STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

TELEPHONE (304) 348-2616
FAX (304) 348-2248

Quewanncoii C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

October 28, 1992

Mary E. Young
PO Box 657
New Martinsville, WV 26155

Cemetary Consultants
dba Northview Services
PO Box 511
Parkersburg, WV 26102

James H. McCauley, Esq.
1710 Washington Blvd.
PO Box 196
Belpre, OH 45714

Mary C. Buchmelter
Deputy Attorney General
812 Quarrier St.
Charleston, WV 25301

Re: Young v. Cemetary Consultants, Inc. dba Northview Services ES-219-89

Dear Parties:

Enclosed, please find the final decision of the undersigned hearing examiner in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition

setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the examiner, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the hearing examiner shall not operate as a stay of the decision of the hearing examiner unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

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

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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

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

Yours truly,

Gail Ferguson
Hearing Examiner

GF/mst

Enclosure

cc: Glenda S. Gooden, Legal Unit Manager

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MARY E. YOUNG,

Complainant,

v. DOCKET NUMBER(S): ES-219-89

CEMETERY CONSULTANTS, INC.,
DBA NORTHVIEW SERVICES,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on December 26, 1991, in Wood County, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainant, Mary E. Young, appeared in person and by counsel, Mary C. Buchmelter, Deputy Attorney General. The respondent, Cemetery Consultants, Inc., dba Northview Services, appeared by counsel, James McCauley, Esquire.

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.

FINDINGS OF FACT

1. The complainant, Mary E. Young, is a female. The complainant has been married for thirteen years to Charles M. Young. Mr. Young is a Correctional Officer at the State Penitentiary in Moundsville, West Virginia. At all times relevant to this action, Mr. Young has worked the midnight shift. The complainant is the mother of three children.

2. On September 29, 1986, complainant, Mary Young, was hired by Northview Services, Inc., a West Virginia corporation, as a telemarketer. As a telemarketer, complainant made telephone calls giving information about the company's services and preparing prospective buyers for a visit from a salesperson. The complainant also performed bookkeeping and office work and worked whatever position and whatever hours were requested of her.

3. On September 9, 1988, Northview Services hired Cemetery Consultants, Inc. (hereinafter respondent) on a trial basis to manage and operate the sales and telemarketing departments. Although complainant was originally hired by Northview Services, at the time of the corporate merger, she was given the opportunity to be an employee of CCI. She was terminated from Northview Services and

re-hired at the same time by CCI, along with other employees in place at the time.

4. The respondent was incorporated in June 1985. Board of Directors members are: Larry McDaniel, Robert Skeen, Jr., Robert Skinner, David Skinner, Thomas Webster and James McCauley. Board members Robert Skinner and David Skinner are brothers-in-law of Carol Skinner whose stipulated testimony was offered by respondent.

5. Respondent's executive committee is comprised of Larry McDaniel and Thomas Webster. At the time of the complainant's termination in 1988, Jerry Rollins served on the executive committee.

6. At the time respondent took over the sales operations of Northview Services Inc., complainant was working a schedule from 9:00 a.m. to 5:00 p.m.

7. According to the respondent because sales were down when it took over, there were plans to change the work hours of the telemarketers on the 9:00 a.m. to 5:00 p.m. shift to a new schedule of 12:00 noon to 8:00 p.m. The reason for the change was to make telemarketing calls more productive and to reach working couples in the evening.

8. According to the respondent, when the complainant heard about the proposed time changes, she verbally expressed her displeasure to a number of people, including several times in different conversations with Larry M. McDaniel, the President of Cemetery Consultants Inc,

9. As of the date of respondent's takeover, complainant's direct supervisor was Debra Adams. Ms. Adams title was Director of Telemarketing.

10. In September of 1988, the complainant was six months pregnant. According to the complainant, Ms. Adams called her into her office and introduced herself. Ms. Adams asked complainant for her ideas about reviving sales at the company. Complainant made some suggestions to Ms. Adams regarding lagging sales. At this time, Ms. Adams told complainant that she was excited about her ideas, but wished complainant was not the one who was pregnant.

11. During the time Debra Adams acted as complainant's supervisor, she sometimes referred to complainant as "Prego," or "Big Mama."

12. At one time Ms. Adams asked complainant to go to the Parkersburg, West Virginia office to see how their telephone room was set up and see if she had any ideas to help their operation. Complainant accompanied Ms. Adams to Parkersburg, whereupon Ms. Adams introduced complainant as the "Prego" from New Martinsville.

13. Complainant reported to Dave and Bob Skinner that Ms. Adams was calling her "Prego" and "Big Mamma." She received no assurance that anything would be done about this behavior.

14. During this time, complainant worked different shifts. At times she would receive telephone calls to come in at different hours and to work different hours. At no time did complainant ever refuse these hours. During her tenure of employment complainant was never disciplined, nor was she ever written up for any violation of company policy.

15. At one point in September, 1988, complainant was approached by Larry McDaniel and Dave and Bob Skinner about how long she would be able to work. Complainant informed them that she intended to work

until the day the baby was due. She told them that she would be taking off about four weeks.

16. Complainant continued to work all hours that she was assigned. She began to train Amy Geho for a position as telemarketer. Ms. Geho began working the 12:00 noon to 8:00 p.m. shift the week beginning on September 9, 1988, and continued to work those same hours until she gave her notice and resigned from her position on November 3, 1988.

17. On September 28, 1988, her day off, complainant received a call from Debra Adams asking her to come in to work. Complainant told Ms. Adams that her husband was at a seminar and that if she came in she would have to bring her three year old son with her. Complainant was assured this would be all right.

18. Complainant came into the office at about 9:00 a.m. and heard an argument ensuing between Jerry Rollins and Ms. Adams. At approximately 10:45 a.m., Ms. Adams came to complainant's office and told her that she could return home and that she would speak with her later.

19. Complainant went home and received another call from Ms. Adams asking her to come back into the office. Again, complainant reminded Ms. Adams that she would have to bring her young son with her. She was told that would be all right.

20. Complainant returned to the office and was told be Ms. Adams that she should leave her son with the receptionist and come into her office.

21. Complainant entered Ms. Adams' office and was told by Adams, "I'm sorry to have to do this, but, you're fired." When

complainant asked why she was being fired, she was told, "because I have to have someone who's going to be able to work all the time. I don't need someone out to have a baby. We're going to have a lot of sales and I really need someone in here all the time."

22. Complainant responded that she would do anything and began crying. Complainant then asked Ms. Adams to put in writing the events that had just occurred. Adams told complainant that she would have to first check with the Parkersburg office to see how to word a statement.

23. Ms. Adams called complainant back into her office and gave her a letter asking her to sign it. The letter indicated that Ms. Young was being terminated because she would not work a changed schedule. The complainant refused to sign the letter because it was untrue.

24. Because complainant refused to sign the letter, Adams asked Carol Skinner to sign and witness that complainant had refused to sign.

25. At this time, Adams gave complainant her paycheck. The check was dated September 27, the previous day. The regular pay day for CCI would have been September 30.

26. As the complainant drove off, Ms. Adams came out to the car and asked for the check back. Adams told complainant that she would have to hold the final check until she (the complainant) returned some contracts she had at her home. The complainant handed over the check, returned home for the contracts, brought the contracts back to Adams and was given her final paycheck once more.

27. According to the respondent, the complainant was terminated because she refused her new work schedule which was from 12:00 noon to 8:00 p.m. The complainant denies that she refused to work the new hours.

28. Evidence was admitted by stipulation of the parties that had Carol Skinner been present at the public hearing she would have testified that, when complainant exited from her meeting with Debra Adams on the 28th day of September, that the complainant told Ms. Skinner that she had refused to work the 12:00 noon to 8:00 p.m. shift and had been fired. Such testimony is not credited.

29. Evidence was admitted by stipulation of the parties that had Amy Geho been present at the public hearing she would have testified that the complainant once voiced her concern to Ms. Geho about changing her working hours from 8:00 a.m. through 4:00 p.m. to 12:00 noon through 8:00 p.m. Such testimony is not credited.

30. After her termination, complainant began to seek other employment. Other than working for Olan Mills where her aggregate income was $134.00, complainant was not able to obtain employment.

31. Respondent had an employee handbook, which contained provisions for maternity leave, which included compensation for earned sick leave days and the ability to return to work within six weeks.

32. Complainant's baby was born on December 19, 1988, and she would have been unavailable for work with respondent from December 19, 1988 through January 16, 1989.

33. The complainant failed to find employment after her termination. She sought and continued to seek employment until March

of 1989 when she was admitted to the LPN program at a community college.

34. In March 1989, complainant took a pre-entrance exam for the School of Licensed Practical Nursing of the Wetzel County Career Center. Complainant passed the entrance exam and had subsequent successful interviews. She was accepted to the school and began her training on June 29, 1989.

35. During the time she was in nurse's training from July of 1989 through June 29, 1990, respondent went to school eight hours a day. The complainant ultimately began employment as a graduate practical nurse in July 1990.

36. At the time of complainant's discharge her hourly rate was $4.10 per hour for a forty hour work week.

37. The complainant is entitled to backpay and benefits for the period September 28, 1988 through June 30, 1989 at which time the complainant enrolled as a full-time student in nursing school and was no longer ready, willing and available for employment.

38. The complainant is entitled to interest on backpay and benefits at the rate of 10% per annum compounded on a monthly basis as supported by the record evidence.

