

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

WILLIAM L. TURNER,

Complainant,

v.

DOCKET NUMBER(S): ERA-170-00  
EEOC NUMBER: 17JA00054

KANAWHA COUNTY  
BOARD OF EDUCATION,

Respondent.

**FINAL DECISION**

A public hearing, in the above-captioned matter, was convened on October 23, 2001 in Kanawha County, in Conference Room B of the West Virginia Human Rights Commission Offices at 1321 Plaza East, Charleston, West Virginia, before Gail Ferguson, Administrative Law Judge.

The complainant, William L. Turner, appeared in person and by counsel for the Commission, Paul R. Sheridan, Senior Assistant Attorney General, for the Office of the West Virginia Attorney General, Civil Rights Division. The Respondent appeared in person by its representative, Richard Clendenin, Principal; as well as by counsel, James W. Withrow, Esquire. Due to Judge Ferguson's extended sick leave and subsequent retirement on July 31, 2002 and by Agreed Order entered October 2, 2002, the matter was reconvened on December 9<sup>th</sup> and 10<sup>th</sup>, 2002 for further testimony and evidence before Robert B. Wilson, Administrative Law Judge, and submitted for decision by Robert B. Wilson, Administrative Law Judge based upon the record made before Judge Ferguson and Judge Wilson. The record was held open to

receive additional evidence regarding Commission's Motion To Amend Complaint and the parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof, and response briefs through June 20, 2003.

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. Respondent, has not contested that it is an "employer" and a "person" as those terms are defined in W.Va. Code §§5-11-3(a) and (d) respectively.

2. Complainant, William L. Turner, is an African American, who graduated from West Virginia Institute of Technology in 1963, where he was a successful four year basketball player. He began his teaching career in Physical Education and Health at Nitro Junior High

with the Respondent, Kanawha County Board of Education, in 1963. Five years later he began coaching as well, serving as coach in basketball, football and track. He was also certified to teach Social Studies. Tr. Vol. I, pages 36-38, 274 and 322.

3. Complainant transferred to East Bank High School in the middle of a semester, in 1976 at the request of the administration there and the County Board of Education following a race riot. He taught Social Studies and was Assistant Boys Basketball Coach for his first two years and Head Boys Basketball Coach at East Bank High School, thereafter. Complainant was the first and only African American male teacher at East Bank High School for many years until Mr. Watkins was hired. There were two African American female teachers at the time Complainant transferred to East Bank High School. Complainant turned down two head coaching jobs to go to East Bank where he was assistant coach. He taught there until the school closed and was consolidated with DuPont High (and several area ninth grades), to form Riverside High School at the close of the 1998-1999 school year. Currently as of 2001, there were only three African American teachers out of sixty-nine employed there, under Principal Clendenin. Tr. Vol. I, pages 38-42 and 274; and Tr. Vol. II pages 227 and 240.

4. Complainant always received satisfactory evaluations throughout his teaching career at East Bank High School until the 1997-1998 school year. Prior to 1998-1999 there were no evaluations done on coaches. According to School Board Policy 5310 as in effect from July 1, 1992 until June 26, 1999, Complainant was supposed to alternate between evaluations one year and a Professional Growth and Development Plan, (which did not involve being subjected to a formal evaluation in those years), the following year provided the last two

years evaluations were satisfactory. Complainant was never given the Professional Growth and Development Plan and was subject to evaluations every year by Principal Clendenin. Tr. Vol. I, pages 42 and 64; Respondent's Exhibit No. 1, Documents No. 103 and No. 104.

5. There were some people who were not supportive of Complainant being the Head Basketball Coach. His initial year was extremely successful with the team going 22-3. Thereafter he had three terrible years in which his teams won only one game. During that period, in addition to declining enrollment at East Bank; the best basketball players were not allowed to play for him. The football coaches told their players they were not allowed to go out for the basketball team because they were to engage in weight lifting during the basketball season instead. Nevertheless in the 1997-1998 basketball season, Complainant's team had the best record in Kanawha County against the toughest schedule according to the Metro Index. Ms. Barker, a fellow teacher, observed that the coaches at the school would stand around and talk. They would have lunch together. The coaches talked amongst themselves about social activities in which they participated. Complainant was not included, no matter what, he was not included. Mrs. Barker went on to note that it was rumored that "they" wanted a different coach, years and years ago, that it settled down, that she thought the problems would go away, but they didn't, the problems continued. Mrs. Barker's testimony is credited. Tr. Vol. I, pages 43-53, 261-264 and 273.

6. Up until 1995 Complainant had a wide range of academic achieving students in his classes. Thereafter he noticed that his classes were concentrated with lower achieving students. In 1996-1997, East Bank was on academic probation. Complainant had none of the honors

classes, yet his students scored within the 49<sup>th</sup> percentile; while the two teachers', one who had two honors classes and the other who had five honors classes, students performed in the 42<sup>nd</sup> percentile on standardized tests. Complainant's students showed a large increase in geographic knowledge. At the end of the 1996-1997 year, Complainant asked Assistant Principal Bossie for an honors course and was told he would get one. When he arrived to start the 1997-1998 year he had not been given an honors class. He went to Principal Clendenin and was given one honors section. Tr. Vol. I, pages 91-97, 215 and 216; Commission's Exhibit 1, Documents No. 6 and No. 7.

7. Groundbreaking for Riverside High School was in 1996, and everyone was anticipating the consolidation at Riverside for some time in advance of that. Tr. Vol. I, page 54.

8. Beginning the Fall Semester of 1997 at East Bank High School, the summer reading assignment which Complainant was to administer for his students was changed by his Department Head without telling Complainant, which resulted in his having extreme difficulty preparing for the new summer reading assignment he was to prepare an exam on. Tr. Vol. I, pages 111-114, and 225-234.

9. From the start of the 1997-1998 school year, Complainant noticed he was getting a lot of discipline problems from his students. He noticed a disturbing coincidence, that many of the problems were coming from his group of JROTC students. The administrators at East Bank High School were not giving him adequate support in dealing with discipline problems as some students had been sent to the office more than four times without being given a suspension from school. Complainant also encountered a situation which made him question

whether Assistant Principal Bossie was giving detention to her JROTC students when he wrote discipline slips on them and sent them to the office. That Complainant was given difficult students in his class assignments, was confirmed by the credible testimony of fellow teacher Mrs. Barker who indicated:

“ . . . I noticed when I’d go down the hallway that the students that Mr. Turner had in his room - - you know, you might have a class of , say twenty-five students, you might have one or two troublemakers that you have to keep your thumb on. Mr. Turner sometimes would have a whole class of those people.” Tr. Vol. I, page 259.

Mrs. Barker further indicated that the students believed that if they did something in Mr. Turner’s classroom, they would not be punished for it. Tr. Vol. I, pages 98-106 and 259-261.

10. The first bad evaluation that Complainant ever received came on December 11, 1997. He was rated unsatisfactory in all six categories that were evaluated. Yet there were no suggestions, recommendations or identified deficiencies in those portions of the evaluation form. The deficiencies were noted in the comments portions however. Even one unsatisfactory on the evaluation is enough to trigger the placement of a teacher on a Plan of Improvement. Complainant had never before been rated unsatisfactory in any category. In fact the Teacher Evaluations date 4/27/96 and 6/11/95 seem to have the same general comments regarding concerns about discipline and the need to vary instructional strategies, but are satisfactory in all categories nonetheless. Tr. Vol. I, pages 55-57; Respondent’s Exhibit No. 1, Documents No. 1, No. 2 and No.18.

11. The bad evaluation followed a letter dated September 15, 1997 in which Assistant Principal Bossie chastised Complainant because his class was loud next door to where she was conducting an observation of an English class. Principal Clendenin performed a formal observation which was highly critical in tone, one criticism was a claim that Complainant did not follow the lesson plan because he reviewed the Chapter 7 by questions and answers rather than lecture yet his notes indicate that Complainant was talking about the lessons. The Principal notes that only 10 of 17 students had their books and that two were asleep and 3-4 not paying attention. He noted that no syllabus, or fire drill instructions were posted, no homework was reflected on weekly plan and that only A B grouping strategy was listed, no variation, and that no daily objectives were posted on board nor sponge activity provided at start of class. Attendance was not taken until an office worker came for it and he stopped class to take attendance at that time. Principal Clendenin criticizes Complainant for not providing the grade book, but does not indicate that it was ever requested. These criticisms track those negative comments in the teacher evaluation dated 4/30/97. Other formal observations were performed on October 10, 1997 by Cindy Daniels, Curriculum Supervisor; on October 21, 1997 by Susan Bossie, Assistant Principal and by Richard Clendenin on November 25, 1997 and December 2, 1997. Respondent's Exhibit No. 1, Documents No. 1, No. 2, No. 4, No. 5, No. 7, No. 8, No. 11, No. 12, No. 13, No. 15, No. 16, and No. 17.

12. A Job Announcement was issued on January 8, 1998 for positions as teachers at Riverside High School, which required that applicants for all professional positions could not be on a Plan of Improvement. The application period was to close on January 23, 1998.

Respondent's Exhibit No. 1, Document No. 19; Tr. Vol. I, pages 66 and 67.

13. Complainant submitted his application on January 20, 1998. The next day he was called into Principal Clendenin's Office, and the following day placed on a Plan of Improvement on January 22, 1998. Commission's Exhibit No.1, Document No.18; Respondent's Exhibit No. 1, Documents Nos. 20-22; Tr. Vol. I, pages 67-70.

14. There was a meeting at which Perry Bryant of WVEA, Complainant, Ms. Daniels, and Principal Clendenin discussed the Plan of Improvement. Complainant confronted Ms. Daniels about the allegations that lesson plans were not available with the list of lesson plans kept by Ms. Bauer, which showed the lessons plans had been submitted, the list further disclosed that another teacher had not submitted lesson plans for seven weeks, and that teacher was not on a Plan of Improvement. When confronted by this document, Ms. Daniels produced the four weeks lesson plans. This indicated to Complainant that Ms. Daniels quite simply was lying about these matters and he no longer believed that she was legitimately trying to assist his improvement as a teacher. Vol. I, pages 82-84, and 87.

15. Complainant was placed on a Plan of Improvement and closely monitored. A Summative Evaluation was performed on May 15, 1998 which was to "finalize all areas of [the] improvement plan and to bring to a close all areas of that plan." Nevertheless, the plan did not seem to close and was extended beyond the close of the semester in contravention of the State Board of Education Policy, as it provided in part as follows:

+There is still concern with classroom/instructional management. Those concerns surround the following: implementing daily lesson plans; directing

students to be on task immediately at the beginning of the class; maximizing time of[sic] task; providing remediation activities; using appropriate instructional activities; setting high expectations for students; and establishing and following procedures and rules that enhance learning.

...

Therefore, due to the above mentioned concerns, you will be monitored via observation and feedback during the first nine weeks of the ensuing school term, beginning August 1998, in the areas of those concerns for further improvement.

Respondent's Exhibit No. 1, Documents No. 61 and No. 103; Tr. Vol. I, pages 76 and 77.

16. The following year 1998-1999, Mr. Clendenin was no longer Principal at East Bank High School. He was given a job of getting ready for the opening of the new Riverside High School for the 1999-2000 school year, selecting staff, developing curriculum and monitoring advances in the building of the facility. Mr. Hopkins was Acting Principal the next year at East Bank High School. Nobody performed any monitoring or observations of Complainant during the following Fall of 1998 as specified in the Summative Evaluation which extended the Plan of Improvement through the first nine weeks of the Fall Semester. Tr. Vol. I, page 119; Tr. Vol. II, pages 68 and 69; and Tr. Vol. III, page 10.

17. One of the first things that Mr. Clendenin did to prepare for the opening of Riverside High was to develop a time line for the hiring of athletic coaches. He began by hiring

Jim Fout (the white Head Basketball Coach at DuPont High) as Athletic Director for Riverside. The Basketball Coach positions were the first to be posted in the Fall of 1998. Jim Fout was appointed Head Basketball Coach at Riverside and Bill Cordell (Complainant's Assistant Basketball Coach at East Bank High at the time and who is also white) was selected as the Assistant Basketball Coach at Riverside High School. Mr. Watkins (Complainant's volunteer assistant coach at East Bank High School, who is an African American) was selected as the 9<sup>th</sup> Grade Boys Basketball Coach at Riverside. The posting for the Head Basketball Coach at Riverside closed while Complainant was effectively still under a Plan of Improvement and the posting specified that applicants could not be on a Plan of Improvement. It is notable that one of the applicants for the Head Basketball Coach position was Ms. Daniel's husband. Although the posting closed for Boys Head Basketball Coach at Riverside on October 26, 1998, for Assistant on November 24, 1998 and for 9<sup>th</sup> Grade Coach on March 31, 1999; all of the above listed vacancies were filled by Kanawha County Board of Education vote on June 17, 1999. Tr. Vol. I, pages 123-125 and 164; Commission's Exhibit No. 1, Document No. 43.

