



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

ARCHA MOORE, JR.
Governor

April 14, 1987

Roberta D. Whitt
P.O. Box 295
Varney, WV 25696

Mingo County Equal Opportunity
Counsel and Headstart Director
Box 1406
Williamson, WV 25661

Dwight J. Staples, Esq.
711½ 5th Ave.
Huntington, WV 25701

Charles Garten, Jr., Esq.
12 Capitol St.
Charleston, WV 25301

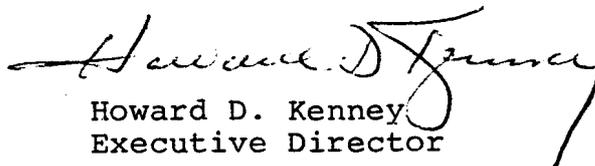
RE: Whitt v. Mingo County Equal Opportunity Counsel
and Headstart Director
EA-609-85 & EH-610-85

Dear Parties:

Herewith please find the 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 April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this order.

Sincerely,


Howard D. Kenney
Executive Director

HDK/mst

Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Enr. H. B. 2638]

8

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an
2 application for review may be prosecuted by either
3 party to the supreme court of appeals within thirty days
4 from the receipt thereof by the filing of a petition
5 therefor to such court against the commission and the
6 adverse party as respondents, and the clerk of such
7 court shall notify each of the respondents and the
8 commission of the filing of such petition. The commis-
9 sion shall, within ten days after receipt of such notice,
10 file with the clerk of the court the record of the
11 proceedings had before it, including all the evidence.
12 The court or any judge thereof in vacation may
13 thereupon determine whether or not a review shall be
14 granted. And if granted to a nonresident of this state,
15 he shall be required to execute and file with the clerk
16 before such order or review shall become effective, a
17 bond, with security to be approved by the clerk,
18 conditioned to perform any judgment which may be
19 awarded against him thereon. The commission may
20 certify to the court and request its decision of any
21 question of law arising upon the record, and withhold
22 its further proceeding in the case, pending the decision
23 of court on the certified question, or until notice that the
24 court has declined to docket the same. If a review be
25 granted or the certified question be docketed for
26 hearing, the clerk shall notify the board and the parties
27 litigant or their attorneys and the commission of the fact
28 by mail. If a review be granted or the certified question
29 docketed, the case shall be heard by the court in the
30 manner provided for other cases.

31 The appeal procedure contained in this subsection
32 shall be the exclusive means of review, notwithstanding
33 the provisions of chapter twenty-nine-a of this code:
34 *Provided*, That such exclusive means of review shall not
35 apply to any case wherein an appeal or a petition for
36 enforcement of a cease and desist order has been filed
37 with a circuit court of this state prior to the first day
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a
40 final order of the commission within thirty days after
41 receipt of the same. or, if applicable, within thirty days
42 after a final order of the supreme court of appeals, a
43 party or the commission may seek an order from the
44 circuit court for its enforcement. Such proceeding shall
45 be initiated by the filing of a petition in said court, and
46 served upon the respondent in the manner provided by
47 law for the service of summons in civil actions; a hearing
48 shall be held on such petition within sixty days of the
49 date of service. The court may grant appropriate
50 temporary relief, and shall make and enter upon the
51 pleadings, testimony and proceedings such order as is
52 necessary to enforce the order of the commission or
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERTA D. WHITT,

Complainant,

v.

DOCKET NOS. EA-609-85
EH-610-85

MINGO COUNTY EQUAL OPPORTUNITY
COUNSEL AND HEADSTART DIRECTOR,

Respondent.

ORDER

On the 15th day of January, 1987, the Commission reviewed the proposed Recommended Decision of Hearing Examiner, Theodore R. Dues, Jr. After consideration of the aforementioned and exceptions thereto, the Commission does hereby adopt said Recommended Decision, encompassing Proposed Findings of Fact and Conclusions of Law as its own, with modifications and amendments set forth below.

The Commission strikes the language "the witnesses included" from Finding of Fact number 56. In addition, the Commission hereby deletes in toto Finding of Fact number 58 and substitutes therefore the following:

"58. Prior to Ms. Whitt's suspension these witnesses had not informed their supervisors as to the infractions they claimed to have observed."

The Commission deletes Finding of Fact number 69 in its entirety.

The Commission deletes Conclusion of Law number 10 in its entirety.

Under the subsection titled "Proposed Order," the Commission has considered and rejects number 5 of said subsection relating to EEOC reporting requirements imposed upon respondent and further rejects number 6 of said subsection entirely

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order except as amended by this Order.

It is hereby accordingly ORDERED as follows:

1. The respondent, Mingo County Equal Opportunity Counsel, shall cease and desist from discrimination in terms and conditions of employment based on age and handicap in violation of West Virginia Code 5-11-1 et. seq.;

2. The respondent shall pay backpay to the complainant in the amount of \$30.00.;

3. The respondent shall pay to the complainant incidental damages in the amount of \$5,000.00.; and

4. The respondent shall pay complainant's attorney fees and costs in the amount of \$6,847.00.

It is hereby accordingly ORDERED that respondent provide to the Commission proof of compliance with the Commission's Order within thirty-five (35) days of service of said Order by copies of cancelled checks, affidavits or other means calculated to provide such proof.

By this Order, a copy of which shall be sent by certified mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 10th day of April, 1987.

RESPECTFULLY SUBMITTED,

BY Betty G. Sanderson 
CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

RECEIVED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DEC - 2 1986

W.V. HUMAN RIGHTS COMM.

ROBERTA D. WHITT,
Complainant,

v.

DOCKET NOS: EA-609-85;
EH-610-85

MINGO COUNTY EQUAL OPPORTUNITY
COUNSEL AND HEADSTART DIRECTOR,

Respondent.

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

This matter matured for public hearing on May 22, 1986 at City Hall, 107 East Fourth Avenue, Williamson, West Virginia. The hearing panel on each day consisted of John M. Richardson, Hearing Examiner and Sid Allen, Hearing Commissioner. The case has been assigned to Theodore R. Dues, Jr., Hearing Examiner, to make a decision based upon the findings and documentary evidence submitted to him.

The Complainant appeared in person and by her counsel, Mike Kelly. The Respondents by its counsel Herbert H. Henderson and Dwight J. Staples.

RECEIVED

ISSUES

NOV 20 1986

Civil Rights Div.

1. Whether Respondent EOC unlawfully discriminated against Complainant because of her age and/or handicap, as prohibited by W.Va. Code § 5-11-9(a).

2. Whether Respondent Childress unlawfully aided and abetted an act of discrimination as prohibited by W.Va. Code § 5-

11-9(i)(1).

3. If the Respondents did unlawfully discriminate against the Complainant, or aid and abet an act of discrimination, whether the Complainant is entitled to recover from Respondents incidental damages in the amount of \$5,000, plus attorney's fees and costs, and whether Respondent EOC should be ordered to cease and desist from such unlawful discriminatory practices.

FINDINGS OF FACT

Based upon the credible evidence adduced at hearing, and the exhibits of the parties, the following facts have been proven to be true, and are found to be true by the Hearing Examiner:

1. The Complainant, Roberta D. Whitt, is 63 years of age and was 62 years of age at the time of the alleged discriminatory acts, which occurred in April and May, 1985. She is a resident of Varney, Mingo County, West Virginia.

2. Respondent Mingo County Economic Opportunity Commission (EOC) is an employer as that term is defined by W.Va. Code § 5-11-3(d), with its principal place of business in Williamson, Mingo County, West Virginia.

3. Mrs. Whitt is, and was at all times relevant hereto, employed by EOC as a teacher in its Head Start Program. She has been so employed for 16 years, working out of the Varney Head Start Center at Ragland, Mingo County, West Virginia. Prior to assuming her teaching responsibilities, Mrs. Whitt worked as a teacher's aide at the Varney facility for five years, giving her

a total of 21 years of employment with EOC. Other than the suspension in question, Mrs. Whitt has never been disciplined or reprimanded by her employer in any way, verbally or in writing.

4. Respondent Childress is employed by EOC as the Director of its Head Start Program.

5. Complainant suffers from high blood pressure, for which she has been taking medication for several years. Mrs. Whitt has not missed any work as a result of her illness and, in fact, has accumulated sick leave time of 225 days. So long as she takes her medication, she can keep, and has kept, her blood pressure at a safe and controlled level.

6. In April, 1985, the Varney Head Start Center had an enrollment of 15 to 16 children, most of whom were ages three or four.

7. In April, 1985, Mrs. Whitt worked with a teacher's aide, Shelby Jean Varney, who is in her mid-forties.

8. The Varney Head Start Center shares a building with the Delbarton Head Start Center, which is also operated by EOC. The two centers are completely separate indoors, with separate staff, but share an outdoor playground and parking area.

9. The outside area of the Centers is fenced, with a gate for the ingress and egress of vehicles. Students, parents, and staff from both Centers use the playground, parking area, and vehicle gate. There is no fence, partition, or other structure which separates or sets off the Varney outside area from the Delbarton outside area.

10. On April 17, 1985, Sharon and Dwayne Adkins, parents

of a Varney Head Start student, and Ms. Adkins' mother, Lacy Keaton, came to the Center to celebrate their son's birthday. They arrived at about 10:15 a.m. Mrs. Whitt and Ms. Varney, the aide, were present that day, as was Bobby Charles Justice, the Center's cook. A cake had been made and ice cream purchased to serve to the children at lunchtime.

11. The Varney students were on the playground until approximately noon, when they were brought inside for the cake and ice cream. Prior to the children being brought in, Ms. Adkins, her husband, Ms. Varney, and Mrs. Whitt were all outside with them. At no time were the children left unattended, though Mrs. Whitt did take a little girl inside to change her underwear. While she was gone, the Adkins' and Ms. Varney watched the children.

12. The Varney children remained inside with the six adults for about one hour or more. A little before 1:30 p.m., as the children returned to the playground, Ms. Adkins and her family left the premises. When they left, Mrs. Whitt and Ms. Varney were both outside with the children. The children left the Center to return home at 2:00 p.m.

13. On that same day, the Delbarton Head Start staff was at an in-service training session at Cedar Lakes, Jackson County, West Virginia. The students at the Delbarton Center, who likewise numbered 15 or 16 children ages three to four, were supervised by several parents who had volunteered to look after them while the staff was at training. Among the Delbarton parents supervising the children on April 17, 1985, was Patricia Skeens, who is now employed by EOC. Neither the Delbarton

parents nor students participated in the birthday party at the Varney Center.