39. The detailed backpay calculations should be submitted to the undersigned by the parties within 15 days either by stipulation or separately. Thereafter, the same may be incorporated by reference as part of this final decision. In arriving at the amount the parties should consider the following:

a. The complainant's backpay award is reduced for the one month period she was unable to work after the birth of her child;

b. The complainant's backpay award is reduced by $134.00 which represents one week salary she received while employed by Olan Mills during the interim period between discharge by respondent and full-time enrollment in nursing school; and

c. The complainant's unemployment compensation earnings are not deducted from her backpay award based upon the collateral source rule.

40. Complainant suffered emotional distress because of respondent's action.

DISCUSSION

In Frank's Shoe Store v. WV Human Rights Commission, ___WV___, 365 S.E.2d 251 (1986), the West Virginia Supreme Court of Appeals for the first time addressed the issue of pregnancy discrimination in the context of sex discrimination under the West Virginia Human Rights Act. In Frank's, the Court found that although the West Virginia Human Rights Act (Act) does not enumerate pregnancy among the specifications subject to its protective provisions, the Act itself should be liberally construed to accomplish its objectives and purposes.

> When our legislature enacted the Human Rights Act it intended to eliminate all discriminatory

> practices included discriminatory treatment of men, as well as women. However, the purpose of that statute should not be thwarted because the discriminatory act adversely affects only a small group of a protected class, as is the case of pregnant women. Pregnant women, like all persons who capably perform the requisite duties, must be afforded an equal opportunity for employment. Frank's Shoe Store, at 365 S.E.2d at 257.

Further, in Montgomery General Hospital v. WV Human Rights Commission, ___WV___, 346 S.E.2d 557 (1986), the Court articulated what would constitute the prima facie case in a pregnancy discrimination case. Using the framework articulated in McDonnell Douglas Corp v. Green, 411 U.S. 729 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, (1981), such formula adopted by the West Virginia Supreme Court in Shepherdstown V. F. D. v. WV Human Rights Commission, ___WV___, 309 S.E.2d 342 (1983), the Court recognized that the Commission may tailor the elements of a prima facie case to fit the type of discrimination occurring. The prima facie burden recognized by the Court in Montgomery General Hospital, supra, was: (a) that the complainant belongs to a protected class; (b) that she is qualified to obtain or remain in that position; (c) that she is not hired or that she is removed from her position regardless of her qualifications or length of service; and (d) that the respondent thereafter sought or retained others with equivalent qualifications who were not pregnant.

In the case at bar, it is clear that the complainant has met her initial burden. It is undisputed that she is a member of a protected class. Respondent has never questioned the complainant's qualifications or her ability to perform the functions of her position of employment. It is undisputed that the complainant was

terminated from her position; and it is undisputed that other employees with similar qualifications were retained.

Once complainant establishes a prima facie, it is incumbent upon the respondent to articulate a legitimate, nondiscriminatory defense. Respondent's burden is not intended to be onerous. The employer "bears only the burden of explaining clearly the nondiscriminatory reason for its actions." Burdine, supra, 450 U.S. at 260, cited in State ex rel. Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., ___WV___, 329 S.E.2d 77, 86 (1975). See also, Shepherdstown, supra. The employer need not prove the legitimate, nondiscriminatory reason, but must only articulate it. It is sufficient if the respondent's evidence raises a genuine issue of fact as to whether or not it discriminated illegally against the complainant. Burdine, supra, 101 S.Ct. at 1094, Furnco Construction v. Waters, 438 U.S. 567, Shepherdstown, supra, 309 S.E.2d 342 (1983); Logan-Mingo Area Mental Health Agency, Inc., supra, 329 S.E.2d at 86.

The third step in the theoretical proof scheme involves an evaluation of the motives or reasons proffered by the respondent for its adverse action.

> This third step of the theoretical proof scheme is based upon a realization that some explanations are the product of hindsight rather than a true barometer of what occurred at the time of the decision.

Holbrook v. Poole Associates, Inc., ___WV___, 400 S.E.2d 863 (1990).

> "Pretext" means an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense. Black's Law Dictionary, 1069 (5th ed. 1979). A proffered reason is a pretext if it is not the true reason for the decision.

Conaway v. Eastern Associated Coal Corp., ___WV___, 358 S.E.2d 423, 430 (1986).

The questions raised at this stage is not whether the proffered reason might have justified the action, but whether it is "the true reason for the decision." West Virginia Institute of Technology v. Human Rights Commission, ___WV___, 383 S.E.2d 490, 496 (1989).

The respondent's proffered defense is clearly pretextual. Respondent's position throughout this case has been that the complainant was terminated solely because it was necessary to change her hours from day time (9:00 a.m. to 5:00 p.m.) to afternoon (12:00 noon to 8:00 p.m.). Respondent claims that faced with this change in schedule, complainant refused to work the new hours. She was terminated, according to respondent, because of this refusal.