18. During the 1998-1999 School Year, Complainant received his first coaching evaluation. Despite the team's record and without ever having attended any of the team's practices, Mr. Hopkins rated the Complainant as does not meet standards in four areas. Mr. Hopkins did not go over the evaluation with Complainant, as required by Policy, it was placed in his mailbox with a note instructing him to sign it. Complainant refused and protested the evaluation. The evaluation was later changed to meets standards in all areas, again without recognizing the superior performance of his team in any area on the evaluation. Mr. Hopkins

also evaluated Complainant's Assistant Coach, Bill Cordell, without the involvement of Complainant, the Head Basketball Coach, again in violation of Policy. Mr. Cordell was given a very positive evaluation by Mr. Hopkins. Mr. Hopkins gave Mr. Watkins, an African American, an even better coaching evaluation than Mr. Cordell. Tr. Vol. I, pages 126-135; Tr. Vol. II, pages 178, 179, and 208-210; and, Tr. Vol. III, pages 23-35.

19. The Complainant was hired as a Social Studies Teacher at Riverside High School when it opened to start the 1999-2000 school year. Tr. Vol. I, pages 135 and 136.

20. Complainant filed a Human Rights Complaint with the West Virginia Human Rights Commission in November 1999. He was placed on a Plan of Improvement following a negative evaluation conducted by Ms. Daniels in late March of 2000. Respondent's Exhibit No. 1, Documents No. 80, No. 89 and No. 92.

21. During the 1999-2000 school year at Riverside, Complainant described several incidents which indicated he was subjected to disparate treatment toward him which created a hostile work environment that would cause a reasonable person in his position to quit. Not only were his lesson plans deleted from the school computer system, but also removed from his locked file cabinet. In another instance he became aware that his students had been given wrong grades in two out of his three classes (the exception being his honors class). In another incident he was cited for failure to give make up work to a student who had been out for the entire semester and came back with just two weeks left in class. The administrators wanted him to give the entire make up work and enter a grade for that student within that period of time. Other teachers also objected to this particularly since the student was never enrolled in their

classes. The other teachers who objected apparently suffered no adverse consequences. In fact they had been instructed to give the student an F and change the grade later once the make up work was completed. Ms. Daniels never gave this instruction to the Complainant however; and, instead used this incident to paper the file for a negative evaluation of Complainant. The most egregious situation involved a student led walkout wherein the student slammed a desk down and swore. The Complainant wrote three students up and sent them to the office. When he requested a parent teacher conference with the one student who was most culpable, Ms. Daniels insisted that he meet with all students and parents and changed the focus of the meeting from the behavior of the students to Complainant's teaching. The failure to support Complainant was compounded by a memo to the parents which emphasized the false statements of the students concerning Complainant's teaching and ignored the discipline that was supposed to be the focus of that meeting. The student involved had stated that Complainant had lost his assignments, while the student behind him said no here are your assignments you gave them to me to hand in. This student had left the parent conference with his parent prior to his having slammed the desk and having cursed being addressed. Later that same student was caught with stolen hall passes and had forged the signature of Ms. Harris, an African American teacher. When confronted he simply lied to Ms. Harris's face that she had signed the pass, apparently having learned that the word of a student would be accepted over that of the African American teachers. Tr. Vol. I, pages 147-156, 295, 297 and 306-310; Tr. Vol. IV, pages 6-24,69-80 and 116-118.

22. Shortly after he was placed on the second Plan of Improvement he began missing

days because of stress of the environment and as the result of an accident. As a result the Plan of Improvement was extended into the next school year. The administrators made false statements concerning the days Complainant attended school, which he contends adversely affected counting of his sick days for extended paid health coverage under his retirement.

23. Complainant resigned on November 17, 2000. Complainant was constructively discharged as the environment was so hostile toward him that no reasonable person would be expected to work under similar conditions. Respondent's Exhibit No. 1, Document No. 98.

24. Complainant was not allowed to apply for the position of Head Basketball Coach at Riverside High School as a result of the unlawful discriminatory actions of Respondent from 1999-2000. This resulted in a loss of \$2,500.00 in that year and thereafter. Respondent's Exhibit No. 1, Document No. 109.

25. As a result of the unlawful racially disparate treatment by Respondent, Complainant suffered embarrassment, humiliation, emotional distress and loss of personal dignity. Complainant is entitled to the maximum amount of incidental damages that the Commission may award in a case not tried before a jury. Tr. Vol. I, 162-164; Tr. Vol. IV, pages 28-31 and 84-86.