14. Between 12:30 p.m. and 1:00 p.m. on April 17, 1985, while the Varney children were eating cake and ice cream, Novella and Thomas Muncy drove past the Delbarton/Varney Centers and saw two children swinging on the vehicle gate. The gate was open and the children were swinging toward the road. The Muncys did not see any adults present on the playground or in the near vicinity.

15. The Muncys did not recognize the children swinging on the gate and neither at that time nor at the hearing could they identify them as being Varney students as opposed to Delbarton students or simply non-Head Start children from the neighborhood.

16. Both Novella and Thomas Muncy were certain that they spotted the children swinging on the gate some time between 12:30 p.m. and 1:00 p.m., the very same time the Varney children, but not the Delbarton children, were being served cake and ice cream in the presence of six adults.

17. That same day, Mrs. Muncy informed EOC personnel at the Puritan Head Start that she and her husband had seen children swinging on a gate as they drove by the Delbarton/Varney Head Start Center. A few days later, Patty Spence, an employee of EOC, came to the Muncy home and told them that she had heard that they had witnessed an incident involving unsupervised children. At Ms. Spence's request, the Muncys signed a form which states that "On April 17, I saw two children playing with the gates at Varney Head Start with no one else around. My husband and I was

going to Chafin Grade School to get our girl."

18. On July 17, 1985, the Muncys signed a second statement concerning the incident in which they stated that, "On _____(sic) we were going to Chafin Grade School to get our daughter. On the way up there we saw two children playing with the car gates where the Varney, Delbarton headstart is located. There was no one else out there at the time."

19. The first statement, which was filled out by EOC employee Ms. Spence and presented to the Muncys for their signatures, mentions the Varney Center, but not the Delbarton Center. The second statement, which Mrs. Muncy wrote by hand, identifies the facility as the "Varney, Delbarton headstart." The second statement, but not the first, accurately reflects the Muncys' testimony at hearing that they did not know which, if any, center had responsibility for the children on the gate.

20. Similarly, when the Muncys mentioned what they had observed to EOC personnel at the Puritan Center, and when they later spoke to Ms. Spence, they did not state that the children were from the Varney Center, nor did they attribute any negligence, wrongdoing, or misfeasance to Mrs. Whitt.

21. The next day, on April 18, 1985, Ms. Dillon (now Chafin), who is employed as a transportation driver for the Varney Center by Respondent EOC, spanked her child on the Varney Start premises. Ms. Dillon's child, who attended Head Start at the Center, had started her car without her permission. Ms. Whitt asked her not to spank her child, but Ms. Dillon responded that the child was hers and, "I'll spank him anytime I want to."

Also present when Ms. Dillon spanked her child were Shelby Jean Varney and Bobby Charles Justice, and Elizabeth Collins, a volunteer parent.

22. Ms. Dillon admitted that she spanked her child with her open hand on his buttocks, and that afterwards Mrs. Whitt "petted him until he quit crying." The spanking occurred at approximately 9:00 a.m. She remembers that the date was April 18 because that is her sister's birthday.

23. On April 18, the Delbarton Center staff was still at in-service training. The children were being supervised by Patricia Skeens, Debbie Ward, and Joyce Webb. While Ms. Ward and Ms. Webb were on the porch of the Delbarton side of the facility, they overheard a child being spanked.

24. According to unsigned statements allegedly provided by the two women the following week, one of the women (it is not known which one wrote which statement) "overheard a child being spanked very hard with the open hand." The statement, on its fact, implies that she did not actually see a spanking administered, nor does she know who spanked the child. The other woman wrote that she "overheard one of the teachers not sure but I believe it was the older lady. She spanked a child with what sounded like a open hand....". Neither of the statements indicates the time of day that the woman overheard the spanking. Neither of the women was called to testify at hearing though both still reside in Mingo County.

25. The only testimony concerning the time of day the women overheard the spanking came from Patricia Skeens, now an

EOC employee, who said that the women related the incident to her at noon and had said that it had occurred within the half-hour. Ms. Skeens also testified that the parents admitted that they had overheard, but not actually observed, a spanking. Given the similarity between what Webb and Ward said they overheard, and the testimony of Ms. Dillon as to what she did, the Hearing Examiner finds as fact that Webb and Ward overheard Ms. Dillon, not Mrs. Whitt, spank her child with her open hand.

26. Sometime during the week of April 22, 1985, Joice Webb and Debbie Ward allegedly called Respondent Childress and informed her of what they had overheard. At Childress' suggestion, the woman provided the previously mentioned unsigned statements.

27. At hearing, it was repeatedly stated that it was EOC's policy that if an employee is accused or suspected of spanking a child, he or she is immediately suspended with pay pending investigation. However, it was admitted there is no written rule implementing this policy.

28. In contradiction to the alleged immediate suspension policy, Respondent Childress admitted that when she learned of the spanking incident she decided not to take any action against Mrs. Whitt. She testified that it was only after she learned from Patty Spence about the April 17 incident that she decided to discuss the possibility of Mrs. Whitt's suspension with Mr. Hamrick.

29. In further contradiction to the alleged immediate suspension policy, Respondent Childress, before going to Mr.

Hamrick, talked to the parents who were at the Delbarton Center. Both the Varney parents and Mrs. Whitt denied that their children had been left unsupervised.

30. Incredibly, though she admitted that the children swinging on the gate, "could have been anybody", including neighborhood children, Ms. Childress testified that the factor motivating her to bring these matters to Mr. Hamrick's attention was that the children (three and four years old) "were on that (Varney) side of the building. Normally, those children stay on that side of the building." In other words, Ms. Childress assumed that the children were from the Varney Center because the gate was closer to the Varney Center than the Delbarton Center.

31. In yet another contradiction, though Childress testified that she went to Mr. Hamrick only after looking into the "children on the gate" incident, and that that was the motivating factor in her decision, Hamrick denied that the suspension was related to the incident. He stated that "when she (Ms. Childress) got the allegations from the two parents, she came to me and she recommended a suspension, an immediate suspension and that is what I concurred with." Hamrick reiterated that the complaints he understood the suspension to be based upon were "from parents regarding child abuse." When asked specifically if the April 18 spanking was the only charge mentioned to him, Hamrick again stated: "She mentioned that she had two parents that had filed a complaint against Mrs. Whitt for spanking a child. Based upon that, she recommended that Mrs. Whitt be suspended immediately and allow her to investigate it.

That is exactly what I concurred with and it was put in writing." Hamrick did admit that allowing children to play on the playground without supervision does not cause the "automatic suspension" policy to come into play.

32. On April 24, 1985, Roberta Whitt was suspended with pay because she "failed to meet the standards" of her position. The two "failures" cited in the suspension memo were the spanking on April 18, 1985, and that "community persons have made allegations against you to the effect that you, nor the aide, were supervising the children at various times on the playground, and that you were endangering childrens' lives." The memo stated that the suspension would remain in effect until the allegations could be investigated.

33. The memo of suspension was handed to Mrs. Whitt by Ms. Childress in the latter's office on April 25th. No complaint was filed, or any disciplinary action taken, against Shelby Jean Varney though she also was charged with leaving children unsupervised. At the time she handed Mrs. Whitt the suspension letter, Ms. Childress did not ask Mrs. Whitt to explain her side of the story or give her an opportunity to respond to the charges. This was the first occasion upon which Mrs. Childress imposed any discipline, verbal or written, against Mrs. Whitt.

34. After Mrs. Whitt was suspended, she cried and was extremely upset. Her daughter, Amanda Ford, testified that when she went home on the day of her mother's suspension, her mother was sobbing and crying. She said that as her mother tried to explain to her what had happened, she kept crying and that her

mother just couldn't talk, she kept sobbing and crying for hours. She cried the entire weekend and was so upset that no one could talk to her without her leaving the room crying. Her feeling of discomfort and embarrassment, her daughter stated, lasted the entire summer.

35. Mrs. Whitt's feelings of embarrassment and humiliation also evidenced themselves in difficulty with eating, concentrating and sleeping. She was less alert, tripped over things, lost things and was not able to cope with the activities of daily living.

36. A friend of Mrs. Whitt's Ralph Hayton, visited her at her home two or three days after the suspension. He described her as being very disturbed and that she was crying and very upset. He also testified that her condition lasted for quite a long time.

37. The Tuesday after she was suspended, Mrs. Whitt met with Mr. Hamrick in his office. Hamrick told her that if she would resign he would help her obtain a medical disability determination, would keep her on health insurance for a year, and would pay her for her accumulated sick days.

38. After meeting privately with Mrs. Whitt, Mr. Hamrick spoke to her daughter, Amanda Ford, who had accompanied her mother to his office. Hamrick told Ms. Ford that "your mother is getting up in years and I really don't think that she is able to take care of these children like she used to." When Ms. Ford explained to Hamrick that her mother watched an active four year old at home by herself and seemed to be taking good care of the

child, Hamrick repeated that he did not think Mrs. Whitt was physically able to take care of the children and said "she is getting on in years." Ms. Ford concluded that she was able to work. Hamrick again repeated his belief and said that if Mrs. Whitt was his mother he wouldn't want her to work. In Ms. Ford's presence, Mr. Hamrick repeated that if Mrs. Whitt would take sick leave until January, 1986, she would be able to get Social Security.

39. Throughout the meeting Hamrick "kept trying to convince her (Mrs. Whitt) not to go back to work, (but) she just couldn't accept that." Hamrick stated that if Mrs. Whitt would take the retirement he would strike everything from her record. Otherwise, he said, the allegations against her would stay on her employment record. He also told Mrs. Whitt, in Ms. Ford's presence, that he wasn't interested in whether or not she spanked the children and again repeated to Ms. Ford that, "she's getting up in age, and she is not able to work, and I don't think she can run and keep up with the kids, like she could a few years ago....I'm not that healthy, I can't do that now, like I could when me and her first started working." Hamrick again told Ms. Ford that he would remove the allegations from her record if she would accept retirement, but that if she didn't retire, "then she would have to go before the policy council and it would be up to them whatever they did...whether she was reinstated or what have you."

40. Though he denies the content of the conversation, Hamrick admits that he met with Mrs. Whitt and then with Mrs.

Whitt and her daughter. Weighing the credibility of the parties, as discussed infra, the Hearing Examiner finds as fact that the conversation took place substantially as testified to by Amanda Ford.

41. On May 10, 1985, Complainant requested a hearing before the full-year Head Start Policy Council, the EOC body with authority to affirm or reverse disciplinary action taken against Head Start Employees.

42. On May 29, 1985, Mrs. Whitt appeared at the Policy Council meeting, with witnesses, to contest her suspension. Respondent, Childress, however, informed Mrs. Whitt and her witnesses that they could not speak at the meeting. Over Mrs. Childress' objection, Lucy Dillon told the Council that it was she, not Mrs. Whitt, who spanked a child on April 18 and that the child was her son.

