BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ANGELA S.BEAVERS,

Complainant,

v.

Docket No: ES-394-02
EEOC No: 17JA200237

WEST VIRGINIA DEPT. OF TRANSPORTATION/DIVISION OF HIGHWAYS AND ERIC ISER IN HIS INDIVIDUAL CAPACITY,

Respondent.

ANGELA S. BEAVERS,

Complainant,

v.

Docket No: ESREP-134-03
EEOC No: 17JA3000020

RUMMEL, KLEPPER & KAHL, L.L.P.,

Respondent.

FINAL ORDER OF THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Procedural History

On April 22, 2005, the West Virginia Human Rights Commission issued a Final Order in the above -styled case. Subsequently, the Commission's chair filed a motion requesting that the Commission reconsider its order. On May 3, 2005, the executive director entered an Order Granting Stay of the April 22, 2005 Final Order and allowed any party wishing to file a motion to reconsider said Final Order to do so within five days of receipt of same. Complainant moved for a rehearing and to set aside the Final Order. On May 12,

2005, pursuant to complainant's motion and majority vote of a quorum of the Commission, the Commission rescinded the April 22, 2005 Final Order and set the matter for reconsideration of the appeal and all the issues related thereto.

On June 30, 2005, the West Virginia Human Rights Commission reviewed the Final Decision issued by Administrative Law Judge Robert Wilson, in the above-captioned matter.

After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt the following as its own, without modification or amendment:

(1.) Administrative Law Judge Robert Wilson's Final Decision, and

(2.) The Final Order of the Commission prepared by Retired Chief Judge Richard Neely, acting for the Commission and at its direction.

It is, therefore, the Order of the Commission that the Administrative Law Judge's Final Decision, and Final Order of the Commission prepared by Retired Chief Judge Richard Neely, acting for the Commission and at its direction, be attached hereto and made a part of this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of

Right to Appeal" attached hereto as Exhibit A.

It is so ORDERED.

Entered for and at the direction of the West Virginia Human Rights Commission this 7th day of July 2005, in Charleston, Kanawha County, West Virginia.

WV HUMAN RIGHTS COMMISSION

IVIN B. LEE
EXECUTIVE DIRECTOR
Rm. 108A, 1321 Plaza East
Charleston, WV 25301-1400
Ph.: 304/558-2616 Fax: 558-0085

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ANGELA BEAVERS,

Complainant

Docket No. ES-394-02
EEOC No. 17JA200237

v.

WEST VIRGINIA DEPT. OF
TRANSPORTATION and
ERIC ISER in his individual capacity,

Respondents

ANGELA BEAVERS

Complainant

Docket No. ESREP-134-03
EEOC No. 17JA3000020

v.

RUMMEL, KLEPPER & KAHL LLP,

Respondent

Final Order

The Final Order of the Commission was prepared by Retired Chief Justice Richard Neely, acting for the Commission and at its direction.

Neely, Retired Justice:

On a former day, to-wit 22 April 2005, the West Virginia Human Rights Commission

rendered a Final Order in the above-styled case, and thereafter, the Commission's chair filed a motion requesting that the Commission reconsider its order. On 3 May 2005, the executive director entered her Order Granting Stay, which allowed any party wishing to file a motion to reconsider the Commission's decision to do so within five days. Complainant then moved for a rehearing and to set aside the Final Order. On 12 May 2005, pursuant to Complainant's motion and majority vote of a quorum of the Commission, the Commission rescinded the 22 April 2005 Final Order and set the matter for reconsideration of the appeal and all the issues related thereto.

Respondent Rummel, Klepper & Kahl, LLP objects to the rehearing procedure as contrary to the Rules of Practice and Procedure Before the West Virginia Human Rights Commission. However, the 22 April 2005 final order is clearly wrong: the Commission, in the same way as any other adjudicatory tribunal, has inherent power to correct its own mistakes in a timely manner. Walker v. W.Va. Ethics Committee, 201 W.Va. 108 (1997).[1] At the time of the Commission's original Order, the Commission was insufficiently familiar

---

1

"...We have generally recognized that: An administrative agency . . . can exert only such powers as those granted by the Legislature[,] and . . . if such agency exceeds its statutory authority, its action may be nullified by a court. A further sound principle of law . . . is that an administrative agency possesses, in addition to the powers expressly conferred by statute, such powers as are reasonably and necessarily implied in the exercise of its duties in accomplishing the purposes of the act[.]....'An administrative agency has, and should be accorded, every power which is indispensable to the powers expressly granted, that is, those powers which are necessarily, or fairly or reasonably, implied as an incident to the powers expressly granted.'" [citations omitted].

201 W.Va. at 121

with the nature of equity court practice in West Virginia in 1880 or the grand nature of the authority of English courts of chancery in 1791.

On 30 June 2005, this matter came on to be heard again by the Commission upon the entire record. The Commission finds as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Standard of Review and Affirmation of the ALJ's Findings

The standard of review for an Administrative Law Judge's findings of fact is an "abuse of discretion" or "clearly wrong" standard. Patton v. Gatson, 207 W. Va. 168 (1999). The standard of review for conclusions of law is de novo. The Commission has reviewed the ALJ's opinion, the record of proceedings below and the briefs of the parties and concludes that the ALJ neither abused his discretion nor was clearly wrong with regard to his findings of fact. Accordingly, the findings of fact of the ALJ are affirmed and summarized here in order to clarify our determination of relevant legal issues.

2. The Nature of the Case

Complainant, Angela Beavers, is a single mother of three who was initially hired as a secretary on the Corridor H construction project and then improved her job description by learning the skills necessary to be an inspector and, indeed, she became in inspector. Ms. Beaver's employment status was a bit complicated, but nonetheless not in any way strange or unprecedented. In a nutshell, Ms. Beavers worked for Respondent Rummel, Klepper & Kahl, LLP (hereafter RK&K), who was a contractor for the Department of Transportation,

Division of Highways (hereafter DOH) on the Corridor H construction site.

RK&K was responsible for inspecting construction work, and in that capacity was expected to hire personnel to do the inspections. The apparent purpose of using a contractor rather than State employees was flexibility: when the job ended, the contract expired and the State was not saddled with unnecessary workers. In addition, the State was not responsible for providing generous State benefits to contractors' employees.

Nonetheless, notwithstanding the use of RK&K for the purpose of recruiting and paying employees, the evidence is overwhelming that DOH, through its agent and servant, Eric Iser, was Ms. Beaver's day-to-day supervisor. RK&K could not hire personnel without DOH's approval, and DOH had the power to evaluate the job performance of RK& K personnel and to cause RK&K to fire personnel and/or promote or demote those personnel

Thus, we agree with the ALJ that DOH and RK&K were joint employers of Ms. Beavers and, therefore, are jointly and severally liable for any and all damages to which the Commission finds that Ms. Beavers is entitled. There were no cross claims asserted by either DOH or RK&K, so it is inappropriate for either Respondent to raise the issue of allocation at the appellate level.[2] Board of Education of McDowell County v. Zando, 182 W.Va. 597

2

There has been a great deal of finger pointing at the appellate level urging that, if anyone is to be held responsible, it should be the "other" respondent. However, there was a joint defense below, so the Complainant did not get the benefit of the finger pointing at the trial level, nor did she have the opportunity to have everything decided at once so that she could, within her lifetime, see the award in this case to which she is entitled. RK&K say that they submitted different proposed findings of fact from DOH, but that was after all the proceedings, predicated on a joint defense, had occurred. Under these circumstances, we believe that remand would not only be inappropriate, but

(1990). Indeed, after paying Ms. Beavers, the Respondents may sue one another for contribution, but this is not an issue that concerns Ms. Beavers because she has no dog in that fight.

Furthermore, under the circumstances that appear of record, there is ample authority that DOH and RK&K are jointly and severally liable: See, EEOC Enforcement Guidance: "Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms," 3 December 1997. See, also, Park v. White, Sec. of the Army, Appeal No. 01A10015 (EEOC, 27 September 2001).

Given that, as a matter of fact, DOH was a joint employer, having the power to hire, assign job duties, evaluate, and discharge Ms. Beavers, DOH's argument that awarding back and front pay against it violates its "sovereign immunity" is inapposite: Clearly the West Virginia Human Rights Act parallels and implements Title VII of the Civil Rights Act. When the State passed the West Virginia Human Rights Act it did not exempt state agencies from the Act's purview. Indeed, the argument concerning sovereign immunity is almost frivolous: Certainly, Kerns v. Bucklew, 178 W.Va. 68 (1987)[3], cited with approval in Skaff v.

---

remand would be highly prejudicial to Complainant's rights and entirely inequitable.

3

In Kerns, the petitioner and the West Virginia Human Rights Commission sought a writ of mandamus compelling the respondents, the President of West Virginia University and the West Virginia Board of Regents, to pay the petitioner damages awarded to her by the West Virginia Human Rights Commission as the result of the Commission's finding of employment discrimination based on the petitioner's sex. The respondents asserted that they were immune from liability by virtue of sovereign immunity. In granting the writ of mandamus, the Court held that the State's sovereign immunity was superseded by federal protection, effective by virtue of the supremacy clause, against employment discrimination. Specifically, the Court stated in Syllabus Point 1:

Pridemore, 200 W. Va. 700, 707 (1997) put this old canard to rest forever!

The Commission finds the facts of this case particularly egregious: DOH finally admitted in its brief before the Commission that:

> With respect to the Complainant's claims against the DOT/DOH for sexual harassment and hostile workplace while she was employed by RK&K and supervised by Eric Iser, the DOT/DOH conceded, after all the evidence was in, that at least some of the actions and words of Mr. Iser were unwelcome, that Mr. Iser's actions and words were based on the Complainant's gender, that Mr. Iser's actions and words were sufficiently severe or pervasive as to alter the Complainant's condition of employment, and that Mr. Iser's actions and words were imputable on some factual basis to his employer, DOT/DOH. In this regard, DOT/DOH also conceded that under the facts and circumstances of this case, where RK&K employees worked in part under DOT/DOH supervision, both RK&K and DOT/DOH had a duty to maintain a workplace free from sexual harassment. [emphasis added.]

Yet, this case was hard-fought all the way both factually and legally. The mild concession on the part of DOH belies the fact that Mr. Iser's actions were grossly obscene and at times criminal, amounting as they did at least to indecent exposure.[4] W.Va. Code 61-8-9 [1992]. The record clearly supports the conclusion that not only were the instances of sexual harassment particularly vulgar, appalling and egregious, but to add insult to injury, there was a conspiracy worthy of Upton Sinclair's The Jungle to make sure that Ms. Beavers would

---

In addition to the overriding effect of the supremacy clause of the Constitution of the United States (art. VI, cl. 2) upon contrary state law, federal legislation which is expressly authorized by section 5 of the fourteenth amendment to the Constitution of the United States and which implements such amendment will by its own force override contrary state constitutional or statutory law, such as governmental immunity (W.Va. Const. art. VI, § 35), which state law provides less protection or relief than provided by the fourteenth amendment and its implementing legislation, such as the Equal Employment Opportunity Act of 1972, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

4

See, Transcript, Vol. 1, p. 303 for the lurid details.

be severely punished should she voice any complaint at this unwelcome conduct or aver any dissatisfaction with her working conditions. In a nutshell, an "old boy" network on the job site made sure that Ms. Beavers would never again have a good job on a Corridor H construction site notwithstanding that all of her evaluations were superior and she had shown great initiative in trying to better herself.[5] The old boy network certainly made good on its threats: So far Ms. Beavers has received not one cent in compensation because notwithstanding DOH's above-cited admission, the Commission has no evidence that a reasonable settlement was ever proposed or offered.

It is obvious from both the DOH's summary of the facts and the ALJ's formal opinion that Ms. Beaver wanted to work: She had found: (1) a metier in which she was good; (2) a metier in which she had respect and responsibility; and (3) a metier in which the wages were superior to available work at her level of education in her part of West Virginia. Thus, all might have ended well if the old boy network had found her a job with a comparable contractor, moved Mr. Iser to another project, or transferred Ms. Beaver to a State job. But instead of seeking reasonable approaches to remedying a surpassing injustice, once Ms. Beaver complained, she was transferred to another job site supervised by Daniel Watts (another DOH supervisor) whom the ALJ found treated her reprehensibly. Indeed, the ALJ found that Mr. Watts and DOH:

---

5 The facts are no better summarized than in DOH's brief before the Commission, pp. 6-10.

> took away complainant's right to use a truck on the work site although other inspectors still were allowed trucks on the work site and so Complainant was forced to walk all over the job site. The job site was huge– as much as one and one-half miles long, and wide too. The ground was very rough with many rocks and dips plus you had to be cautious about large trucks passing. ... At times the heat index during the summer of 2001 was 115 degrees. Complainant had to walk over the site when temperatures were so high as to make other employees ill.

ALJ's Finding of Fact 154.

On 12 October 2001 employees John Fox and Tony Ross were laid off from the Watts job by RK&K, ostensibly because the project for DOH was substantially complete. Then, on 19 October 2001, Ms. Beaver was laid off for the same reason. However, both Mr. Fox and Mr. Ross quickly found work with Baker Engineering, another Corridor H contractor, while Ms. Beaver could find no work with any contractor. And, the ALJ specifically found that Robert Eppler wanted to hire Ms. Beaver for Baker Engineering but that she was blackballed by DOH employees Mr. Long and Mr. Burns. ALJ's Finding of Fact 158. The ALJ also found that:

> It is common for consultant employees such as Complainant to move from one employer to another as contracts are awarded. Once an inspector is recognized as a good inspector by DOH, even though a particular consultant's contract might end, the inspector will be considered for employment by DOH with another firm. At the time of the Public Hearing there were roughly 50 to 70 consultants working in District 5 alone.

Finding of Fact 157. Furthermore the ALJ found that Ms. Beavers, contrary to DOH's contention, had an excellent reputation and a fine work record as an inspector. The ALJ found:

> Moreover, Complainant's actual work efforts while at site five under Iser is uncontrovered: she took home construction books to study, came into the office over the Christmas holidays, received an 8 on a scale of 10 in a job performance done by Iser, received a pay raise and was

> congratulated for her effort [Complainant's Exhibit No. 6], and worked 10 hours a day performing both field work and office work for two Corridor H job sites. Tr. Vol. I, pages 275, 276, 299, 300, 307, and 308; Tr. Vol. II pages 19 and 20; and Tr. Vol III, pages 241 and 242, and pages 279 and 280.

Finding of Fact 160.

Accordingly, the record amply supports the ALJ's award of both back pay and front pay: The ALJ found that both Respondents had opportunities to mitigate the injury they had done, yet they chose not to do so. And the record amply supports the ALJ's conclusion that the Complainant was unable to find any comparable work anywhere in her geographical area. Thus Complainant's loss of both back wages and future wages was directly and proximately caused by the illegal actions of the Respondents.

Therefore, upon review of the entire record the Commission concludes that jointly the Respondents intentionally and maliciously destroyed Ms. Beavers' opportunity for a career: Ms. Beavers landed an entry level job with a contractor that supervised road construction for the State; Ms. Beavers applied herself to learn the skilled trade of road construction inspection; Ms. Beavers was good at her job; Eric Iser, as a DOH supervisor, made it impossible for Ms. Beavers to continue to work because of a hostile working environment; RK&K, notwithstanding notice of the sexual harassment of its employee failed to live up to its statutory duty to protect Ms. Beavers in a timely and efficient manner; and, notwithstanding that Ms. Beavers' qualifications, in the normal course of things, would have assured her continued employment on Corridor H and, thereafter, on other road projects, Ms. Beavers was blackballed and lost her great opportunity for steady, high-wage work.

3. Modification of the Commission's 22 April 2005 Order

In the Commission's 22 April 2005 Order, the Commission reversed the ALJ's award of both back pay and front pay and remanded the case to the ALJ for consideration of an apportionment of fault and a reevaluation of attorneys' fees based on the holding that the Complainant could not recover more than $3,277.45 as "incidental" damages. These holdings are clearly wrong, which is why the Commission, on motion of its Chair and the Complainant, set the matter for rehearing and the Commission thereafter granted the Complainant's motion to reconsider.

a. *Back Pay*

W. Va. Code, 5-11-10 [1994] provides in relevant part:

> If, after such hearing and consideration of all of the testimony, evidence and record in the case, the commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this article, the commission shall issue and cause to be served on such respondent an order to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, admission or restoration to membership in any respondent labor organization, or the admission to full and equal enjoyment of the services, goods, facilities, or accommodations offered by any respondent place of public accommodation, and the sale, purchase, lease, rental or financial assistance to any complainant otherwise qualified for the housing accommodation or real property, denied in violation of this article, as in the judgment of the commission, will effectuate the purposes of this article, and including a requirement for report of the manner of compliance. Such order shall be accompanied by findings of fact and conclusions of law as specified in section three [§ 29A-5-3], article five, chapter twenty-nine-a of this code.

Code, 5-11-10 [1994], then, provides the authority of the Commission to award back pay, and it also provides the Commission the option of awarding "front pay" under circumstances where reinstatement is not an option.

An award of back pay, as is specifically authorized by Code 5-11-10 [1994], does not violate defendants' right to trial by jury pursuant to W.Va. Const., art. III, § 13. Gino's Pizza of W. Hamlin, Inc. v. West Virginia Human Rights Comm'n, 187 W. Va. 312, 418 S.E.2d 758 (1992).[6]

b. *Front Pay*

Similarly, front pay is specifically authorized by Code 5-11-10 [1994] in this case because the Respondents took no steps to mitigate their injury to Ms. Beavers by rehiring her. Although Respondents have asserted that Ms. Beavers either was discharged for substandard performance or would not have been hired in the future because the jobs on Corridor H were not there, we expressly reject both arguments as a matter of fact on the entire record.

The great weight of the credible evidence is that Ms. Beavers was an excellent employee who was highly motivated, and that Ms. Beavers' inability to find further work as

---

[6]Specifically, the Court said:

> Appellee contends that an award of any amount, inclusive of back pay and attorney fees, beyond $ 2,500.00, violates its right to trial by jury pursuant to W. Va. Constitution art. III, § 13. We disagree. We expounded at great length the rationale behind the constitutionality of an award for back pay, incidental damages and attorney fees by the Human Rights Commission in Bishop Coal Co. v. Salyers, supra. We decline to depart from the precedent established by Bishop Coal. Furthermore, an award of back pay is specifically authorized by W. Va. Code, 5-11-10 [1987].
>
> 187 W. Va. 312, 318

a construction inspector was directly linked to her being blackballed. Accordingly, equitable principles require that in lieu of reinstatement, Ms. Beavers receive an award of the money she would have earned had the discrimination not occurred. Furthermore, we reject any argument that Ms. Beavers was required to mitigate her damages by doing filthy, brutal and disgusting work in a chicken slaughter house for barely more than minimum wage. Mitigation does not require degradation! The record reveals that Ms. Beavers exerted reasonable effort to mitigate her damages by seeking work comparable to what she was doing for Respondents but those efforts were unavailing.

4. The Historical Test of the Right to Jury Trial

The Respondents strenuously argue that they have been denied a right to a jury trial because the "front pay" award appears to be a "legal" type remedy covered by W.Va. Const. Art. III, §13's right to a jury trial.

In this regard, the right a jury trial under Art. III, §13 in this State is analyzed under the same standards as the right to a jury trial preserved by the Seventh Amendment to the Constitution of the United States. Criss v. Salvation Army Residences, 173 W. Va. 634 (1984). Thus, the right to jury trial is preserved and reviewed by what is called the historical test. This standard generally means that the state and federal constitutions preserve the right of jury trial as it existed in English history at some past time, either in 1791 when the Seventh Amendment to the Constitution of the United States was adopted or, in the case of the states,

at the date of the state constitutional section.[7] See, Fleming James, Jr., "Right to a Jury Trial in Civil Actions," 72 Yale L. J. 655, 657 n.15 (1963). Under the historical test, litigants are entitled to have a claim presented to a jury if the claim would have received a jury trial under the common law of England at the time the Constitution was ratified. Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916)).

a. *The Outline of the Jury Trial Test*

At common law, not all civil matters were tried to a jury. A jury trial was customary in suits brought in English law courts, while it was not available at all in courts of equity. Tull v. United States, 481 U.S. 412, 417 (1987). Thus, at common law, if a claim were a legal action before a law court so that it might receive a "legal" remedy, a jury trial right existed; if, however, a claim was an equity action at the time of the ratification of the Seventh Amendment or a jury trial provision in a state constitution so that it might receive only an "equitable" remedy, there was no right to a jury trial.

In addition, the Supreme Court of the United States has construed the language of the Seventh Amendment to require a "jury trial on the merits in those actions that are analogous

---

7

"'The right of trial by jury,' which the Constitution declares 'shall be preserved,' must be understood to be the common-law right, as settled and existing in this State in 1880, the time at which the amendment of this section was adopted by the people." Hickman v. B & O R.R. Co., 30 W. Va. 296, 4 S.E. 654 (1887), overruled on other grounds Richmond v. Henderson, 48 W. Va. 389, 37 S.E. 653 (1900).

to 'Suits at common law.'" Id. In Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830), the Supreme Court stated the term "Suits at common law" refers to "'suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.'" Id. at 447. The Supreme Court went on to state, "the Amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." Id. at 447. This analysis applies not only to common-law forms of action, but extends to causes of action created by Congress where legal rights are at stake. Tull, supra, at 417.

The historical test's legal/equitable remedy distinction remains the standard today. This is so even though the American federal court system and many state systems like West Virginia's have merged what were once separate courts[8], or at least separate systems of adjudication under separate procedural rules[9], into one unified procedure.[10] Our sister State

---

8

One of the reasons that so many corporations are headquartered in Delaware is that Delaware still has a specialized chancellery court that hears shareholder derivative matters and other "equitable" issues involving corporations. Delaware's chancellery division is well-known for being competent and fair, so Delaware actually "sells" its chancery court services to business.

9

For example, before the passage of the West Virginia Rules of Civil Procedure, a litigant began an action in equity by filing a "bill in equity" while a litigant began a legal proceeding by filing a "declaration." The term "bill in equity" is still used in Virginia, but the separate law and equity pleadings will be abolished 1 January 2006 when Virginia adopts the federal model and converts to one form of action, the "civil action."

10

In the Federal system this is called The Federal Rules of Civil Procedure and in the State system, this is called The West Virginia Rules of Civil Procedure.

of Virginia, however, still retains separate equity jurisprudence with separate rules, separate dockets, and separate terminology. See, Rules of the Supreme Court of Virginia, Part II, "Equity Practice and Procedure." But with the merger of procedures for claims at law and claims in equity in the federal system and West Virginia today, this historical test seems antiquated and even "irrational." Paul D. Carrington, "The Seventh Amendment: Some Bicentennial Reflections," 1990 U. Chi. Legal F. 33, 74-75. Nevertheless, neither the courts, the state legislatures, nor Congress has changed the applicable historical test standard for determining the right to jury trial.

Thus, to determine whether a particular action will resolve legal rights, both the nature of the issues involved and the remedy sought are examined. Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990). The historical test analysis has two steps: first, the modern statutory action in dispute is compared to the 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity; second, the remedy sought is examined by determining whether it is legal or equitable in nature. Id. (citing Tull, 481 U.S. at 417-18). The Supreme Court has stated that the second inquiry is the more important of the two. Id.

Under the first prong, if an action would have been brought before a court of law in England, then it is legal in nature and generally requires a trial by jury. Otherwise, it is an equitable action. Under the second prong, if the remedy sought is one for which only a court of law in England had the power to award, then the remedy is a legal one. Otherwise, the

remedy is equitable. An example of a legal remedy is punitive damages. An example of an equitable remedy is an injunction.

b. *Administrative Proceedings Have No Common Law Parallel*

However, the Supreme Court has drawn a distinction between public rights and private rights created by statute and enforced in non-jury settings. See, Atlas Roofing Co. v. Occupational Safety & Health Review Comm., 430 U.S. 442, 450 n.7 (1977). Atlas Roofing involved Congress' creating a legal claim by statute against unsafe working conditions in the workplace. Any alleged violations are assigned to administrative agency adjudication. The Court found this action not to be a violation of the employer's Seventh Amendment jury right. The Court firmly stated:

> At least in cases in which "public rights" are being litigated, e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact the Seventh Amendment does not prohibit Congress from assigning the fact-finding function and initial adjudication to an administrative forum with which the jury would be incompatible.

Id. at 450.

In addition, the U. S. Supreme Court in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) addressed the Seventh Amendment jury right question in relation to the creation of the National Labor Relations Act, where a new federal agency, the National Labor Relations Board, would determine unfair labor practices on the part of an employer. The Court found no violation of the right to jury trial because under the historical test's first-prong standard an unfair labor practice proceeding "is not a suit at common law or in the

nature of such a suit" notwithstanding that substantial pack pay damages can be awarded. In Curtis v. Loether, 415 U.S. 189 (1974) the Court further clarified its Jones & Laughlin holding when it stated that Jones & Laughlin upheld "congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment." Id. at 194-195.

c. *Background of Equity*

In England in 1791 there were three courts – the King's Bench, the Common Pleas and the Exchequer -- administering the common law.[11] In addition, there were a number of other courts, including an Admiralty Court and an Ecclesiastical Court that had other jurisdiction and in which juries did not appear. But above all these courts loomed the Court of Chancery administering equity. If each of these courts had had exclusive jurisdiction over certain subjects, there would now be comparatively little difficulty in distinguishing a suit at common law from a suit in equity or in admiralty or in any other branch of the law. We could perform the test simply by examining the subject matter of the suit.

And today it is easy to distinguish between the common law and, say, admiralty. But if the choice must be between common law and equity, a judge is inevitably destined to

---

11

The broad outline of equity jurisprudence in 1791 has been thoroughly researched because of the national importance of the Seventh Amendment. Equity jurisprudence persisted into the 19th Century largely unaltered in its basic features, so in the absence of detailed authority showing some major change in equity practice between 1791 and 1880, the Commission holds that the federal precedent on Seventh Amendment matters is entirely persuasive under the West Virginia Constitution, Art III,§13 .

come out at roughly the same place as he or she went in! For equity created the greater part of its jurisdiction by abstractions from the common law.[12] Suitors at common law who found its processes inequitable petitioned the Chancellor to intervene. At first, no doubt, he (and there were no "shes" at this time) did so ad hoc and on the merits of the particular case. But by 1791 the Chancellor's interventions were governed by three main principles. These were first set out by John Mitford in 1780 in a celebrated treatise, and approved by our own Justice Story in 1836. Joseph Storey, Commentaries on Equity Jurisprudence (1836). The suitor had to show (a) that the common law gave him no right in a case in which "upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong"; (b) that, although the common law recognized the right, its powers were insufficient to afford a complete remedy; or (c) that the court was being made "an instrument of injustice." J. Mitford, A Treatise on the Pleadings in Suits in the Court of Chancery (2d ed. Dublin 1789) (1st ed. London 1780)[13] pp. 102-103.