26. On November 10, 1999, Complainant filed a complaint with the West Virginia Human Rights Commission, in essence alleging on or about January 23, 1999, prior to and continuing thereafter he was given a negative evaluation and placed on a Plan of Improvement which resulted in his being denied a coaching position with Respondent due to his race and age. The case was Noticed for Public Hearing in August, 2000 for Hearing in July 2001 based upon

an Amended Complaint. On July 3, 2001, Commission's counsel filed a Motion seeking to amend the complaint, which was granted by Order of Judge Ferguson entered July 17, 2001. The Second Amended Complaint clarified the fact that the original complaint resulted from being placed on a Plan of Improvement on January 23, 1998 (not 1999) and added a claim for subsequent constructive discharge and adverse treatment beginning with a negative evaluation on March 21, 2000 due to race, age and retaliation for the filing of the original complaint. Complaint; Notice of Public Hearing entered August 8, 2000 and Amended Complaint; and, Order entered July 17, 2001 and Second Amended Complaint.

27. Complainant was constructively discharged at the beginning of the 2000-2001 school year. Had he not been constructively discharged, Complainant would have worked until his 65<sup>th</sup> birthday on March 12, 2005, or an additional four years and five months. The back pay figure through that date, discounted to October 2001, is \$81,450.00, net of retirement pay. Through the end of the 2002-2003 school year that discounted back pay figure is \$50,222.00. Tr. Vol. I, page 157; Commission's Exhibit No. 1, Document No. 69.

28. Complainant is entitled to back and front pay of \$2,500.00 per year as Head Basketball Coach for five seasons from 1999-2000 through 2004-2005 for a total of \$12,500.00.

29. The Human Rights Commission has expended \$1,732.85 in prosecution of this case as set forth more fully in Exhibit A of Commission's Proposed Findings of Fact and Conclusions of Law and Memorandum of Law.

**B.**

## DISCUSSION

West Virginia Code § 5-11-9(1) of the West Virginia Human Rights Act, makes it unlawful “for any employer to discriminate against an individual with respect to ... hire, tenure, conditions or privileges of employment if the person is able and competent to perform the services required...” The term “discriminate” or “discrimination” as defined in W.Va. Code § 5-11-3(h) means to “exclude from, or fail or refuse to extend to, a person equal opportunities because of race . . . [or] age.” In order to establish a case of disparate treatment for discriminatory discharge or failure to hire under W.Va. Code § 5-11-9 , with regard to race and/or age, the complainant must prove as prima facie case, that:

1. The complainant is a member of a protected class;
2. The employer made an adverse decision concerning the complainant; and,
3. But for the complainant’s protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

West Virginia Code § 5-11-9(7) of the West Virginia Human Rights Act, makes it unlawful:

For any person, [or] employer. . .to:

- (A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit any acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section;
- (B) Willfully obstruct or prevent any person from complying with the provisions

of this article, or to resist, prevent, impede or interfere with the Commission or any of its members or representatives in the performance of a duty under this article; or,

(C) Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the Respondent. The complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and, adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a prima facie case of discrimination; the Respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by the Respondent was not the true reason for the decision, but rather pretext for discrimination.

The term “pretext” has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490

(1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986). Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and, where pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). Although, discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. \_\_\_\_, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

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

“In order to prove constructive discharge, a plaintiff must establish that the 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 the specific intent to cause the plaintiff to quit.” Travis v.

Alcon Laboratories, Inc., 202 W.Va. 369, 504 S.E.2d 419, 434 (1998); Slack v. Kanawha County Housing and Redevelopment Auth., Syl. Pt. 6, 188 W.Va. 144, 423 S.E.2d 547 (1992).

This case presents difficult issues regarding the timeliness of the complaint as well as the availability of particular relief. As an initial matter it must be pointed out that complaints are not drafted by attorneys but rather by lay non lawyer intake officers of the West Virginia Human Rights Commission. The initial complaint as clarified in the first amended complaint alleged that prior to and continuing from January 22, 1998, when Complainant was placed on a Plan of Improvement, he subsequently was denied the opportunity to apply for the position of Head Basketball Coach at Riverside High School when it opened. Although the complaints do not specifically state that they are for an alleged hostile environment claim, the fact that the complaints allege a continuing violation necessarily imply that the gravamen of the complaint is that Complainant was subjected to harassment because of his race and age, because the Respondent's supervisory personnel did not want an older African American to serve as the Head Coach at Riverside High School. The problem arises in connection with the dates that gave rise to Complainant's ineligibility for the position of Head Coach. If one goes by the date when the first Plan of Improvement was placed in effect on January 22, 1998, or the date the Head Coaching Position Announcement closed, August 26, 1998, than the complaint filed for failure to hire which was not filed until November 10, 1999, would have been untimely. If one goes by the date the Assistant Head Coach Position Announcement closed, November 24, 1998, the complaint would be timely, but Complainant was not under a Plan of Improvement at that point and would presumably have been eligible to apply as the first nine weeks of the

1998-1999 school year had passed as specified in the Summative Evaluation dated May 15, 1998. Nevertheless, technically speaking the position of Head Basketball Coach at Riverside High School was not filled until June 17, 1999, when the School Board voted to approve the appointments for those positions. Thus the Complainant's complaint is timely filed November 10, 1999, for failure to hire as Boys Head Basketball Coach.