Complainant's testimony that she often worked evening and afternoon hours is uncontroverted. Respondent could have produced her previous time sheets to overcome this testimony. Instead, respondent claimed that, even though CCI supposedly honored accumulated time for vacation and/or sick leave of Northview employees, complainant's time sheets for prior to 1988 mysteriously disappeared and could not be reproduced. It is clear that respondent's claim that Mary Young "refused" to work the afternoon shift is suspect.

If one delves a little deeper into respondent's defense, it becomes even more evident that complainant's termination had nothing whatsoever to do with a change in schedule. Again, the method of complainant's termination is uncontroverted. Complainant was "summoned" into the office by her immediate supervisor, Debra Adams.

At no time prior to this meeting is there any evidence that anyone informed complainant that her hours were being changed. Respondent's representative, Larry McDaniel, himself testified that other than the letter given to complainant by Debra Adams after her termination, nothing was ever said or written to complainant about a change in hours. Mr. McDaniel testified that the executive committee met on the Thursday before the termination and decided that they were going to change the schedules in the telephone rooms. They decided, McDaniel testified, that they would find employees who could work those schedules and terminate those who would not. He then said complainant was terminated by Debra Adams, with the authority of the executive committee. There is absolutely no indication, though, that complainant was ever informed, until the day of her termination, that her hours were being changed; or failure to accept this would result in a termination.

Complainant was called in to the office on her day off to wait around for one and three-fourths hours while Debra Adams and Jerry Rollins argued. She was sent home and then called back again. At that point, she was terminated and handed a paycheck that was dated earlier. Complainant was not told that her hours were changed. She was told that she was terminated. Debra Adams, before she even talked to complainant, had a check in her hand for complainant's severance pay.

In determining which side to believe, it is up to the factfinder to assess the credibility of witnesses and the persuasiveness of the evidence. Westmoreland Coal Company v. Human Rights Commission, ___WV___, 382 S.E. 2d 562, 567, n.6 (1989). She is free to choose to

believe one witness and disbelieve another if he finds that the latter's testimony lacked credibility.

Respondent's defense that complainant's termination was based on her refusal to work afternoon hours is not believable based on the evidence it presented.

The record reveals that prior to the public hearing the respondent, by counsel, and the complainant, by prior counsel and without involvement of the hearing examiner, reached stipulations as to what the testimony of two witnesses would be in lieu of their appearance and testimony at the public hearing.

It is the contention of the respondent that this stipulated testimony corroborates its position that the complainant would not work the later hours, which resulted in her termination.

A basic tenet of evidentiary law is that a stipulation as to what a person's testimony would be is not an agreement that the statement, if made, is true. Hutchison v. Savings Banks, 105 S.E. 677 (1921). Conflicts in the fact, even those stipulated by the parties must be resolved by the trier of fact in the same manner she would resolve any conflicting testimony. Although the stipulations were admitted in evidence as representing an agreement as to what Amy Geho and Carol Skinner would have said, the charge of the trier of fact is to determine the appropriate weight to be given this testimony, and in this case, that weight is deminimus, if not non-existent. To be sure, the major issue in this case is one of credibility. Therefore, without the safeguards of sworn testimony, cross examination and the opportunity to observe the demeanor and

comport of Ms. Geho and Ms. Skinner as well as evaluate witness bias, their testimony is not credited.

What remains is an obligation on the part of the trier of fact to decide, "which party's explanation of the employers motivation it believes." United States Postal Service Board of Governors v. Aikens, 103 S.Ct. 1478, 1482 (1983). On the one hand, the respondent by its sole witness, Larry McDaniel, testified that it was the complainant's unwillingness to work the later hours, which led to her termination. The trier of fact is not persuaded that this was the true reason. On the other hand, the complainant presented unrebutted, credible evidence that a supervisor who had previously manifested an animus toward her because, based on her pregnant condition, called her into the office on her day off to tell her she was fired because respondent did not want to retain an employee who would be taking time off from work to have a baby.

The complainant in this case has clearly established, by a preponderance of the evidence, that she was discriminated against by her employer because of sex.

CONCLUSIONS OF LAW

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

2. The respondent, Cemetery Consultants, Inc. dba Northview Services, 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 sex discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful sex discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay and statutory interest as set forth in Findings of Fact 36, 37, 38 and 39.

8. Contrary to the position of complainant, a discharged employee who enrolls as a full-time student is no longer ready, willing and available for employment and is not entitled to a backpay award for that period. Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985); Washington v. Krogers, 671 F.2d 1072 (8th Cir. 1982); and Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975).

9. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of $2,950.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity she suffered.

RELIEF AND ORDER

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

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

2. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

3. The respondent shall pay ten percent per annum interest on all monetary relief.

It is so **ORDERED**.

Entered this 27 day of October, 1992.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER