting to note, that the person who assumed the Complainant's auditing responsibilities for the satellite Armories around the state, performed only one on-site visitation after the Complainant's discharge. Notwithstanding the Respondent's position that the work load did not allow for any additional on-site audits, this coupled with the much higher number of audits performed by the Complainant seems unjustifiable since the Complainant's slot was eliminated allegedly because it was no longer needed. The transfer of funds to the maintenance department, coupled with the additional consideration that

the maintenance position was never filled, leads one to the confirmed conclusion that the Respondent has been less than forthright in representing its intentions and objective in addressing the Complainant's continued employment.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter herein.
2. The Complainant established a *prima facie* case of sex discrimination.
3. The Respondent failed to articulate a credible legitimate nondiscriminatory reason for its actions.
4. The Complainant has realized a loss in wages and benefits as a result of her discharge.
5. The Complainant sustained emotional stress and mental anguish as a result of the Respondent's conduct.

PROPOSED ORDER

Accordingly, the Examiner recommends to the Commission that judgment be awarded to the Complainant and that the following relief be provided:

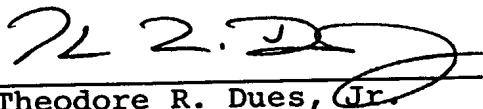
1. That the Complainant be awarded back pay in an amount for the period of March 14, 1987 to April 24, 1987. This is to be calculated on the basis of an annual wage of \$13,550.
2. If the Bishop decision is determined not to be

retroactive, then the Complainant should be awarded incidental damages in the amount of Ten Thousand Dollars (\$10,000) for humiliation and mental anguish.

3. A cease and desist order prohibiting the West Virginia State Armory Board from engaging in unlawful discriminatory employment practices.

DATED: March 8, 1989

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner