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May 2, 1995

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Re: Barbara Burns v. Smoot Coal Company, Inc.,
Fork Lick Coal Processors, Inc., and
Paul F. Fazenbaker, Sr., President
Docket Nos. ES-22-87, REP-278-87 and REP-307-87

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled action. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

Norman Lindell

NORMAN LINDELL
ACTING EXECUTIVE DIRECTOR

Enclosures
Certified Mail/Return
Receipt Requested

cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General
Civil Rights Division

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BARBARA BURNS,

Complainant,

v.

DOCKET NO. ES-22-87
REP-278-87
REP-307-87

SMOOT COAL COMPANY, INC., FORK LICK COAL PROCESSORS, INC., and PAUL F. FAZENBAKER, SR., President,

Respondents.

FINAL ORDER

On April 27, 1995, the West Virginia Human Rights Commission reviewed the Final Decision of the Administrative Law Judge in the above-styled action issued by Administrative Law Judge Richard M. Riffe. 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 thereto filed in response to the Administrative Law Judge's Final Decision, the West Virginia Human Rights Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision as its own, except for such modifications and amendments are set forth immediately hereinbelow.

The Final Decision of the Administrative Law Judge is hereby modified as follows: On page 5, the second paragraph, beginning with the sentence "[t]he second problem, . . ." and ending with the words "for the respondent[.]" has been deleted.

It is, therefore, the Order of the West Virginia Human Rights Commission that the Final Decision of the Administrative Law Judge

be attached hereto and made a part of this Final Order, except as modified by this Final Order as set forth hereinabove.

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 2nd day of May, 1995, in Charleston, Kanawha County, West Virginia.

Norman Lindell

NORMAN LINDELL
ACTING EXECUTIVE DIRECTOR

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed, is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the commission awards damages other than back pay exceeding $5,000.00; (2) cases in which the commission awards back pay exceeding $30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BARBARA J. BURNS,

Complainant,

v.

DOCKET NUMBERS: ES-22-87
REP-307-87
REP-278-87

SMOOT COAL COMPANY, INC.;
FORK LICK COAL PROCESSORS, INC.;
PAUL F. FAZENBAKER, SR, PRESIDENT,

Respondents.

FINAL DECISION

A.

BOILER PLATE

This matter came on for hearing on 3 August 1994 at the Webster County Courthouse, Webster Springs, West Virginia. The complainant appeared in person and by her attorney Betty Jean Hall; the respondent appeared by its attorney Terry D. Reed. All proposed findings of fact, conclusions of law and argument submitted by the parties have been considered and reviewed in relation to the record. Where the proposed findings, conclusions and argument are consistent with this order, they have been adopted; where they are inconsistent with this order they have been rejected. Each proposed finding and conclusion that does not appear in this order has been rejected as unnecessary, irrelevant, cumulative or not supported by the evidence. Where the testimony of any witness is not consistent with

the findings of fact as stated herein, that testimony was not credited. Where any finding of fact should have been labeled a conclusion of law or vice versa, it should be so read. The findings of fact are based upon the evidence produced taking into account each witness' motive, state of mind, strength of memory and demeanor while on the witness stand and considering the plausibility of the evidence in view of the other evidence of record.

This case has been the subject of inordinate delay. Prior to my receiving it the Commission misplaced parts of the file and that, along with collateral litigation, caused initial delay. Then, I heard the case as I was heading out the door to another job. Initially, I had agreed to write the decision after I had left, but a dispute with the previous executive director resulted in the case going back to the Commission for someone else to handle. The case again languished. Then that executive director left and his successor arranged with me to write this order. For my part in the delay, I apologize.

B.

INTRODUCTORY COMMENTS

The issues in this claim were narrowed considerably prior to hearing. Respondent admitted the discriminatory acts alleged in each claim number and stipulated that the amount of incidental damages complainant suffered with respect thereto exceeded the Commission's jurisdictional limit. Complainant, in her brief, conceded that she was limited to $2,950.00 per claim number in incidental damages.

regardless of whether each named respondent was separately liable. (In other words, it is undisputed that plaintiff is entitled to $2,950.00 per claim times three claims, or $8,850.00, in incidental damages.) No interest accrues on incidental damages; rather, they are more akin to general damages than special damages.

What remained were two questions: a) Whether plaintiff could recover jointly and severally from both Smoot Coal Company and Fork Lick Coal Processors; and b) Whether plaintiff was entitled to back pay for overtime or bonuses. Also, of course, was the question of attorney fees and costs, if any, due plaintiff.

I hereinafter rule: in favor of plaintiff on the question of whether she may recover from each or both of her former employers (finding that they are one entity under the Act); in favor of respondent on the back pay issues; and, award costs and fees to plaintiff less 1/2 of her attorney fees incurred from and after the hearing on 3 August 1993, since she prevailed on one of the two issues litigated thereafter. (By 3 August 1993 respondent had admitted liability and general damages on all three claims, thereafter contesting special damages, which they win; and which entities are liable for the judgment, which they lose.)

In large part I adopt complainant's proposed findings with respect to the question of which respondent was her employer. I conclude (easily) that the respondents were a unified entity under the Act. Moreover, and alternatively, unlike any federal anti-discrimination laws, the State Human Rights Act broadly applies to "other organized groups of persons". Code 5-11-3 (a). If they don't fit under any other test, I find that both were her employer

under the "other organized groups of persons" rubric. This language does not appear in any federal anti-discrimination law that I find. The phrase must mean something, and I infer that it connotes a legislative intent that the Act apply broadly.

The question of overtime pay or Saturday bonus pay is more difficult by far. I find the proof to amount to about a 50-50 coin toss after application of the liberality rule and thus find for respondent. First off, I am not offended by plaintiff changing from an "overtime" theory to a "Saturday bonus" theory late in the game and would have allowed liberal amendment of the pleadings to conform to the proof, had that been proved.

There are two chief problems, however. First, these little mining operations were in such a constant state of flux that I cannot conclude by a preponderance of the evidence what the "usual" organizational chart should look like, much less what the fair rate of pay for the safety director and/or superintendent was or should have been at any given time. Sometimes the "safety director" position was essentially nonexistent except as a titular moniker - sometimes, apparently, it was a genuine full-time-plus job. It looks like the superintendent really ran the mines some of the times, and sometimes Fazenbaker just needed someone to be called the superintendent while he ran production. The plaintiff's strongest proof in these regards is the respondent's admission of liability as to sex-based and concomitant retaliatory discrimination on the underlying charges. But all the proof still just leaves me with suspicions, and not a "more likely than not" belief that Ms. Burns would have gotten Saturday bonuses had she been a man. Indeed, I was

even suspicious that she might have received "preferential" treatment because of her gender - that her gender entered into the decision to put her in management positions. (I put "preferential" in quotes because she didn't want the job - at least at some points.)

Finally, respondents' request to put on proof concerning the attorney fees claim is refused. Both Ms. Hall and Ms. Hedges are known to me personally and their integrity is beyond reproach. Mr. McAteer's reputation is likewise for truthfulness. Their rates are very reasonable. In fact, I would be inclined to give Ms. Hall a multiplier for wrangling with this for so long were it not for the fact that her attorney fee request is rather substantial in comparison to plaintiff's recovery. It is a case in which collection of any judgment obtained has never been sure, Ms. Hall, et al., deserve praise for their willingness to accept the claim in the first instance and their endurance in pursuing it in the final instance. The request to depose plaintiff's counsel is denied and full attorney fees, reduced by 1/2 from and after 3 August 1993 (in acknowledgement of the non-prevailing issue) are hereinafter awarded.

C.

FINDINGS OF FACT

1. Complainant Burns was first employed by Fork Lick as a lab trainee on or about 2 April 1984.

2. During the time she was a lab trainee, Complainant Burns was on the Fork Lick payroll.

3. On or about 3 September 1984 Complainant Burns was promoted to the newly created position of Safety Director of Smoot and Fork Lick.

4. During the September 1984 - September 1985 period when she served as Safety Director of Smoot and Fork Lick, Complainant Burns remained on the Fork Lick payroll.

5. On or about 2 September 1985 Complainant Burns was promoted for a period of three months until she requested to return to her old position as Safety Director of Smoot and Fork Lick.

6. Effective 2 September 1985 and simultaneous with being named Superintendent of Smoot and Fork Lick, Complainant Burns was transferred from the Fork Lick to the Smoot payroll.