As stated earlier, the undersigned concludes that all of the complaints filed in this matter sufficiently raise the claim of a continuing violation, discriminatory hostile work environment, as the claim of continuing violation necessarily implies such a claim. The Second Amended Complaint filed by Order dated July 17, 2001 clarified that Complainant had been subjected to a continuing violation of harassment based on race, age and retaliation. As Complainant was constructively discharged on November 17, 2000; there is no question but that his claim for constructive discharge, was timely filed.

The undersigned did have the opportunity to observe the demeanor of several of the key witnesses in this case, including Complainant, Principal Clendenin and Cindy Daniels. The undersigned found Complainant's testimony generally very credible. Although, Principal Clendenin is very well spoken and pleasant, his testimony was found to be somewhat evasive and generally not very credible. The first observation that the undersigned would make is that the system of teacher observations and evaluations is clearly extremely subjective. Secondly, the process is subject to manipulation by unscrupulous individuals who may state anything they wish on the forms for these evaluations, and be essentially unquestioned concerning those identified deficiencies. In this instance everything is well documented and convincing in its

outward appearance. There are however, several factors which call these outward appearances into question.

The most striking of these is the timing of the first negative evaluation of the Complainant in his teaching career, which began in 1963. He receives his first negative evaluation in December 1997, just prior to the postings for teaching positions at Riverside High School, which specify that one can not be on a Plan of Improvement when transferring to a new teaching position (or any other professional position, including coaching positions for that matter) with Respondent. That Plan of Improvement commenced on January 22, 1998, one day prior to the close of the teaching postings for Riverside High School. Further suspicion is cast upon these events by the fact that the negative evaluation rated Complainant unsatisfactory in all six areas of evaluation, based upon criticisms that essentially are no different than those that are contained in each of the evaluations that took place in prior years that resulted in no evaluation ratings of unsatisfactory. The credibility of Principal Clendenin's testimony is further discredited by his apparent lack of regard for Policy in regard to evaluations of the Complainant. Since 1994, Principal Clendenin was to alternate evaluations with Professional Growth and Development Plans. Instead Complainant, who is African American, was continually subjected to evaluations in every year that Complainant worked as a teacher with Mr. Clendenin as Principal. As of 2001, Principal Clendenin had just three African American teachers on a staff of approximately sixty-nine teachers at Riverside High School.

These facts must further be viewed in relation to the importance of high profile high

school athletic competition, especially football and basketball programs. It is important to keep in mind that Complainant was originally brought to East Bank in response to the lack of African American male role models following racial disturbances there. Ms. Barker's testimony was striking in that it confirmed Complainant's claims that his negative evaluation was triggered by a desire to see that he would not serve as the Boys Basketball Head Coach at Riverside High School. She confirmed that the other coaches did not socialize with Complainant and that Complainant was not accepted as a Head Basketball Coach by many people, that they wanted him replaced and that although she had thought those problems were in the past, that they were not, but rather continued. The source of this animosity and hostility to his being head coach is obviously racial in nature. Its severity is indicated by the refusal of the football coaches, who get first crack at student athletes because their season is in the Fall, would not let their athletes compete in basketball, "because they wanted them to lift weights". The fact that there were procedural irregularities and such an apparent discrepancy between success on the field for Coach Turner in contrast to the evaluation comments and ratings of unsatisfactory by Acting Principal Hopkins the first year coaching evaluations took place, go beyond mere proof by a preponderance of the evidence, to clear and convincing proof, that the motive for the negative evaluations was a racial bias against coach Turner serving as Head Basketball Coach at the new Riverside High School. The undersigned finds this notwithstanding the fact that Mr. Hopkins rated Mr. Watkins, an African American very highly in the coaching evaluations. While it is true that this could be interpreted as a proof of lack of bias, such would ignore the very real phenomena of increasingly sophisticated practitioners of racial bias, who

cover their tracks by engaging in tokenism to wash their hands of their racially motivated misdeeds. While Mr. Watkins' coaching evaluation was better than that of Coach Cordell, it was Coach Cordell who was selected as Assistant at Riverside while Coach Watkins was selected for 9<sup>th</sup> Grade Coach.

Ms. Daniels lied concerning missing lesson plans, which she produced when confronted with the records of Ms. Bauer that they had been turned in. Ms. Daniels' husband was one of the applicants for the Head Basketball Coach position. It was Ms. Bossie who told Complainant he would be given an honors class and later started the negative comments, observations and evaluations of Complainant with her scathing reprimand concerning noise from Complainant's classroom. It was Ms. Bossie whose JROTC kids were giving Complainant his biggest disciplinary problems. The nature of the criticisms in the negative observations and evaluations of Complainant are things that one would observe in any given high school class, students without books, looking at other course work and sleeping for instance. They are further the things that would occur most often in classes packed with the poorest students and biggest discipline problems. For all the forgoing reasons, the undersigned finds that Complainant has demonstrated by a preponderance of the evidence that the negative evaluations and harassment by Respondent's supervisory personnel was not motivated simply by legitimate professional concerns, but rather was pretext for a racially motivated bias against the Complainant serving as Boys Head Basketball Coach at Riverside High School. Complainant is entitled to back and front pay of \$2,500.00 per year as Head Basketball Coach for five seasons from 1999-2000 through 2004-2005 for a total of \$12,500.00.

The Respondent's agents became aware of Complainant's concerns at least by the time he refused to sign the negative coaching evaluation. Certainly, they were aware that he was upset when he enquired about the School Board's actions in approving the new coaching appointments at Riverside High School in June 1999. When he began the new school year at Riverside in 1999 he was subjected to severe harassment. That harassment included having his word and integrity questioned by Ms. Daniels who clearly seized on any complaint by students as grounds to discredit Complainant, even when the students themselves repudiated their claims, or where the claims were otherwise patently ridiculous. The incident concerning the attempt to discipline the student who had slammed his fist on the desk and swore, even after it was brought to his attention and he later admitted that Complainant had not lost his assignment, but rather it had been held by a classmate; was seized upon by Ms. Daniels to discredit and harass Complainant, imposing a check off system and regular feedback to parents concerning assignments. When that student later had stolen passes with the forged signature of another African American Teacher; that student clearly was sent the message that lying right to the face of African American teachers was all right. The Respondent's explanation for the fact that grades were wrong for two out of the three classes of Complainant is simply not convincing. They claim that this was the result of Complainant having submitted his grades late. Such an explanation defies common sense. Why would a late submission result in changes to the grades submitted. Yet this was another grounds used to give a negative evaluation of the Complainant which ultimately led to his negative evaluation and subsequent Plan of Improvement in March 2000. The Complainant filed his West Virginia Human Rights Act

complaint with the Commission in November 1999. After that time he was subjected to escalating harassment, which not only was hurtful to Complainant, but was also conducted in such a manner as to convey the willingness of the Riverside High School administration to hurt the students assigned to his classes as well.

After teaching for some 37 plus years, Complainant thought he had learned that if you work hard and do the right things, that being an African American would not be some insurmountable handicap to full participation in the economic and social life of this nation. His experiences with Respondent has clearly had a devastating impact on Complainant, resulting in untold embarrassment, humiliation, anger and frustration. The harassment at the hands of Respondent's administrators at Riverside High School was such that no reasonable person could be expected to continue working under such circumstances. This is particularly true for a teacher who was seeing the interests of his students adversely affected by the attempts of the administration to discredit and harass him, by changing student grades, and interfering in the proper disciplinary activities with student/parent conferences regarding discipline concerns.

The Complainant has proven by a preponderance of the evidence that he was subjected to harassment and a hostile working environment because of his race, age and in retaliation for his attempts to seek protection under the West Virginia Human Rights Act; when he was subjected to said hostile work environment during the 1999-2000 school year at Riverside High School, and that he was thereby constructively discharged on November 17, 2000, when he retired. As a result of the Respondent's unlawful discriminatory conduct, Complainant is entitled to reinstatement in the next available positions within the Respondent, as a teacher

and coach, with front pay until such time as he is reinstated, and to an award of back pay, net of retirement, as a teacher through the end of the 2002-2003 school year of \$50,222.00 as discounted from October, 2001. Should complainant not be reinstated by the start of the 2003-2004 school year, Complainant shall be awarded back pay in the amount of \$81,450.00, net of retirement pay, through the end of March 2005, when he states he would have retired. As a result of the unlawful discriminatory harassment of Complainant, he has suffered humiliation, embarrassment, emotional distress and loss of personal dignity, in addition to his economic loss. As a result of the Respondent's unlawful discriminatory conduct, Complainant is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity, or the maximum amount allowable for incidental damages before the West Virginia Human Rights Commission without a trial by jury, as this amount is far below that necessary to compensate Complainant for the emotional harm and that to his health from being subjected to the unlawful treatment by Respondent.