12

Indeed, Lord Devlin has concluded that 18th Century equity jurisprudence performed the same type of law modernizing function that is today accomplished though our own courts' use of the due process clause of both the federal and state constitutions. See, Patrick Devlin, "Equity, Due Process and the Seventh Amendment: A Commentary on the *Zenith* Case," 81 Mich. L. Rev. 1571 (1983).

13

The treatise was first published in 1780, when the author described it as "an attempt to methodize the subject." He made substantial alterations for the 1789 edition; I have used this as being nearest in time to 1791. The book was used extensively by bench and bar and ran into many editions. Mitford himself, as Lord Redesdale, became Lord Chancellor of Ireland, an important equity judge, in 1803. The treatise served as a major foundation for Justice Story's equity jurisprudence, which was instrumental in bringing "equity into the mainstream of American law." G. Dunne, Justice Joseph Story and the Rise of the Supreme Court 372 (1970).

The obvious example of the first of these principles in action is the creation of the trust. The common law would not recognize the informality of the trust, relying as heavily as it did on formal written documents showing contracts or land ownership, so a suit for breach of trust was not entertained at all in a court of common law. Therefore, trust law belonged exclusively to equity. There was, however, no such clear distinction of subject matter in a case in which the common law recognized the right but could not give an adequate remedy[14] or in a case in which the common law court, because of its faulty process, found itself being used as an instrument of injustice.

In many, perhaps most, of these cases the Chancellor could have granted the relief sought without interfering with the trial of the main point by a jury at common law. Thus, he could have told the suitor whose complaint was that damages would be an inadequate remedy that the suitor must first obtain the verdict of a jury on the question of liability. On occasions this is what the Chancellor did. But in general the chancellor found that most cases cannot be split between courts without the certainty of additional expense and the risk of injustice. So there was soon established in the Chancery a general principle against multiplicity of

---

14

Take as an example of the inadequate remedy a case of trespass in which an award of damages, the only remedy known to the common law, would not stop the repetition of the trespass. The plaintiff in the common-law suit could then petition the Chancellor to issue an injunction forbidding any further trespass under pain of imprisonment. Or it might be the defendant in a common-law suit who needed some procedural aid, such as discovery, unknown to the common law and which only the Chancellor could order. Discovery, now, of course, is provided automatically in all consolidated civil actions so there is no longer a need to appeal to a chancellor for discovery. See, Rules 33 and 34, W.Va. Rules of Civil Procedure.

suits: "[T]he court will not put him to sue doubly." Jesus College v. Bloom, 3 Atk. 262, 263, 26 Eng. Rep. 953, 954 (Ch. 1745). Thus, in addition to exclusive equity, in which there was never any suit at common law at all, there arose what came to be called concurrent equity made up of suits at common law that, in effect, the Chancellor decided himself. In so doing, he necessarily denied the suitor at common law his right to trial by jury.

d. *How Historic Equity Affects Commission Decisions*

What was the effect of this situation on the Seventh Amendment and W.Va. Const. Art. 3, §13? The key, in the Commission's opinion, is found in the word "preserved," which is used in both documents. In 1791, the right to trial by jury in a suit at common law was subject to the power of the Chancellor to stay the suit. The Seventh Amendment did not extend that right; it preserved it. The right that it preserved was not unqualified but subject to the Chancellor's power to stay. Thus, the historical test involves an inquiry not only into what suits would, in 1791, have been entertained at common law, i.e., what were legal rights as opposed to rights that were exclusively equitable -- a comparatively easy matter to determine -- but also as to whether in 1791 the Chancellor would have allowed the suit to proceed at common law.

"In Suits at common law, . . . the right of trial by jury shall be preserved." The text is deceptively simple. It implies that in 1791 the right to trial by jury in every suit at common law was secure and needed only to be preserved. Nevertheless, the fact was, as every lawyer who has studied a bit of legal history would know, that a plaintiff who embarked on a suit

at common law had no guarantee that it would end up with the issue being decided by a jury. There could be a suit properly brought at common law upon a legal claim and seeking only a legal remedy, such as an action of ejectment, and yet the Chancellor would intervene and decide the matter himself or, if a judgment had already been obtained, the Chancellor would prohibit its enforcement.

"Preserved" is not the same as "guaranteed." See, Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n., 430 U.S. 442, 459 (1977) (White, J.).[15] If the Seventh Amendment were to be interpreted as guaranteeing the right to trial by jury in every suit that could properly be entertained at common law, the power of concurrent equity would have been totally destroyed. The Chancellor got his way by prohibiting the litigant from pursuing his rights at common law and offering him, if he was entitled to it, equitable relief instead. Thus every intervention by equity into a suit at common law could end up by denying the litigant his right to trial by jury. And, it cannot be thought that it was the object of either the Seventh Amendment or W.Va. Const. Art 3, §13 to put an end to all such interventions and

---

15

"Rather, as a general rule, the decision turned on whether courts of law supplied a cause of action and an adequate remedy to the litigant. If it did, then the case would be tried in a court of law before a jury. Otherwise the case would be tried to a court of equity sitting without a jury. Thus, suits for damages for breach of contract, for example, were suits at common law with the issues of the making of the contract and its breach to be decided by a jury; but specific performance was a remedy unavailable in a court of law and where such relief was sought the case would be tried in a court of equity with the facts as to making and breach to be ascertained by the court." [footnotes omitted.]

Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 458-459.

so to deprive equity altogether of its power over the common law. To preserve trial by jury as it existed in 1791 or 1880 is, therefore, to preserve it subject to the intervention of equity as it was in 1791.

e. *West Virginia's Right to Jury Trial in Light of Historical Equity Jurisdiction*

With this detailed federal precedent interpreting the Seventh Amendment to the Constitution of the United States in mind, we now turn to W.Va. Const. Art. 3 §13, which parallels the Seventh Amendment and says:

> In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.

Note that Art. 3 §13 also uses the word "preserved." Our Supreme Court of Appeals has wrestled with the applicability of W. Va. Const., Art. 3 §13 to the Human Rights Commission and generally determined that "restitution" in the form of back pay, reinstatement, or front pay wages in lieu of restitution[16] are "equitable" remedies that do not require a jury when awarded by the Commission. Thus in Perilli v. Board of Educ., 182 W. Va. 261 (1989) our Court said:

> We recognized in Price v. Boone County Ambulance Authority, 175 W. Va. 676, 337 S.E.2d 913 (1985), that actions under the state Human Rights Act may be brought initially either

---

16

Casteel v. Consolidated Coal Co., 181 W.Va. 501 (1989) held in section VII that front pay is provided in lieu of reinstatement. Obviously, if reinstatement is an equitable remedy and entirely within the control of the Respondent, front pay in lieu of reinstatement is an equitable remedy. It is an axiom of mathematics that things equal to the same quantity are equal to one another.