7. On or about 2 December 1985 Complainant Burns was returned to her position as Safety Director of Smoot and Fork Lick.

8. From 2 December 1985 through the end of the relevant time period (22 May 1986), that is during her second stint as Safety

Director of Smoot and Fork Lick, Complainant Burns remained on the Smoot payroll.

9. From 3 September 1984, the date she was named Safety Director of Smoot and Fork Lick, until the day of her physical departure on 22 May 1986 Complainant was never paid any overtime or "bonuses" for Saturday work.

10. This case originated when Complainant Barbara Burns ("Burns") filed a complaint (ES-22-87) with the West Virginia Human Rights Commission ("HRC") on 15 July 1986 against Appellees Smoot Coal Company, Inc., a West Virginia corporation and its president, Paul F. Fazenbaker, Sr. ("Smoot" and "Fazenbaker") alleging that she had been sexually harassed by Fazenbaker and denied equal pay by Smoot. (The complaint was amended on 29 August 1986 to include Fork Lick Coal Processors, Inc. ["Fork Lick"].)

11. On 19 August 1986, approximately one month after the complaint was filed, Smoot/Fazenbaker wrote Burns that she had been fired. On 20 August they wrote to advise that her health insurance was being cancelled. A fact-finding conference on the underlying case had previously been scheduled for 29 August 1986.

12. Immediately prior to the fact-finding conference on 29 August Burns filed a retaliation complaint (REP-95-87) ("the first Retaliation Complaint", which is not a part of this consolidated action) alleging that she had been fired and her health insurance terminated as a reprisal for filing the original case. HRC filed a separate reprisal action on 25 August 1986 against Smoot and Fazenbaker, based on the same set of facts.

13. As a result of these reprisal complaints, a Predetermination Conciliation Agreement was entered into between Burns, HRC, and Smoot/Fazenbaker on 29 August 1986 which became the subject matter of a subsequent "breach of contract" complaint filed with the Webster County Circuit Court on 9 January 1987. This breach of contract case, which had to do with enforcement of the Predetermination Conciliation Agreement ("contract"), was determined in favor of Complainant by the West Virginia Supreme Court of Appeals in December 1991 and again (pursuant to a series of motions for clarification) in December 1992, and thus is not a subject of the instant case.

14. Meanwhile, on 16 October 1986, the Commission found probable cause to believe that Complainant had been discriminated against by Respondents pursuant to the original ES-22-87A complaint (sexual harassment and equal pay violations).

15. On 24 November 1986 a telephone conference hearing was held with counsel and the HRC hearing examiner "James Gerl", who scheduled part of a series of sex discrimination/sexual harassment cases against Fazenbaker/Smoot/Fork Lick, including the Burns case then pending (ES-22-87), to be conducted 20-24 April 1987.

16. Two additional retaliation complaints which were filed by Burns against Smoot, Fork Lick and Fazenbaker were consolidated for hearing together with the original underlying sex discrimination and equal pay case. The essence of those retaliation complaints are as follows:

A. REP-278-87 (filed 11 December 1986) ("the Second Retaliation Complaint"): In this case Complainant alleges that Respondents retaliated against her by requiring her to submit to a physical examination by a company physician, when no male employee had ever been required to submit to a physical examination by anybody other than his own personal physician as a condition of return to work. This was despite the fact that on 29 August 1986 when they entered into the Predetermination Conciliation Agreement to resolve the First Retaliation Complaint, Respondents specifically agreed that Complainant could return to work "based upon an examination by Complainant's doctor, at company expense."

B. REP-307-87 (filed 7 January 1987) ("the Third Retaliation Complaint"): In this case, Complainant alleges that Respondents again retaliated against her by stating that they intended to fire her for a second time effective 15 January 1987. Respondents were now alleging that Complainant had become mentally incapable of performing her job as safety director and that they had (within days after she filed her initial complaint) discovered that she lacked the requisite skills to perform her job as safety director. This was despite the fact that only months before she filed her complaint, she had been, against her will, promoted from safety director to general superintendent of both of Smoot and Fork Lick's mines.

17. On 3 April 1987 HRC found probable cause in the REP-278-87 and REP-307-87 reprisal complaints. Shortly thereafter, these two cases were consolidated for hearing with the original ES-22-87A case.

18. On 6 April 1987 Hearing Examiner Gerl denied Smoot and Fork Lick's request for a continuance of the underlying HRC case.

19. On 14 April 1987 the Circuit Court of Webster County[1/] ordered as follows:

> "Accordingly, it is adjudged and ordered, that, during the pendency of this action [the breach of contract case which resulted from Burns' first retaliation charge against respondents], the Respondents West Virginia Human Rights Commission and James Gerl, shall be and they are hereby restrained from conducting the hearings in the West Virginia Human Rights Commission's Administrative cases of Barbara Burns vs. Smoot Coal Company, Inc., et al, and Mandy Morris vs. Smoot Coal Company, Inc., et al, and further are hereby restrained from taking any further action in either of said cases, all during the pendency of this action."

20. Thus, this case languished from 14 April 1987 until 12 December 1991 when the West Virginia Supreme Court of Appeals issued its first opinion in favor of Complainant and included the following guidance for moving forward the HRC case as follows at footnote 4:

> "The Court notes that the appellants [Burns and HRC] claim, and expend great energy, in arguing that the circuit court erred in restraining the appellant Human Rights Commission from proceeding with the sex discrimination and harassment case of appellant Barbara Burns. In like vein, they argue that the circuit court exceeded its jurisdiction when it ruled that Barbara Burns had not been sexually harassed.
>
> "After carefully examining the circuit court's final order dated 25 September 1990 ... this Court cannot see, in that order, from which the present appeal is being taken, that the circuit court has restrained the appellant Human Rights Commission from proceeding with the sex

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1/ Smoot Coal Co., Inc. and Fork Lick Coal Processors, Inc., Petitioners, vs. HV Human Rights Commission; James Gerl; Barbara Burns and Mandy Morris, Respondents. Webster County Circuit Court Civil Action No. 87-Misc-30, filed April 13, 1987..

discrimination/sexual harassment case of Barbara Burns.

"From the briefs in this case, as well as from some passing references in the record, it appears that Smoot Coal Company, Inc., and Paul Fazenbaker filed a wholly separate proceeding in the Circuit Court of Webster County to restrain further proceedings on the sexual harassment complaint filed by Appellant Burns, as well as on a complaint filed by another employee, Mandy Morris, until the present proceeding was concluded. Apparently, the temporary injunction sought was issued. So far as this Court can determine after perusing the thousands of pages of record in this case and that separate proceeding, that case, although related to the present one, was never consolidated with the present one and really is not before this Court in the present appeal. Given this circumstance, this Court cannot see how the circuit court, in the present proceeding, erred in failing to dissolve the temporary injunction issued in the other wholly separate proceeding. It is true that in its opinion the trial court found that Smoot Coal Company, Inc., and Paul Fazenbaker had not sexually harassed Ms. Burns, but that finding was incorporated in the court's opinion, and not its mandate. Given the nature of the mandate, this Court believes that the language in the opinion relating to harassment was mere surplusage, and in line with this Court's holding in Moran v. Clark, 30 W.Va. 358, 4 S.E. 303 (1887), this Court does not believe its insertion in the opinion constitutes a ground for reversal.

"Rather clearly, the conciliation agreement in the present case left the initial sexual harassment complaint filed by Barbara Burns open, and the pleadings in the present case had nothing to do with that complaint. Under the rule in Kell v. Crumby, 124 W. Va. 357, 20 S.E.2d 461 (1942), that the award of relief different from that sought in the complaint constitutes reversible error, this Court believes that it would have been improper for the circuit court to have concluded the appellants' rights relative to the discrimination complaint in the present proceeding, but as previously indicated, this Court cannot see how, in the present proceeding the circuit court concluded the appellants' rights on the discrimination complaint.

> "If the appellants wish to dissolve the temporary injunction in the wholly separate proceeding instituted by Smoot Coal Company, Inc., and Paul Fazenbaker, they should file the appropriate motion in the proceeding in which that injunction was issued. If they wish to appeal the court's action, they should do so in conjunction with the record of that proceeding."

21. Following that instruction from the West Virginia Supreme Court of Appeals, the HRC filed a Motion to Dissolve Temporary Injunction in the 87-MSC-30 case, which was granted on 21 February 1992.

22. On 28 May 1983 the three separate cases, which had previously been consolidated for hearing, were heard on 3-4 August 1993. Several stipulations were entered by respondents' admissions of liability.

23. The parties stipulated that Respondent Paul F. Fazenbaker, who was then president of both Respondent Smoot and Respondent Fork Lick, willfully and deliberately violated the Human Rights Act by sexually harassing Complainant Burns (admission of liability as to ES-22-87A).

24. The parties stipulated that Smoot was an employer of Burns at the relevant time in question (3 September 1984 - 22 May 1986).

25. The parties stipulated that Respondent Paul F. Fazenbaker, who was then president of both Respondent Smoot and Respondent Fork Lick, willfully and deliberately violated the Human Rights Act when he demanded that she subject herself to examination by their doctor when that had never been required of other employees (admission of liability as to REP-278-87).

26. The parties stipulated that Respondent Paul F. Fazenbaker, who was then president of both Respondent Smoot and Respondent Fork Lick, willfully and deliberately violated the Human Rights Act when he, through counsel, threatened to fire her as of 15 January 1987 (admission of liability as to REP 307-87).

27. The parties stipulated that Complainant was competent to be Respondents' safety director.

28. At all relevant times, Paul F. Fazenbaker was president of both Smoot and Fork Lick.

29. The Smoot operations and the Fork Lick operations had common management, including the same president and "hands on boss", Paul F. Fazenbaker, Sr. Equipment, including large equipment like continuous miners and roof bolters, was moved from the Smoot operations to the Fork Lick operations, and vice versa. Miners at the Smoot and Fork Lick operations shared a common bathhouse. The Smoot and Fork Lick operations shared office space.[2/] They shared the same mailing address. When the common management held social events for employees (e.g. the Christmas dance and summer picnic and dance), the events were held jointly for the employees of both Smoot and Fork Lick.

[2/] Fork Lick Receptionist Libby Smith described the office for Spring Ridge, Smoot and Fork Lick: "It was an office that was really an old house, and my office was in what I would have considered a living room. Carol's (Smoot employee) office was directly in front of me in what I would have considered a dining room, and Paul's (Fazenbaker's) office was to my right, which I would have considered a bedroom...(T)here was another little room hooked on this, what I would have considered a dining room, and that's where the engineers (Smoot employees) were and that's where Mike Carpenter worked. And we had some other engineers back there too."

30. Smoot and Fork Lick have always shared common officers. During the period in question, Paul F. Fazenbaker, Sr., was president of both. Today Charles G. Roberts Sr., is the president of both Smoot and Fork Lick; Michael R. Carpenter is the vice president of both Smoot and Fork Lick; and Carol Henline is the Secretary/Treasurer of both Smoot and Fork Lick. Smoot and Fork Lick share common owners: Roberts and Carpenter each own 50 per cent of the stock of Smoot and 50 per cent of the stock of Fork Lick. Today Smoot and Fork Lick share common attorneys and accountants. Smoot and Fork Lick shared the same telephone console in the same office.

31. When employees were transferred back and forth between the Beaver Run mines (Fork Lick operations) and the Smoot mine (a Smoot operation), employees were simply reassigned duties by management. They did not "apply" for a new job; they were transferred by management officials. As witness Larry Hamric, a former employee who had been on both payrolls stated, "(T)hey just automatically reassign(ed) us duties as to various places." On some occasions, when employees were transferred from one of the Fork Lick mines (Beaver #1 or Beaver #2) to Smoot, or vice versa, they were not transferred from one payroll to the other, but simply remained on the previous payroll.[3/] Employees, including a former foreman,

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3/ As the Secretary-Treasurer for both Smoot and Fork Lick, Carol Henline, testified: "I'm not sure if we did transfer his (Hamric's) retirement [when he was transferred from one company to the other]...From Fork Lick to Smoot or--I know at the end when they disbursed it that he was on Smoot, yes, and his name was transferred from Fork Lick. But when they were jumping back and forth and working temporary, like they would bring them down from one and be working in another, I don't know if we transferred it then or not, just jumping back and forth." (Tr. 102-103)

testified that there were "no differences" in the two companies (Smoot and Fork Lick). Libby Smith, who was a Fork Lick employee during the relevant time period, testified:

> MS. SMITH: It was all Spring Ridge, Smoot, and Fork Lick. We were all in the same thing. (Tr.175)...
>
> MS. SMITH: I was a receptionist. I answered the phone; and when I answered the phone, I answered the incoming calls for -- Well, we had three different lines -- Spring Ridge Coal, Smoot Coal, Fork Lick Coal.
>
> HALL: All on the same telephone console?
>
> SMITH: Yes. And I answered them. That was my job. I handled payroll for Fork Lick Coal. If Carol, Carol Henline, she handled Smoot payroll, if she was on vacation or absent for whatever reason, I did it then; and if I was absent, she did Fork Lick's payroll.
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> HALL: So the Smoot and Fork Lick people in the office switched off on duties and helped each other out?
>
> SMITH: Yes. (Tr. 176-77)

Other clerical staff, including Carol Henline, who had worked for Smoot from February 1984 through the relevant time period testified that she did not know whether a new office manager, Joetta Fazenbaker Meadows, was the office manager for Smoot or Fork Lick or both. Richard Bragg, who has served as Safety Director for Smoot and Fork Lick for the bulk of the time since Ms. Burns' departure in May 1986, testified that he didn't even remember whether he started out on the Smoot or the Fork Lick payroll when he hired on in August 1984.

32. Richard Bragg, who ultimately replaced Burns as safety director, was safety director of both Smoot and Fork Lick, though he was at all times relevant on the Smoot payroll.

33. The National Labor Relations Board found in early 1989 that:

> 3. At all times material herein, Respondent JNO. McCall, Respondent Spring Ridge, Respondent Smoot and Respondent Fork Lick have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of said operations; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise.
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> 4. By virtue of its operations described above in paragraph 3, Respondent JNO. McCall, Respondent Spring Ridge, Respondent Smoot and Respondent Fork Lick constitutes a single integrated business enterprise and a single employer within the meaning of the Act. (Complainant's Exhibit 9; Tr. 78-79)
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> (This finding is evidence on, but is not determinative of, the same issue in our case.)

34. After Complainant Burns filed the series of sexual harassment, equal pay violation and retaliation complaints, the common management of Smoot, Fork Lick and the "mother company" Spring Ridge (which in 1984-87 owned 100 per cent of stock of each Smoot and Fork Lick; see Complainant's Exhibit 8[4/]), realigned the

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[4/] In the Stock Purchase Agreement of 1 January 1989 wherein Roberts and Carpenter purchased 100% of the stock of Spring Ridge, Smoot and Fork Lick, it is stated: "WHEREAS, the parties have reached an understanding with respect to the sale by Seller and the purchase by Buyer of all the issued and outstanding shares of capital stock of Spring Ridge Coal Co., Inc, a West Virginia Corporation ("Spring Ridge"), Spring Ridge having two wholly owned subsidiaries, Fork Lick Processors, Inc., a West Virginia corporation ("Fork Lick"), and Smoot Coal Company, Inc., a West Virginia Corporation ("Smoot")." (Complainant's Exhibit 8).

companies so that Respondent Smoot would no longer have any employees or any assets.

35. In 1988, after Complainant Burns filed this and related cases, Smoot employees were transferred to the Fork Lick payroll, Today Fork Lick thrives and continues to produce coal, while Smoot has no employees and no active bank accounts.

36. Complainant Burns was the safety director over Fork Lick's Beaver mines, Fork Lick's prep plant, and the Smoot mine (all operations of both Smoot and Fork Lick). The fact that Complainant Burns was from 3 September 1984 through 22 May 1986, an employee of both Smoot and Fork Lick is supported by Complainant's Exhibits 17 and 18, two letters written by Ms. Burns to the Mine Safety and Health Administration. Both letters were dated 18 May 1985 and both were signed by Ms. Burns. However, one letter was written on behalf of Fork Lick on Fork Lick letterhead and is signed by "Barbara J. Burns, Safety Director" (Complainant's Exhibit 17), while the other was written on behalf of Smoot on Smoot letterhead and is signed by "Barbara J. Burns, Safety Director" (Complainant's Exhibit 18). The fact that Burns was safety director of both Smoot and Fork Lick is also corroborated by Exhibits 19-24, which show that Burns was on the Fork Lick payroll while a lab trainee (2 April - 2 September 1984) and continuing through 1 September 1985, during which time she was writing official letters on behalf of both Smoot and Fork Lick. The payroll records show that she was moved to the Smoot payroll when she was named superintendent of both companies on 2 September 1985 and she continued on the Smoot payroll for the latter period of her job as safety director (1 December 1985 - 22 May 1986). That Ms. Burns

was safety director of Smoot and Fork Lick is corroborated by the testimony of Mr. Hamric, who said that he worked for both companies and understood that she was the safety director of both.

37. The Complainant failed to prove that she did not receive either overtime or Saturday bonuses because of her sex by a preponderance of the evidence.

38. The companies grew and shrunk with rises and falls in price, production and demand. Employees were shuffled about from place to place and job to job. I could not tell, by a preponderance of the evidence, whether plaintiff was treated more or less favorably than others with respect to overtime and bonuses.

39. Ms. Burns' diary and the related testimony served more to raise questions about her candor than to answer questions about gender bias.

D.

CONCLUSIONS OF LAW

1. At all times referred to herein, Respondents Smoot Coal Company, Inc., Fork Lick Coal processors, Inc. and Paul F. Fazenbaker, Sr., President of both, was an employer within the meaning of Section 3(d), Article 11, Chapter 5 of the Code of West Virginia.

2. At all times referred to herein the Complainant, Barbara Burns, was a citizen and resident of the State of West Virginia and is a person within the meaning of section 3(a), Article 11, Chapter 5, of the Code of West Virginia.

3. On or about 15 July 1986 the Complainant filed a verified complaint alleging that Respondents had engaged in illegal practices against her in violation of W.Va. Code Section 5-11-9.

4. On or about 11 December 1986 the Complainant filed a verified complaint alleging that Respondents had engaged in further illegal practices against her in violation of W.Va. Code Section 5-11-9.

5. On or about 7 January 1987 the Complainant filed a verified complaint alleging that Respondents had engaged in further illegal practices against her in violation of W.Va. Code Section 5-11-9.

6. All three of the above-referenced verified complaints were timely filed.

7. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to Sections 8, 9 and 10, Article 11, Chapter 5 of the Code of West Virginia.

8. Complainant has prevailed as to liability in each of the three cases which have been joined in this action due to the stipulations of Respondents.

9. Complainant has demonstrated by a preponderance of the evidence that she was an employee of both Smoot and Fork Lick.

10. Complainant has demonstrated by a preponderance of the evidence that Smoot and Fork Lick were in fact operating as a single employer.

11. Complainant has not demonstrated by a preponderance of the evidence that similarly situated salaried males were paid $175.00 per Saturday for each Saturday worked.

12. Complainant has not demonstrated by a preponderance of the evidence that she worked 57 Saturdays between 3 September 1984 and 22 May 1986 for which she was not paid $175.00 extra.

13. Complainant is entitled to an award of $8,850.00 in incidental damages, no back wages or interest, $3,147.08 in costs and $53,333.34 in attorney fees, for a total award of $65,330.42 (sixty five thousand, three hundred thirty dollars and forty two cents).

E.

EXPLANATION OF ATTORNEY FEE AWARD

Chris Hedges		$ 720.00
J. McAteer		1,200.00
B.J. Hall		51,413.34 *
total fee allowed	=	$53,333.34

* Ms. Hall's fee was derived by cutting her fees from and after the hearing date ($14,495.97) in half ($7,247.00) in recognition of the issue upon which plaintiff did not prevail (back wages). Her attorney fee claim ($58,661.33) was thus reduced by $7,247.99, to $51,413.34. All of her pre-hearing time was needed to obtain the

admission of liability on the day of hearing and she prevailed on one of the two remaining issues (the liability of both Smoot and Fork Lick).

F.

RELIEF

Respondents are ORDERED to cease and desist from unlawful discriminatory conduct and are jointly and severally liable to plaintiff in the amount of sixty-five thousand, three hundred, thirty dollars and forty-two cents ($65,330.42).

The respondents shall make appropriate payment to the complainant forthwith, but in no event later than 31 days from the date of entry of this order. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Acting Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

C.

APPEALS

Anyone adversely affected by this order may appeal herefrom as set out in Exhibit A.

WV HUMAN RIGHTS COMMISSION

ENTER: 19 December 1994

BY: Richard M. Riffe /mst
RICHARD M. RIFFE
ADMINISTRATIVE LAW JUDGE