The nature of the racial discrimination in this case is quite disturbing. The evaluation process is so subjective and the grievance process so clouded by a presumption of regularity in that process, that a cease and desist order is not only warranted and necessary; but, is perhaps insufficient to what appears to be a systemic and endemic racial bias against professional African Americans within the Kanawha County Board of Education. As such, it is found that Respondent shall be required to report each year identifying all teachers, coaches and administrators placed on Plans of Improvement by race during that year; as well as, to keep the applications and any other documents connected with all hires of teachers, coaches and

administrators, and to report identifying the race of those applicants and the successful candidates for those positions.

C.

**CONCLUSIONS OF LAW**

1. The complainant, William L. Turner, 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, Kanawha County Board of Education, is a “person” and an “employer” as those terms are defined under 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 West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

5. The Complainant has established a prima facie case of race and age discrimination, regarding his original ineligibility for hire as Head Basketball Coach at Riverside High School; and, of race, age and retaliation in regards to the hostile environment and his constructive discharge from his teaching position at Riverside High School. The Respondent claims a legitimate non discriminatory motive for the Respondent’s action, that the Complainant was subjected to legitimate evaluation and Plans of Improvement; which the Complainant, by a

preponderance of the evidence has proven to be pretext for his being placed on a Plan of Improvement initially to prevent his application for Head Coach of Boys Basketball at Riverside High School; and, his subsequent constructive discharge because of a racially hostile environment and racially disparate treatment, a continuing violation, which was severe and pervasive and which would have caused any reasonable person to abandon their job under such conditions.

6. As a result of the Respondent's unlawful discriminatory conduct, Complainant is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity.

7. As a result of the Respondent's unlawful discriminatory conduct, Complainant is entitled to reinstatement in the next available positions within the Respondent, as a teacher and coach, with front pay until such time as he is reinstated, and to an award of back pay, net of retirement, as a teacher through the end of the 2002-2003 school year of \$50,222.00 as discounted from October, 2001. Should complainant not be reinstated by the start of the 2003-2004 school year, complainant shall be awarded back pay in the amount of \$81,450.00, net of retirement pay, through the end of March 2005, when he states he would have retired. Complainant is entitled to back and front pay of \$2,500.00 per year as Head Basketball Coach for five seasons from 1999-2000 through 2004-2005 for a total of \$12,500.00.

8. The Commission is entitled to an award of its reasonable costs incurred in prosecution of this matter in the amount of \$1,732.85 as more fully set forth in Commission's Memorandum of Law.

**D.**

**RELIEF AND ORDER**

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

1. The above named Respondent shall cease and desist from engaging in unlawful discriminatory practices. Respondent shall be required to report each year identifying all teachers, coaches and administrators placed on Plans of Improvement by race during that year; as well as, to keep the applications and any other documents connected with all hires of teachers, coaches and administrators, and to report identifying the race of those applicants and the successful candidates for those positions. Said reports shall be submitted to the Director of Compliance at the West Virginia Human Rights Commission for the next ten years.

2. Within 31 days of the receipt of the undersigned's order, the Respondent shall pay the reasonable costs of the Commission incurred in the prosecution of this matter, in the amount of \$1,732.85.

3. Within 31 days of receipt of the undersigned's order, 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, plus pre-judgment and post-judgment statutory simple interest of ten percent.

4. Respondent shall reinstate Complainant in the next available position as a teacher and coach, plus pre-judgment and post-judgment statutory simple interest of ten percent on all back and front pay awarded. Respondent shall tender payment of back pay within 31 days from

receipt of the undersigned's order back pay, net of retirement, as a teacher through the end of the 2002-2003 school year of \$50,222.00 as discounted from October, 2001. Should Complainant not be reinstated by the start of the 2003-2004 school year, Complainant shall be awarded back pay, net of retirement pay, in the amount of \$81,450.00, through the end of March 2005, when he states he would have retired. Complainant is entitled to back and front pay of \$2,500.00 per year as Head Basketball Coach for five seasons from 1999-2000 through such time as he is hired as a Head Basketball Coach or until 2004-2005 for a total of \$12,500.00, in the event he is not placed in such a post prior thereto.

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, Ivin B. Lee, Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 21<sup>st</sup> day of July, 2003.

**WV HUMAN RIGHTS COMMISSION**

BY: \_\_\_\_\_



**ROBERT B. WILSON  
ADMINISTRATIVE LAW JUDGE**