



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
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Executive Director

8 August 1991

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Lloyd's Electronics, Inc.
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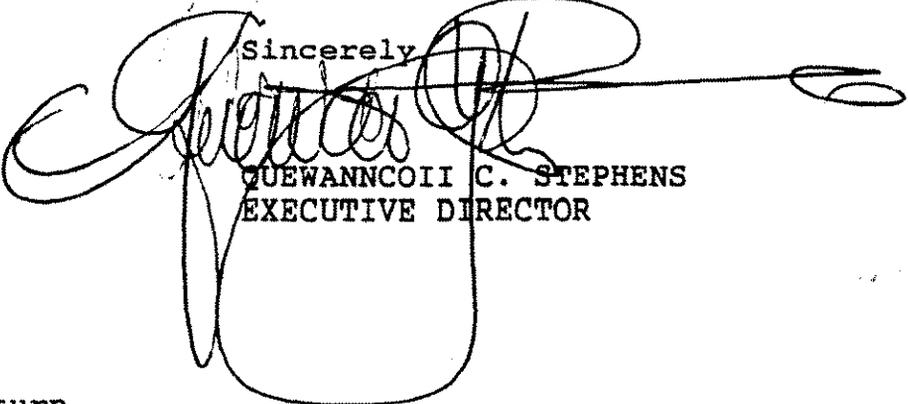
Larry Skeen, Esquire
216 West Main Street
Post Office Box 66
Ripley, WV 25271

Re: Vogel v. Lloyd's Electronics, Inc.
Docket Nos. EA-235-88 and REP-386-88

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled and numbered case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1990, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,



QUEWANNCOI C. STEPHENS
EXECUTIVE DIRECTOR

QCS/jm

Enclosures

Certified Mail/Return
Receipt Requested

cc: The Honorable Ken Hechler
Secretary of State

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

FRANK VOGEL,

Complainant,

v.

DOCKET NO. EA-235-88
REP-386-88

LLOYD'S ELECTRONICS, INC.,

Respondent.

FINAL ORDER

On July 10, 1991, 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 Gail Ferguson. After due 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 by the complainant, the Commission decided to, and does hereby, adopt said recommended findings of fact and conclusions of law as its own, without modification.

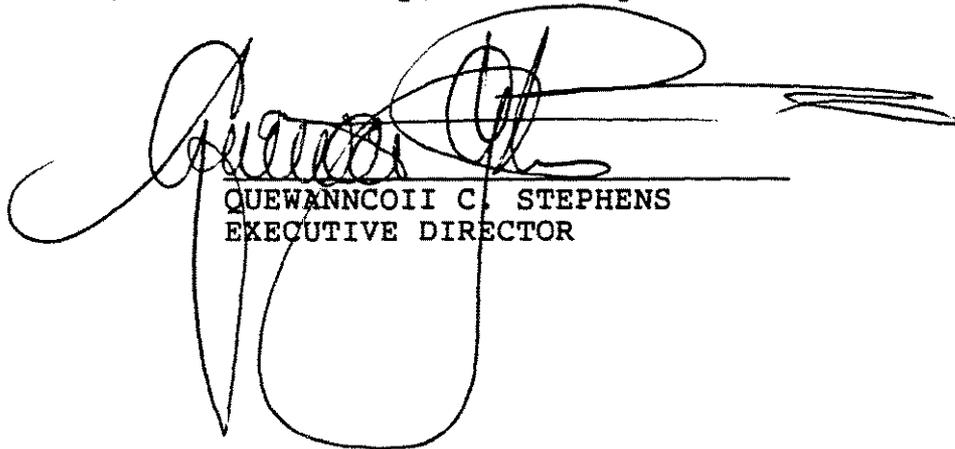
By this final order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they have ten (10) days from the date of receipt of this Final Order to request that the Human 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 8th day of August, 1991, in Charleston, Kanawha County, West Virginia.



QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

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 nonresident of this state, the nonresident 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 § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

FRANK VOGEL,

Complainant,

v.

DOCKET NUMBER(S): EA-235-88
REP-386-88

LLOYD'S ELECTRONICS, INC.,

Respondent.

HEARING EXAMINER'S FINAL DECISIONS

A public hearing, in the above-captioned matter, was convened on February 15 & 16, 1990, in Jackson County, at the Jackson County Courthouse, Ripley, West Virginia, before Gail Ferguson, Hearing Examiner.

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 hearing examiner 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.

AGE DISCRIMINATION CLAIM

EA-235-88

FINDINGS OF FACT I

1. Respondent, Lloyd's Electronics, Inc., is a small electronics business which provides technical and installation services to its customers at its Parkersburg shop and in other areas of West Virginia.

2. Complainant was hired by respondent on May 17, 1976, as an installer/technician, and worked for respondent until his termination on August 24, 1987.

3. The complainant, Frank Vogel, was born on June 4, 1943, and at the time of his termination from employment, was 44 years of age.

4. On September 7, 1979 complainant was promoted to the position of Electronic Technician.

5. During the course of his employment, complainant was paid the following wages:

05/17/76 - 12/31/76	\$107.54 (net) per week
01/01/77 - 12/31/77	\$224.00 (gross) per week
01/01/78 - 09/06/79	\$250.00 (gross) per week

09/07/79 - 07/10/80	\$283.55 (gross) per week
07/11/80 - 10/09/80	\$303.50 (gross) per week
10/10/80 - 02/26/81	\$313.50 (gross) per week
02/27/81 - 06/04/81	\$323.50 (gross) per week
06/05/81 - 09/30/81	\$323.50 (gross) per week
10/01/81 - 07/01/82	\$338.50 (gross) per week
07/02/82 - 01/05/84	\$355.43 (gross) per week
01/06/84 - 02/28/85	\$375.00 (gross) per week
03/01/85 - 08/24/87	\$405.00 (gross) per week (stip.)

6. In early 1987 and prior to complainant's termination, the Parkersburg office of respondent consisted of one manager, Herbert O. Kelly; two technicians, David Woody and complainant; one installer, Paul Maxson; and one secretary, Barbara Ellen Hunt.

7. During complainant's tenure, the majority of the duties he performed were related to his position as technician; although he performed some installer work.

8. David Woody was hired by respondent as an installer on May 2, 1977. In November of 1977, Woody was promoted to technician. Even though Mr. Woody and the complainant were both technicians, they were assigned different jobs.

9. The main duties of an installer was to perform the hardware work of radio installation, to mount and lay cables, to do connections and to remove and install equipment. Much of the installer work required climbing.

10. The main duties of a technician were to repair radios and to maintain equipment for respondent's customers. The technical position was highly specialized and required knowledge of electronics.

11. Of the two positions, the technician position commanded a higher salary range than the lower skilled installer position.

12. In 1982, income generated by respondent's Parkersburg shop decreased from \$25,000.00 per month in February to an average of \$18,000.00 per month, in the months of March through August.

13. As a result of respondent's economic turndown, Herbert Kelly, the Parkersburg manager, was directed by company management to reduce the staff of the Parkersburg shop in June of 1987.

14. Mr. Kelly first terminated Paul Maxson, age 36, a less experienced employee than the complainant who was working at the lower technical level of an installer.

15. As a result of Mr. Maxson's termination, both the complainant and the other technician, David Woody, assumed Maxson's install duties.

16. Although the complainant could perform most install duties, the complainant could not climb to high places, because of a psychological barrier.

17. The respondent was aware of complainant's limitation in this regard because the complainant had disclosed this to respondent at the time of his initial hire 11 years earlier.

18. Climbing was an important component of the duties of an installer as respondent's stations and antennae for communications were located on towers on hilltops, which averaged a height of 200 feet. Respondent utilized its installers when its customers'

antennae needed to be replaced or changed or when a new system or tower needed to be installed.

19. In August of 1987, as the economic turndown continued, Mr. Kelly was directed by respondent's vice president, William Webb, to further reduce his staff by letting one of the two technicians go, and to reorganize remaining staff.

20. For a number of months prior to the complainant's termination, Mr. Kelly had maintained time and proficiency production studies on his Parkersburg employees. The complainant had been reprimanded and warned for non-production in the past by respondent's management.

21. The complainant's supervisor, Herbert Kelly, made the decision to let the complainant go and to retain David Woody because he believed Woody to be the better qualified of the two based on prior performances; and because of the anticipated needs of the shop in the face of the economic slump.

22. The complainant's inability to climb also was a factor the respondent considered in reaching its decision to retain David Woody.

23. As part of the reorganization plan, Kelly was directed in addition to his managerial duties to assume in part the duties of a technician.

24. As a result of the realignment, the respondent created a position of install trainee to assist David Woody with the install duties, which included climbing.

25. Derrick Rost, under the age of 40, was hired as an install trainee one day after the complainant's termination.

26. Although Mr. Rost worked primarily as an installer at the beginning of his employment, he was used as a technician on small jobs.

DISCUSSION I

The complainant's burden of proof in an age discrimination case is to show that age was a factor in the adverse decision to terminate him. Age need not be the sole motivating factor, but rather, the determining factor, in the sense that, but for the respondent's motive to discriminate against him because of his age, he would not have been discharged. Conaway v. Eastern Associated Coal Co., 358 S.E.2d 423 (WV 1986); Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979). Courts have generally applied the order of proof test established in McDonnell Douglas v. Green, 411 U.S. 792 (1973); Shepherdstown V.F.D. v. WV Human Rights Commission, 309 S.E.2d 342 (1983). The complainant carries the initial burden of establishing a prima facie case of intentional discrimination. After this showing, the burden shifts to the respondent to articulate a legitimate nondiscriminatory reason for the employer's rejection. After the respondent has articulated a justification, the burden shifts back to the complainant allowing him, by a preponderance of the evidence, to prove that this reason was merely a pretext for the alleged discrimination.

In Conaway, the West Virginia Supreme Court of Appeals proposed a general test for determining a prima facie case of illegal

employment discrimination in situations where McDonnell Douglas is unadaptable. In order to make a prima facie case, a complainant must prove the following:

1. that the complainant is a member of a protected class;
 2. that 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.
- Kanawha Valley Regional Transportation Authority v. West Virginia Human Rights Commission, 383 S.E.2d 857, 860 (WV 1989).

Applying the Conaway standard to the facts at bar, the complainant established a prima facie case of age discrimination. It is undisputed that the complainant has satisfied two elements of the proposed test: class membership by virtue of his age, 45; and adverse action by virtue of his termination. What the complainant must next show is some evidence that would sufficiently link the employer's decision and his status as a member of the protected class so as to give rise to an inference of discrimination. As pointed out by the court, a complainant may establish the necessary nexus by evidence of disparate treatment between members of the protected class and others; through elimination of the apparent legitimate reasons for the adverse decision; by statistics; or through party admissions.

On the face of his complaint, the complainant alleges the following:

"On August 24, 1987, I was terminated from Lloyd's Electronics, Inc., where I was employed as an Electronics Technician.

I was told by William Webb, Vice President, that I was being laid off because Herb Kelly, Parkersburg Manager, felt I was not doing the job.

I believe I have been discrimination against because of my age, 44, in that:

The respondent replaced me with a younger employee, with less experience and a lower salary than I was receiving.

I had worked for the respondent for approximately 11 1/2 years."

Although the evidence of record reveals that the employee hired subsequent to complainant's discharge was under the age of forty, this information is not necessarily probative at the prima facie stage. The query as posed by Conaway is whether the complainant can inferentially shown that he was discharged because of his age. Further, in a reduction in force or reorganization case such as this, what creates the presumption is not the discharge per se, this may be a given in light of an economic downturn, but rather the discharge of an individual, older employee, coupled with the retention of a younger employee. Matthew v. Allen Chambers, 35 FEP 404 (N.D. Ill. 1984). The focus of the disparity, then, is between the complainant and David Woody, the other technician less senior and younger than the complainant who was retained. Conaway, supra; Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393 (3rd Cir.); EEOC v. Western Electric Co., 713 F.2d 1011 (4th Cir. 1983). Upon these facts, the complainant has established a prima facie case, requiring the respondent to articulate reasons for its decision, i.e, the exigency of the reduction in force and nondiscriminatory reasons for complainant's discharge.

Respondent's rebuttal clearly establishes a legitimate nondiscriminatory reason for discharging the complainant. The evidence reveals that in 1987, the respondent suffered an economic slump. At that time, respondent's Parkersburg shop consisted of one manager, Hebert O. Kelly; two technicians, David Woody and complainant; one installer, Paul Maxson; and one secretary, Barbara Ellen Hunt. In an effort to curtail costs, respondent initially let go Paul Maxson, 36, a lower salaried installer. As a result of Maxson's termination, the complainant and the other technician in addition to their regular duties assumed Maxson's install duties, which included climbing. Climbing was an important component of the duties of an installer as respondent's stations and antennae for communications were located on towers on hilltops, which averaged a height of 200 feet. Respondent utilized its installers when its customers' antennae needed to be replaced or changed or when a new system or tower needed to be installed. The complainant admitted that he could not climb because of an inexplicable fear; and further that he make known this limitation to the respondent when he was hired. As the downturn continued, respondent was obliged to further reduce its staff by terminating one of the two technicians. The evidence reveals that, of the two technicians namely, complainant and Woody, the Parkersburg manager, Herbert Kelly, adjudged Woody to be the more proficient and productive based on comparative evaluations and the more adaptable given respondent's ongoing reorganization and anticipated needs. Finally, the evidence reveals that, contemporaneous with complainant's discharge, Kelly assumed the role of technician in addition to his managerial duties, thereby creating

the needs for an installer to assist Woody with installation duties, which included climbing. The evidence further reveals that the turndown continued through the end of the year and that Rost was subsequently dismissed because of poor performance.

Although the complainant contends that he was an experienced and effective employee, he produced no evidence that clearly demonstrated that he was as or more qualified than Dave Woody, the employee respondent retained. To be sure, substantive evidence of the record establishes the opposite. Moreover, the complainant presented insufficient evidence by testimony or by documentation to establish that the new hire, Derrick Rost in fact was hired to replace him. Finally, the evidence does not establish that complainant's duties were assumed by Rost, but rather that under ongoing reorganization and consolidation, Rost was hired to perform duties which included those that complainant, admitted he could not perform. The complainant has failed to prove by a preponderance of the evidence that respondent's actions toward him were age based.

CONCLUSIONS OF LAW I

1. The complainant, Frank Vogel, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Lloyd's Electronics, Inc., is an employer as defined by WV 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 WV Code §5-11-10.

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

5. Complainant has established a prima facie case of discrimination.

6. The respondent has articulated legitimate nondiscriminatory reasons for its action toward the complainant, which the complainant has failed to establish, by a preponderance of the evidence, to be pretexts for unlawful age discrimination.

ORDER I

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

1. Complainant's age discrimination claim is dismissed.

RETALIATION CLAIM

REP-386-88

FINDINGS OF FACT II

1. On November 9, 1987, the complainant, Frank Vogel, filed an age discrimination action against his former employer, respondent, Lloyd's Electronics, Inc.

2. Respondent maintains a retirement plan for its employees, and it is undisputed that complainant was entitled to certain retirement benefits by virtue of his employment tenure of almost twelve years.

3. The complainant's entitlement was \$939.49 from the respondent's 401K plan and \$425.00 which represented a percentage of complainant's gross wages.

4. Shortly after his discharge, in August of 1987, the complainant made inquiry and requested said monies by speaking with William Webb, respondent's vice president.

5. It is undisputed that respondent was aware of complainant's age discrimination case on or before December 14, 1987.

6. The respondent was on notice that the complainant filed a claim of age discrimination with the commission, prior to the time that the complainant again contacted respondent regarding the fact that he had not yet received his retirement benefit checks.

7. The respondent advised the complainant that pursuant to the advice of its legal counsel, complainant's retirement checks had been sent to its counsel, as counsel had directed.

8. On December 8, 1987, William Webb, respondent's vice president, sent to respondent's attorney two checks made payable to complainant: one for \$939.49; and the other for \$417.93 with a memo referencing this transfer. The operative language is as follows:

"This employee discharged in August. What do I do? What should I expect to happen? Should I hold any monies from this employee until this is resolved?"

9. On December 15, 1987, respondent's attorney wrote the complainant a letter which reads in substantive part as follows:

"My client has asked me to advise you that it is currently holding the sum of \$939.49 in surrendered funds from your 401K plan together with \$452.55 amounting to 3% of your gross wages per mandatory corporate retirement policy.

This money is presently being withheld as a set off to any damages you might be found owing to my client in the event of the denial of your employee discrimination above referenced and upon any counterclaim we might assert by independent action in Circuit Court.

However, not being completely aware of any requirements in this regard, by copy of this letter to the Pittsburgh EEOC office I am advising that we are willing to interplead or implead this money into Court or to be held by the EEOC pending a resolution of the above styled administrative proceeding."

10. But for the advice of its counsel, the uncontroverted evidence indicates that the complainant would have received from the respondent his retirement benefit checks reasonably within the time frame reflected, to have been applicable to other employees laid off by the respondent prior to the complainant.

11. The complainant suffered humiliation, embarrassment, distress and loss of personal dignity as a result of respondent's conduct.

12. The record does not reflect whether or not the complainant has yet received his retirement funds.

13. If the complainant has not received his benefit check, he is entitled to said funds with compounded pre and post judgement statutory interest on said amount until they are received.

14. If the complainant has received said benefit checks, he is entitled to any interest on said monies occurring from December of 1987 to the date the monies were received.

DISCUSSION II

It is undisputed that on November 9, 1987, the complainant filed a discrimination claim against the respondent with the West Virginia Human Rights Commission, pursuant to WV Code §5-11-10, and that thereafter, while the charge was pending, that the respondent failed to provide the complainant with certain benefit checks he was entitled to; to wit, with \$939.29 in surrendered funds from complainant's 401K plan together with \$452.55 which represented a percentage of complainant's gross wages per respondent's retirement policy. The record further reveals that the respondent, by counsel, advised the complainant in December of 1987, that he could not have the funds because they were being withheld as a set off to any damages respondent anticipated receiving should the complainant's parent age discrimination charge not be sustained; or alternatively,

as a result of any independent counter claim the respondent might assert against the complainant.

By showing that these adverse employment consequences followed from complainant's participation in a protected activity, the complainant has met his burden of establishing a prima facie case of retaliation. Robinson v. Monsanto Co., 758 F.2d 331 (8th Cir. 1985); Womack v. Morrison, 619 F.2d 1292 (8th Cir. 1980).

The burden then shifts to the respondent to articulate a legitimate nondiscriminatory reason for its adverse action towards the complainant.

The respondent offers no reason for its failure to give the complainant his accrued retirement funds in its customary manner other than the pendency of complainant's parent charge against it and its reliance on the advice of its legal representative. However, as a matter of law, complainant's participation in the proceedings of the West Virginia Human Rights Commission was a statutorily protected activity, therefore, without more, respondent's explanation is not legitimate, notwithstanding respondent's proffer that it relied on its attorney's advise. The determination of whether the respondent was motivated by a desire to retaliate, only arises after the respondent had offered a legitimate nondiscriminatory reason, which in this case it has not done. Grant v. Bethlehem Steel Corp., 622 F.2d 43-(2nd Cir. 1980); Womack v. Monsanto Co, supra.

Accordingly, the respondent has failed to rebut complainant's prima facie showing of retaliation.

CONCLUSIONS OF LAW II

1. The complainant, Frank Vogel, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Lloyds Electronics, Inc., is an employer as defined by WV 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 WV Code §5-11-10.

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

5. Complainant has established a prima facie case of discrimination.

6. The respondent has not articulated a legitimate nondiscriminatory reason for its actions.

7. As a result of the unlawful retaliatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$2,500.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

8. The complainant is entitled to any outstanding monies related to his retirement benefits as set forth in findings of fact numbers, 12, 13 and 14.

ORDER II

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

2. Within 31 days of receipt of this decision, the respondent shall tender to the complainant all outstanding monies as referenced in findings of fact numbers 12, 13 and 14.

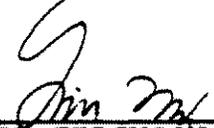
3. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,500.00 for humiliation, embarrassment, emotion distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

It is so ORDERED.

Entered this 5th day of March, 1991.

WV HUMAN RIGHTS COMMISSION

BY



GAIL FERGUSON
HEARING EXAMINER