> before the Human Rights Commission (in an administrative hearing) or in the circuit courts (as a civil cause of action). W. Va. Code, 5-11-13 [1983]. The plaintiff's option may be influenced by the trade-offs involved. An administrative hearing may be more flexible, cheaper, and faster, but, as we pointed out in Salyers, supra, the Human Rights Commission has limited jurisdiction in awarding money damages. The circuit courts may make greater awards, but likely at greater legal expense and longer delay. In practice, it is likely that a plaintiff will choose the administrative route when his case is strong but his damages slight, and proceed in the courts, before a jury, when he has a riskier but potentially more valuable claim. Whatever litigants do in practice, we made clear in Price that plaintiffs may elect the procedure they prefer. W. Va. Code, 5-11-13 [1983].

Obviously this approach, integrating as it does both legal and equitable principles, is entirely consistent with equity practice in the 18th Century, and therefore, constitutional.

f. *The Equitable Clean Up Doctrine*

Our Court's surpassing consistency on these subjects can be seen in the limits established for "incidental" damages by Human Rights Commission v. Pearlman Rlty. Agcy., 161 W.Va. 1 (1981) and Bishop Coal Co. v. Salyers, 181 W.Va. 71 (1989). There is no question that compensation for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity are exclusively legal in nature and damages for such affronts were never the primary object of a suit in equity. The reason, then, for the limitation on incidental damages goes back to the "equitable clean-up doctrine." Although courts speak little of this doctrine today because of the merger of law and equity under the Federal Rules of Civil Procedure and state rules like the West Virginia Rules of Civil Procedure modeled on the Federal Rules, the equitable clean up doctrine was of enormous importance when courts of law and courts of equity were separate courts with separate judges.

And, indeed, that is still the situation with the West Virginia Human Rights

Commission in that the Commission is unable to provide "legal" relief: The Commission is an adjudicatory tribunal whose powers are limited to providing statutory relief of an exclusively equitable nature. The equitable clean-up doctrine, also called "incidental" or "ancillary jurisdiction," historically allowed the chancellor who granted equitable relief to grant legal relief as well.[17] This foreclosed jury trials on legal issues that equity courts treated as incidental to an equitable claim. Under the clean-up doctrine, the courts of equity addressed legal issues only so far as their decisions were incidental or subordinate to the determination of some equitable question. The doctrine served to economize litigation by obviating the need for two separate actions in the courts of law and equity.[18] But the

---

17

Under the clean-up doctrine, once equity "properly acquire[s] jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law." Greene v. Louisville & I.R.R., 244 U.S. 499, 520 (1917); see, De Funiak, Handbook of Modern Equity, § 99. For instance, an action for an injunction accompanied by a request for a money judgment presents both equitable and legal claims. Once equity acquired jurisdiction over the action to decide the injunction claim, the chancellor had discretion to decide factual questions related to the legal request for a money judgment, including the actual amount of the award. See Patrick Devlin, "Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment," 80 Colum. L. Rev. 43, (1980).

18

Following the merger of law and equity, federal courts retained jurisdiction over equitable and legal issues raised in a single civil action, eliminating the historical justification for the clean-up doctrine. Hence, post-merger Supreme Court opinions have disapproved of the doctrine. Addressing a counterclaim under a legal theory in Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) the Court held that when courts of law can provide an adequate legal remedy on any issue, a party has a constitutional right to a jury trial on that issue regardless of whether equitable issues arise in the same suit. Then, in Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1964) the Court stated that "the [rule] that the right to trial by jury may be lost as to legal issues where those issues are characterized as 'incidental' to equitable issues . . . may [not] be applied in federal courts." Id. at 470. The Court's refusal to apply the doctrine in recent cases reflects its desire to restrict the doctrine as an outdated procedural device, but it still has vitality in a circumstance such as the Commission because the Commission, like a court of equity of yore, can award only equitable-type relief.

Commission's authority to provide various equitable remedies in the form of restitution through back pay, reinstatement, or restitution in lieu of reinstatement through front pay should not be confused with the Commission's limited authority to award "incidental" relief under Supreme Court of Appeals authority that instantiates into Commission procedure the principles of the equitable clean up doctrine.

5. Incidental Damages versus Equitable Relief

Thus, faithful to the "equitable clean-up doctrine," the West Virginia Supreme Court of Appeals authorized only "incidental" damages in Human Rights Commission v. Pearlman Rlty. Agcy., supra, which was entirely in keeping with ancient equity practice and well within Federal Seventh Amendment jurisprudence as well as jurisprudence interpreting our own W.Va. Const., Art. 3 §13. Briscoe Home v. Ohio River R.R., 78 W. Va. 502, (1916).[19] In Moundsville Water Co. v. Moundsville Sand Co., 124 W. Va. 118 (1942) our Court said in Syl. Pt. 6:

19

Brisco did not actually award incidental legal relief in an equitable action, but the Court's discussion of the claim indicates that such relief was commonly awarded by courts sitting in equity. The Court said:

> And with respect to this bridge and the other relief prayed for the opinion says: "The demands for compensation for replacing the bridge and for damages for the loss of land, occasioned by the washing of Miller's Run, are purely legal and could not be enforced here except as incidents to the granting of some equitable relief. Whether the enforcement of them could be had as incidents to the enforcements of covenants in the contract with which they are in no way connected it is unnecessary to decide.

W.Va. at 507.

> Damages for the trespass remedied by an injunction may be ascertained and decreed in the injunction suit.

6. Front Pay is an Equitable Remedy

The Commission's authority is exclusively statutory and its remedies are all equitable in nature. W. Va. Code , 5-11-10 [1994] allows the Commission:

> ...to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, admission or restoration to membership in any respondent labor organization...

In the case now before us, the Respondents have consistently taken the position that they cannot reinstate Ms. Beavers, either because (in the case of RK&K) RK&K no longer has a contract that would require Ms. Beavers' services, or (in the case of DOH) because DOH was not Ms. Beavers' employer. The Commission finds, on the basis of the total record, that these demurrers are pretextual: properly motivated, both Respondents could have found a way to reinstate Ms. Beavers to a job for which she is qualified, so both Respondents' demurrers flunk the "duck test." Loudermilk v. Loudermilk, 183 W. Va. 616 (1990).[20]

Throughout these proceedings, no offer of reinstatement was ever made and the Commission can take the Respondents' reluctance to provide an employment opportunity through which Ms. Beavers could have completely mitigated her future lost wages damages to be tantamount to a refusal to reinstate. And, the record shows that when an opportunity for Ms. Beavers arose with Baker Engineering, Respondent DOH interfered so as to eliminate

---

[20] "The duck test emerges from the old adage that if it walks like a duck, quacks like a duck, and looks like a duck, it is probably a duck." 183 W.Va. at 618 n.2.

the opportunity. Front pay, then, is awarded only when the statutory remedy of reinstatement is either not available or reinstatement is frustrated by the acts of the respondent(s). Fadhl v. City & County of San Francisco, 741 F.2d 1163, 1167 (9th Cir. 1984) ("An award of front pay is made in lieu of reinstatement.")[21] Thus, in this case it makes no difference whether failure to reinstate was the result of refusal on the part of the Respondents or impossibility. The result is the same: Ms. Beavers lost a great opportunity through no fault of her own and entirely through the fault of the Respondents.