43. Thereafter, the Council adjourned into a private session with Ms. Childress. She told them about the contested incidents and explained that the Council had to vote on the suspension.

44. Ethel Fleming, the Chair of the Policy Council, clearly understood from Ms. Childress' presentation that "there were some parents that said she spanked the child, there were some that said she left them unattended on the playground.: Neither Webb, Ward, nor the Muncys appeared before the Policy Council.

45. Patricia Skeens, who was also on the Policy Council, told Council members that when volunteering at the Delbarton

Center she had observed Varney children playing outside without supervision. She urged the Council to uphold Ms. Childress' decision at least until they could "check it out". Skeens was a volunteer at the Delbarton Center on the day the children were swinging on the gate and later became an EOC Head Start employee.

46. Following Ms. Childress' suggestion, the Council voted to uphold Mrs. Whitt's suspension. The Council cited two incidents as grounds for its action: (1) the "spanking of a child at the Delbarton/Varney Head Start Center on April 18, 1985," and (2) "leaving the children at Delbarton/Varney Head Start Center unattended on the playground on April 17, 1985." The suspension was without pay.

47. On June 3, 1985, Roberta Whitt appealed the decision of the Policy Council.

48. For various reasons, including at least one continuance requested by each of the parties, Mrs. Whitt's appeal was not heard.

49. On August 21, 1985, Larry Hamrick, seeking to resolve the matter, called Ms. Teresa McCune, Esquire, who had represented Mrs. Whitt for purposes of obtaining unemployment compensation. He spoke to Ms. McCune twice. During the first call, he told her that, "Just between us, we know that Mrs. Whitt was fired because she was too old and too sick, but I think that we can work something out."

50. That same day Mr. Hamrick called Ms. McCune again and said that he would like to talk to Mrs. Whitt because he thought he could arrange a settlement with her. Ms. McCune told

him that she did not want him to talk to her client directly at that time, that she would call Mrs. Whitt and see if his proposal was acceptable, and that she would get back to Mr. Hamrick.

51. Before Ms. McCune had a chance to call her client, she heard from Mrs. Whitt. Mr. Hamrick had already been to Mrs. Whitt's house, the Complainant said, and had offered to reinstate her with backpay.

52. Ms. McCune testified that in both of her conversations with Mr. Hamrick, he mentioned Mrs. Whitt's age. She does not recall, however, discussing with him the settlement of the HRC complaints filed by Mrs. Whitt. Again, weighing the credibility of the parties, the Hearing Examiner finds that testimony of Ms. McCune to be more credible than that of Mr. Hamrick, who denied making any mention of Mrs. Whitt's age or health.

53. Immediately after her conversations with Mr. Hamrick, Ms. McCune wrote a letter to Mrs. Whitt's current counsel the letter, admitted into evidence as Respondents' Exhibit No. 3, reflects Ms. McCune's testimony that Hamrick confided to her that the reason for Mrs. Whitt's suspension was her age and alleged poor health.

54. When he visited Mrs. Whitt on August 21, Mr. Hamrick brought with him a letter from him to her ordering her reinstatement and stating that her "personnel file will be purged of any and all matters pertaining to these complaints." The letter does not specify a reason for her reinstatement. Mrs. Whitt received all of her backpay except for one day (\$30), which

was inadvertently left out of the backpay calculations.

55. Both Hamrick and Childress testified that the reason they agreed to reinstate Mrs. Whitt was because Joyce Webb and Debbie Ward refused to testify against her. Hamrick admitted that all other witnesses who testified at this hearing were available throughout 1985 to testify at an internal EOC hearing. It is incredible that EOC failed to hold an internal hearing because Webb and Ward refused to appear, especially since EOC had written statements from the two women.

56. The Respondents produced numerous witnesses, all current EOC employees, who testified that they have observed Mrs. Whitt commit various infractions of EOC policy. The witnesses included.

57. None of the incidents testified to by these witnesses are related to, or in any way relevant to, Mrs. Whitt's suspension and shed no light on the incidents of April, 1985.

58. Prior to Mrs. Whitt's suspension, none of the above-mentioned witnesses informed their supervisors as to the infractions they claimed to have observed.

59. The testimony of Mrs. Justice was specifically rebutted by Elizabeth Collins, a Varney parent who had been a volunteer at the Center when Mrs. Justice was a substitute cook.

60. Despite EOC's interest and obligation in protecting its children, no disciplinary action was taken against the witnesses for failing to report alleged incidents that, if true, endangered childrens' lives. The witnesses' failure to report their alleged observations, and EOC's failure to discipline them

for such nonfeasance, makes this testimony less than credible, and the Hearing Examiner affords it little weight.

61. Three other EOC employees have been disciplined for alleged abuse of children. In one instance, direct evidence of children being hit, in the form of an eyewitness, resulted in the discharge of an aide and the transfer of the teacher, the latter being disciplined for allowing abuse to occur in her classroom. The other instance involved an accusation involving sexual abuse. None of these three incidents are comparable to the facts at bar. Here, there was no eyewitness to the alleged spanking, nor was the accusation severe. Also, the Respondents failed to take any action against Ms. Varney, the aide, who allowed the alleged incidents to occur.

62. On the whole, weighing their manner of testifying, their apparent candor and fairness, apparent prejudice or bias in favor of one party or against another, and the consistency of one's testimony with that of the other witnesses for the party, the Complainant and her witnesses are found to be more worthy of credit than the witnesses for Respondent.

63. The testimony of Childress and Hamrick was so contradictory in regard to important issues that such testimony can be credited with little veracity. The testimony of Respondents' other witnesses was not only inconsistent, but largely irrelevant to issues here presented.

64. The Hearing Examiner specifically finds the testimony of Complainant, Amanda Ford, and Teresa McCune as to the statements made by Mr. Hamrick concerning Mrs. Whitt's age

and health to be credible and Mr. Hamrick's denial of the same to be unworthy of belief.

65. The Complainant, Roberta D. Whitt, produced direct evidence, in the form of statements made by Larry Hamrick, that her age and health were determining factors in her suspension.

66. In viewing the evidence as a whole, the Complainant proved by a preponderance of the evidence that her age and health were determining factors in Respondents' decision to suspend her.

67. The Respondents failed to produce credible evidence that the same decision to suspend Mrs. Whitt would have been reached even absent the impermissible factors. Respondent Childress testified that she did not invoke the alleged "immediate suspension" policy and made the decision to suspend Mrs. Whitt only after looking into the "unsupervised children" incident, which is not a ground for immediate suspension, and then conferring with Mr. Hamrick. By their own testimony, Respondents showed there was ample room for discriminatory factors to enter into the decision-making process.

68. Based on Mr. Hamrick's statements to Ms. Ford and Ms. McCune, coupled with the contradictions between the stories of Childress and Hamrick, and the testimony of neutral witnesses as to the incidents of April 17 and 18, Complainant showed that it was more likely to probable that she was suspended not pursuant to an "immediate suspension" policy or as a result to resign because of Respondents' negative assessments of her age and health.

69. Respondent Childress aided and abetted Respondent

EOC in carrying out an act of unlawful discrimination.

70. As a result of Repondents' unlawful actions, Complainant suffered humiliation, embarrassment, mental and emotional distress.

DISCUSSION

Age and/or handicap need only be a determining factor, not the sole factor, in Complainant's suspension.

W. Va. Code § 5-11-3(h), which defines the terms "discriminate" and "discrimination" places the burden on the Complainant at bar to show that she was suspended "because of" her age and/or handicap. The term "because of" not being defined in the Act, and there being no West Virginia appellate cases on point, it is proper for the Commission to look for guidance to federal court decisions interpreting analogous statutes, such as Title VII of 1964 Rights Act, 42 U.S.C. §2000e et seq., and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., in determining the nature of Complainant's burden. West Virginia Human Rights Commission v. United Transportation Union, Local 6551, 280 S.E.2d 653 (1981).

A review of federal case law clearly indicates that for Complainant to prevail she need not prove that her age or handicap were the sole factors in her suspension, but only that either ground was "a determining factor." Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979); Spangulo v. Whirlpool Corporation, 641 F.2d 1109 (4th Cir. 1981), cert. den., 454 U.S. 860 (1981); Laugesen v. Anaconda, 510 F.2d 307 (6th Cir. 1975); Cancellier v.

Federated Dept. Stores, 672 F. 2d 1312 (9th Cir. 1982), cert. den., 103 S.Ct. 113 (1982). It is sufficient if Complainant provides evidence to support as a "reasonable probability" the inference that "but for" her age or handicap she would not have been suspended. Lovelace v. Sherwin Williams Company, 681 F.2d 230, 243 (4th Cir. 1982). See also, EEOC v. Western Electric Company, Inc., 713 F.2d 1011 (4th Cir. 1983).

To state it another way, the "ultimate issue" is whether age or handicap "made a difference" in determining whether Complainant was to be disciplined. Ackerman v. Diamond Shamrock Corporation, 670 F.2d 66, 70 (6th Cir. 1982). Complainant may show that unlawful grounds "made a difference" in her employer's decision by providing evidence that leads the fact finder reasonably to conclude that: (1) the Respondents consciously denied an equal employment opportunity to Complainant because of her handicap or age, Williams v. General Motors Corporation, 656 F.2d 120, 130 (5th Cir. 1981), cert. den., 455 U.S. 943 (1982); or (2) the Respondents regarded the Complainant's age or handicap as a negative factor in their consideration, Id., or (3) the Respondents did not treat age or handicap neutrally. EEOC v. Western Electric, 713 F.2d 1011, 1015 (4th Cir. 1983).

If there was more than one factor in the Respondents' decision to suspend the Complainant, she is still entitled to recover so long as one factor was age or handicap and "if in fact it made a difference" in the decision. Laugesen, supra, at 371. In such instance, the Respondents are liable even though another factor, such as the need to investigate the charges, "was also a

strong and perhaps even more compelling reason." Id., at 317. See also, Popko v. City of Clairton, 570 F. 2d 446 (W.D. Pa. 1983).

CONCLUSIONS OF LAW

Based on the foregoing findings of fact and discussion of law, the Hearing Examiner concludes, as matters of law, as follows:

1. All conditions precedent to the institution of this action have been fulfilled and the West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties.

2. The West Virginia Human Rights Act is violated when an employer discriminates against an employee between the ages of forty and sixty-five years because of her age. W.Va. Code § 5-11-9(a).

3. The West Virginia Human Rights Act is violated when an employer discriminates against an employee who it regards as handicapped, even if the employee is not, in fact, handicapped. W. Va. Code § 5-11-9(a); West Virginia Human Rights Commission Interpretive Rules Governing Discrimination on Handicapped, Rule 2.0.7.(c).

4. A Complainant in a Human Rights Commission case who alleges discrimination on the basis of age or a perceived handicap has the burden of showing that her age or perceived handicap were determining factors in the employment action taken against her. Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979);

Spanguolo v. Whirlpool Corporation, 641 F.2d 1109 (4th Cir. 1981), cert. den., 454 U.S. 860 (1981); Laugesen v. Anaconda, 510 F. 2d 307 (6th Cir. 1975); Cancellier v. Federated Dept. Stores, 672 F. 2d 1312 (9th Cir. 1982), cert. den., 103 S.Ct. 113 (1982). She may show that the unlawful grounds were determining factors by providing evidence that leads the fact finder reasonably to conclude that: (1) the Respondents consciously denied an equal employment opportunity to Complainant because of her handicap or age, Williams v. General Motors Corporation, 656 F.2d 120, 130 (5th Cir. 1981), cert. den., 445 U.S. 943 (1982); or (2) the Respondents regarded the Complainant's age or handicap as a negative factor in their consideration, Id., or (3) the Respondents did not treat age or handicap neutrally. EEOC v. Western Electric, 713 F.2d 1011, 1015 (4th Cir. 1983).

5. A Complainant in a Human Rights Commission action may make a prima facie case of unlawful discrimination either under ordinary principles of proof, i.e., by "any direct or indirect evidence relevant to and sufficiently probative of the issue," Lovelace v. Sherwin Williams Company, 681 F.2d 230, 239 (4th Cir. 1982), see also Stangulo v. Whirlpool Corporation, 641 F2d. 1109 (4th Cir. 1981); cert. de., 454 U.S. 860 (1981), or, alternatively, by application of the judicially created proof scheme first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Where there is direct evidence that unlawful discrimination was a significant and determining factor in an employment decision the allocation of proof prescribed by McDonnell Douglas does not apply. Lee v. Russell County Board of

Education, 684 F.2d 769 (11th Cir. 1982); Belle v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), cert. de., 104 S.Ct. 2385 (1984); Simmons v. Camden County Board of Education, 757 F.2d 1187 (11th Cir. 1985); Lindsey v. American Cast Iron Pipe Co., 772 F.2d 799 (1985).

6. The Complainant, Roberta D. Whitt, produced credible direct evidence that her age, 62 years at the time in question, and her perceived handicap were viewed negatively and not neutrally by Respondent EOC and that the same were determining factors in the decision to suspend her from her teaching position.

7. Viewing the evidence as a whole, Complainant proved by a preponderance of the evidence that she was unlawfully discriminated against because of her age and her hypertension, which EOC incorrectly perceived as handicap.

8. Upon finding that Complainant's direct evidence of discrimination was credible, the burden of persuasion switched to Respondents and they were required to prove by a preponderance of the evidence that the decision to suspend Mrs. Whitt would have been reached even absent the presence of discriminatory factors. Lee, supra; Miles v. MNC, 750 F.2d 867 (11th Cir. 1985).

9. Respondents failed to show that the decision to suspend Mrs. Whitt would have been made even without reference to her age or perceived handicap. Specifically, the evidence presented at hearing showed that there was ample latitude in EOC's alleged "immediate suspension" policy for the introduction of discriminatory factors. Proof of such latitude was, in fact,

supplied by the testimony of Respondent Childress, who, contrary to the policy as represented by EOC, decided at first not to suspend Mrs. Whitt on the mere accusation of spanking. EOC's past suspensions and the representation of other older employees in the workforce, though not wholly irrelevant, do not foreclose a finding that Mrs. Whitt was wrongfully suspended because of her age and perceived handicap.

10. Complainant likewise, showed by a preponderance of the evidence that Respondent Childress, in violation of § 5-11-9(i)(1), aided and abetted her employer in carrying out an act of unlawful discrimination.

PROPOSED ORDER

Accordingly, the Examiner recommends the Commission issue a final Order as follows:

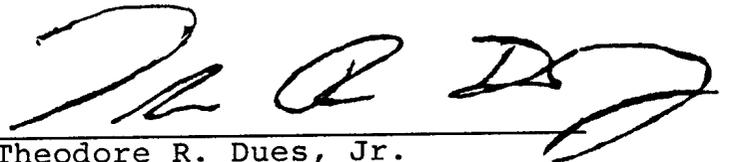
1. Judgment for Complainant;
2. Back pay awarded in the amount of Thirty Dollars (\$30.00).
3. Incidental damages awarded in the amount of Five Thousand Dollars (\$5,000.00);
4. Attorney's fees and costs awarded in the amount of Six Thousand Eight Hundred Forty Seven Dollars (\$6,847.00). (See attached affidavit);
5. Issue an Order directing Respondent EOC to cease and desist from discriminating in its discipline of its employees and requiring EOC to report to the Human Rights Commission on a quarterly basis for a period of two years concerning discipline

meted out to its employees; and

6. Complainant's motion to amend the style is granted and this case shall henceforth be styled "Roberta D. Whitt v. Mingo County Economic Opportunity Counsel and Peggy Childress."

DATED: November 19, 1986

ENTER:

A handwritten signature in black ink, appearing to read 'Theodore R. Dues, Jr.', written over a horizontal line.

Theodore R. Dues, Jr.
Hearing Examiner

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERTA D. WHITT,

Complainant,

v.

DOCKET NO. EA-609-85
EH-610-85

MINGO COUNTY EQUAL
OPPORTUNITY COUNSEL
and HEADSTART DIRECTOR,

Respondents.

AFFIDAVIT FOR ATTORNEY FEES AND COSTS

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Mike Kelly, counsel for the complainant in this action, hereby state under oath as follows:

1. The following is a true and actual summary of my time spent in litigating this action as compiled from my time records routinely kept throughout the duration of this matter:

<u>Date(s)</u>	<u>Activity</u>	<u>Hours</u>
August 23, 1985	Review referral letter, contact HRC	0.5
September 10, 1985	Review HRC file	1.0
February 21, 1986	Review AG's file and documents	2.0
March 10, 1986	Draft and send discovery	3.0
April 21, 1986	Answer discovery, calls to client	3.0
May 13, 1986	Call to client, prepare for conference	2.5
May 14, 1986	Pre-hearing conference	1.0
May 19, 1986	Interview witnesses	1.5
May 21, 1986	Prepare for hearing	4.0
May 22, 1986	Talk to witnesses, hearing	14.0
June 27, 1986	Read transcript	4.0

July 1, 1986	Research	3.0
July 3, 1986	Research	2.0
July 7, 1986	Research, draft facts	4.0
July 8, 1986	Draft facts	3.0
July 9, 1986	Draft discussion of law	10.0
July 10, 1986	Draft discussion of law	8.0
July 11, 1986	Draft discussion of law	6.0
July 13, 1986	Draft discussion of law	6.0
July 17, 1986	Finalize draft	6.0
July 18, 1986	Finalize entire brief	<u>10.0</u>
	<u>TOTAL HOURS</u>	<u>94.5</u>

2. I have been a member of the Bar of the State of West Virginia for ten years and have been engaged in the practice of civil rights law for a combined period of four years.

3. Given the time and labor required in this action, the difficulty of the question involved, the results obtained, and the fee customarily charged in the Kanawha Valley area for similar legal services by attorneys of similar experience, a fee of \$70 per hour in this action is reasonable.

4. The costs expended in this action on behalf of complainant are \$160 in travel time (8 hours x \$20 per hour) and \$72 in travel costs (360 miles x 20¢ per mile), for a total of \$232.00.

5. That the total amount due and owing to the Appalachian Research and Defense Fund, Inc., for attorney fees and costs is:

Attorney fees (94.5 hours x \$70/hr.)	\$6,615.00
Costs	<u>232.00</u>
<u>TOTAL AMOUNT DUE</u>	<u>\$6,847.00</u>

Mike Kelly
MIKE KELLY
1116-B Kanawha Blvd, East
Charleston, WV 25301

Taken, sworn to, and subscribed before me this 25th day
of July, 1986.

My Commission expires January 25 1993.

J. D. [Signature]
NOTARY PUBLIC

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERTA D. WHITT,
Complainant,

v.

DOCKET NO. EA-609-85
EH-610-85

MINGO COUNTY EQUAL
OPPORTUNITY COUNSEL
and HEADSTART DIRECTOR,

Respondents.

MOTION TO AMEND STYLE

AND NOW comes the complainant herein, by counsel, and respectfully moves the Hearing Examiner that the style of this action be amended to reflect the correct identity of the respondents and that henceforth this action be styled as "Roberta D. Whitt v. Mingo County Economic Opportunity Commission and Peggy Childress."

ROBERTA D. WHITT,
Complainant,

By Mike Kelly
Counsel for Complainant

Mike Kelly
1116-B Kanawha Blvd., East
Charleston, WV 25301

CERTIFICATE OF SERVICE

I, Mike Kelly counsel for the complainant in the above-styled action, hereby certify that I on this the 25th day of July, 1986, have served a true copy of the attached Motion to Amend Style and Complainant's Proposed Findings of Fact and Conclusions of Law upon the respondents by United States Mail, postage prepaid, by mailing a true copy thereof to:

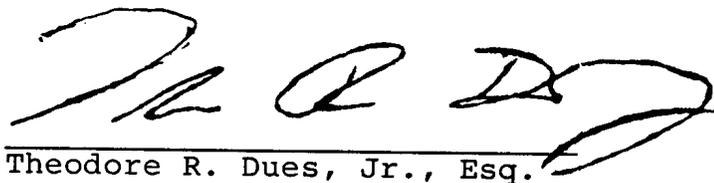
Herbert H. Henderson, Esq.
Dwight J. Staples, Esq.
Henderson & Henderson
711 1/2 Fifth Avenue
Huntington, WV 25701
Counsel for Respondents

Theodore R. Dues, Jr.
Hearing Examiner
405 Capitol Street
Charleston, WV 25301


Mike Kelly

CERTIFICATE OF SERVICE

I, Theodore R. Dues, Jr., Hearing Examiner, do hereby certify that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon Mike Kelly, Esq., 1116-B Kanwha Blvd., E., Charleston, West Virginia, 25301 and Herbert H. Henderson, Esq. and Dwight J. Staples, Esq., Henderson & Henderson, 771 1/2 Fifth Avenue, Huntington, West Virginia, 25701 by mailing a copy of the same in a properly addressed envelope on this the 19th day of November, 1986.


Theodore R. Dues, Jr., Esq.
Hearing Examiner