A court of equity's most notable power was the power to award an injunction. Yet if a recalcitrant defendant refused to follow the court's injunction order or put frivolous obstacles in the way of a Plaintiff's availing himself or herself of the court's relief, a court of

---

21 See, also, e.g.. Cowan v. Strafford R-VI Sch. Dist., 140 F.3d 1153, 1160 (8th Cir. 1998) (front pay award considered alternative remedy where reinstatement "impossible"); Selgas v. American Airlines, Inc., 104 F.3d 9, 12 (1st Cir. 1997) ("front pay is available as an alternative to [reinstatement]" in Title VII action); Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1182 (2d Cir. 1996) (stating that front pay is awarded in sound discretion of the district court where reinstatement is inappropriate); Patterson v. PHP Healthcare Corp., 90 F.3d 927, 936 n.8 (5th Cir. 1996) (stating that front pay may in some cases be invoked in place of reinstatement); Suggs v. Servicemaster Food Educ. Management, 72 F.3d 1228, 1234 (6th Cir. 1996) (stating that front pay and reinstatement are alternative, rather than cumulative, remedies in employment discrimination context); Ramirez v. Oklahoma Dep't of Mental Health, 41 F.3d 584, 588 (10th Cir. 1994) (plaintiff sought reinstatement "or, in lieu thereof, front pay"); McKnight v. General Motors Corp., 973 F.2d 1366, 1368 (7th Cir. 1992) (stating that front pay may be awarded "in lieu of reinstatement"); Weaver v. Casa Gallardo, 922 F.2d 1515, 1528 (11th Cir. 1991) ("Prevailing Title VII plaintiffs are presumptively entitled to reinstatement or front pay."); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 890 (3d Cir. 1984) (stating that front pay in Title VII cases "is an alternative to the traditional equitable remedy of reinstatement").

equity could award money damages through a proceeding in civil contempt.[22] Thus, there is ample authority that when the purposes of an injunction, or in this case, an order of reinstatement, are frustrated by a Respondent, it is then proper to award money damages in lieu of the injunction. That was equity practice in West Virginia in 1880. State ex rel. Mason v. Harper's Ferry Bridge Co., 16 W. Va. 864 (1879).[23]

Furthermore, this is generally the view in other contexts where administrative agencies or courts have been charged with the administration of remedial statutes. Dominic v. Consolidated Edison Company, 822 F.2d at 1258 (Second Circuit -- under the ADEA[24] "front pay is a matter for the exercise of the trial judge's equitable discretion"); Wildman v. Lerner

---

22

"The appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemner, or an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order." Syl. pt. 3, State ex rel. Robinson v. Michael, 166 W.Va. 660, 276 S.E.2d 812 (1981). [Emphasis added.] Cited with approval in United Mine Workers v. Faerber, 179 W. Va. 73 (1986).

23

Syl. Pt. 3 of Mason v. Harper's Ferry Bridge Co. provides:

> The Supreme Court of Appeals may punish a party summarily for such a contempt. Its right to do so is inherent and essential to the existence of the court; and the discretion involved in this power is in a great measure arbitrary and undefinable, and for a contempt of this character it has been in no degree restricted by our statute-law. This court may order, that that which has been done in disobedience of its lawful process shall be undone, where justice to any person requires this course to be adopted. When the contempt is wilful, it may imprison the party; and when merely inadvertent and reckless, it may impose a fine on the party. If a fine be imposed, the court may imprison the party, if such fine be not paid in the time prescribed by the court.

[24]Age Discrimination in Employment Act.

Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985) (award of front pay is within the trial court's discretion); and Gibson v. Mohawk Rubber Co., 695 F.2d at 1100 (Eighth Circuit -- monetary damages in lieu of reinstatement constitute an equitable rather than a legal remedy and award is within the trial court's discretion).

"[A]s a prospective make-whole remedy, front pay at best 'can only be calculated through intelligent guesswork.' Sellers v. Delgado College, 781 F.2d 503, 505 (5th Cir. 1986). 'We recognize its speculative character by according wide latitude in its determination to the district courts.' Id. We find that an award covering a five year period was within the court's discretion." Deloach v. Delchamps, Inc., 897 F.2d 815, 822 (5th Cir., 1990).

Although ten years of front pay is rather longer than is common in these matters, we find from a complete review of the evidence that the ALJ's decision is supported by the substantial weight of the credible evidence and that he neither abused his discretion nor is clearly wrong. The evidence is uncontroverted that the Corridor H project will continue through 2012. The great weight of the credible evidence also shows that Ms. Beavers was intentionally and maliciously blackballed so that she was denied the opportunity to mitigate her damages by applying her skills and training to a job for which she was suited and for which she had enthusiasm. The record also supports the ALJ's finding that others who were laid off quickly found similar work with other contractors because they had valuable skills in demand on the Corridor H project. And, there is little or no reason to believe that at some time before the termination of the Corridor H project in 2012 there will no longer be a need

to inspect the work!

Under these circumstances, and given that both Respondents had it in their power to offer, either themselves or through their wide network of business associates and independent contractors, alternative appropriate employment, we affirm the award of front pay by the ALJ.

7. The ALJ's Adjustment for Tax Consequences was Appropriate

The Respondents complain that the ALJ awarded an additional sum of $148, 231 to offset Ms. Beavers' enhanced tax liability as a result of receiving all of her damages in a lump sum. There is nothing unprecedented about such an award in a case where the object of the award is to make the Complainant whole pursuant to a statutory scheme that expressly calls for making the Complainant whole. After all, had the Respondents not caused Ms. Beavers to lose her job, her wages would have been paid over years, and she would not have been required to pay a substantial part of her earnings to the State and federal governments under the progressive income tax scheme that penalizes high income earners. The federal civil rights act has been interpreted as providing an award for tax consequences as an equitable remedy. Blaney v. International Ass'n of Machinists and Aerospace Workers, 151 Wn.2d 203, 215-216, 87 P.3d 757 (2004). Van Pham v. City of Seattle, 103 P.3d 827, 834 (Wash. Ct. App., 2004). And, the Commission is particularly persuaded by the reasoning of the Court in O'Neill v. Sears, Roebuck & Co., 108 F. Supp. 2d 443 (D. Pa., 2000) and believes it worth quoting that Federal Court at length:

> Prejudgment interest, the Third Circuit held, "reimburse[s] the claimant for the loss of the use of its investment or its funds from the time of the loss until judgment is entered."

> Starceski, at 1102 (quoting Berndt v. Kaiser Aluminum & Chemical Sales, Inc., 789 F.2d 253, 259 (3d Cir. 1986)). Since the Third Circuit recognized the economic necessity of compensating for the lost "time value of money" in order to comply with the "make-whole" doctrine, we anticipate that the Third Circuit would likewise compensate the claimant for the depletion of that money due to the increased taxes to which the award is subject on account of its being received in a single tax year, rather than being spread out over time.
>
> The argument is particularly compelling in the case of front pay, since the plaintiff has already had his front pay recovery reduced to present value, on the assumption that he can now invest the money and receive a yearly return equal to his lost wages. However, if the plaintiff must pay a higher tax on the present value of his earnings, this leaves less for investment. Hence, the plaintiff will not, in fact, realize an investment gain large enough to equal the future wages that he is not getting as a result of the defendant's discriminatory conduct. As the television advertisement of a few years ago said: "It's not how much you make, it is how much you keep." The goal of the ADEA is to allow plaintiff to keep the same amount of money as if he had not been unlawfully terminated. Compliance with this goal requires reimbursement for the reduced amount of front pay money that the plaintiff has to invest as a result of higher taxes, as well as reimbursement for the higher taxes he must pay on his back wages caused by getting this money in a lump sum.

108 F. Supp. 2d at 446-447, [emphasis added.] See, also, Arneson v. Callahan, 128 F.3d 1243, 1247 (8th Cir., 1997) where the remedy of enhancement for taxes is recognized, but was not awarded against the United States only because of peculiar federal statutes.

8. Dismissal of Eric Iser was Proper

Respondents complain that the ALJ should not have allowed Complainant to dismiss Eric Iser from the action. However, no cross claim had been asserted against Mr. Iser and no evidence was produced by the other Respondents that Mr. Iser could have responded to an award of damages. Furthermore, the Complainant wanted Mr. Iser's testimony and the testimony of a witness who was a client of Mr. Iser's lawyer. In return for a release of Mr. Iser, Mr. Iser agreed to testify and his lawyer agreed to produce the desired third party

witness. The Respondents produced no evidence that they were damaged by Mr. Iser's release, and there is no evidence that the settlement with Mr. Iser was in "bad faith."[25] The record reveals that the Complainant got as much as she could from Mr. Iser. Thus, the ALJ did not abuse his discretion and was not clearly wrong in dismissing Mr. Iser.

10. Attorneys' Fees

Respondents complain that adequate inquiry was not made into the reasonableness of attorneys' fees. When a fee petition is submitted to the ALJ, he or she should scrutinize the petition to determine whether it is within the normal range for attorneys' fees given, among other things, the nature of the work, the volume of the record, the amount of time devoted to the case, and the skill of the attorneys.[26] If, on a prima facie basis, the fee petition is

---

[25] This case is reminiscent of plea bargains in criminal cases when the defendant trades a guilty plea for an agreement by the prosecutor that the prosecutor will stand silent on the issue of sentence. When the defendant has been caught red-handed with a ski mask and double-barreled shotgun right outside the recently-robbed Kroger store, he can't really bargain for very much: He takes what he can get, and so it was in Ms. Beavers' case.

[26] A more elaborate analysis of third party liability for attorneys' fees in a fee-shifting arrangement may be found in Syl. Pt. 4 of Aetna Casualty & Sur. Co. v. Pitrolo, 176 W. Va. 190 (1986) where our Court said:

> Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

reasonable, the burden shifts to the Respondents to show, among other things, that the rates are unreasonable, the work was unnecessary, or the billing records contain a mistake.

The Respondents did not challenge the fee petition below and we find, looking at the entire record, that a fee of $118,173.03 is, if anything, quite modest.

Accordingly, the judgment of the ALJ is affirmed. It is hereby ordered by the Commission that:

1. As a result of the Respondents' unlawful discriminatory conduct, Complainant is entitled to an award of $3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity. Respondents DOH and RK & K are jointly and severally liable for this amount.

2. As a result of the Respondents' unlawful discriminatory conduct, Complainant is entitled to back pay and future lost wages and benefits as a result of her terminations from employment on Corridor H projects as an Inspector and her subsequent blackballing by DOH in the amount of $345,873.

3. To offset the effect of increased taxes that the Complainant would need to pay as a result of receiving the award to which she is entitled in a lump sum in a single year, the past and future wages of $345,873 must be enhanced by a factor of 1.428, giving a total award for back pay and future lost wages in the amount of $494,104. The Respondents are jointly and severally liable for this award.

4. The Complainant is entitled to an award of her reasonable attorneys' fees and costs incurred in the prosecution of this matter in the amount of $118,173.03. The Respondents are jointly and severally liable for this award.

5. Respondents shall tender to Complainant prejudgment and post judgment interest at a simple interest rate of ten percent per annum on the back pay and future lost wages award from 14 October 2003 until such time as the back pay and future lost wages are tendered. The Respondents are jointly and severally liable for the payment of pre-judgement and post-judgement interest..

It is furthered ORDERED that all stays heretofore entered in this matter are hereby dissolved.

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 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 7th day of July, 2005 in Charleston, Kanawha County, West Virginia.

IVIN B. LEE, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ANGELA S. BEAVERS,

Complainant,

v.

Docket No.: ES-394-02
EEOC No.: 17JA200237

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS and ERIC ISER , in his INDIVIDUAL CAPACITY,

Respondents.

ANGELA S. BEAVERS,

Complainant,

v.

Docket No.: ESREP-134-03
EEOC No. 17JA300020

RUMMEL, KLEPPER & KAHL, L.L.P.

Respondent.

CERTIFICATE OF SERVICE

I, Ivin B. Lee, Executive Director for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing **FINAL ORDER** by depositing a true copy thereof in the U.S. Mail, postage prepaid this 7th day of July 2005 to the following:

Angela S. Beavers
99 Mount Hope Drive
Moorefield, WV 26836

WV Dept. Of Transportation/
Division Of Highways
State Capitol Complex
Building 5, Room 519-A
Charleston, WV 25305

Eric Iser, Project Supervisor
WV Dept. Of Transportation/
Division Of Highways
P. O. Box 99
Burlington,WV 26710

Rummel, Klepper & Kahl, L.L.P.
1 Grand Central Park, Suite 2040
Keyser, WV 26726

David M. Hammer, Esquire
Hammer Ferretti & Schiavoni
408 West King Street
Martinsburg, WV 25401
Counsel For Complainant, Angela S. Beavers

Barbara L. Baxter, Esquire
WV DOT/DOH/Legal Division
State Capitol Complex
Building 5, Room 519-A
Charleston, WV 25305
Counsel For Respondent, WVDOT/DOH

Barbara H. Allen, Esquire
Managing Deputy Attorney General
Attorney General's Office
State Capitol Complex, E-26
Charleston, WV 25305
Counsel For Respondent, WVDOT/DOH

Harry P. Waddell, Esquire
300 West Martin Street
Martinsburg, WV 25401
Counsel For Respondent, Eric Iser

Charles R. Bailey, Esquire
Vaughn T. Sizemore, Esquire
Bailey & Wyant, PLLC
P. O. Box 3710
Charleston, WV 25337-3133
Counsel For Respondent, Rummel, Klepper & Kahl, L.L.P.

IVIN B. LEE, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION