STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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

GASTON CAPERTON
GOVERNOR

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

Quewanncoii C. Stephens
Executive Director

February 28, 1992

Laura M. Bills
Route 7, Box 254A
Morgantown, WV 26505

Paul R. Sheridan, Esquire
Senior Assistant Attorney General
812 Quarrier Street, 5th Floor
Charleston, WV 25301

West Virginia Department
of Tax and Revenue
Bldg. 1, Room W-300
State Capitol
Charleston, WV 25305

Kelli D. Talbott, Esquire
Assistant Attorney General
Room W-435, State Capitol
Charleston, WV 25305

Re: Bills v. WV Department of Tax & Revenue
Docket No. ES-363-84

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above styled and numbered case.

Pursuant to W. Va. Code § 5-11-11, as amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Issues not previously raised to the Commission on appeal are deemed to be waived.

Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for a review of this Final Order.

Sincerely,

Quewanncoii C. Stephens
Executive Director

Enclosures
CERTIFIED MAIL/RETURN
RECEIPT REQUESTED
cc: The Honorable Ken Hechler
Secretary of State

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

LAURA M. BILLS,

Complainant,

v. DOCKET NO. ES-363-84

WEST VIRGINIA DEPARTMENT
OF TAX AND REVENUE,

Respondent.

FINAL ORDER

On February 19, 1992, the West Virginia Human Rights Commission reviewed the findings of fact and conclusions of law set forth in the Final Decision of the Hearing Examiner filed in the above-styled action by Richard M. Riffe. After consideration of the aforementioned Final Decision, and after a thorough review of the transcript of record, arguments and briefs of counsel, the Commission decided to, and does hereby, adopt said Final Decision of the Hearing Examiner as its own, encompassing the findings of fact and conclusions of law set forth therein, without modification or amendment.

It is, therefore, ADJUDGED, ORDERED and DECREED that the Final Decision of the Hearing Examiner, encompassing the findings of fact and conclusions of law, be attached hereto as this Commission's Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and the counsel, and by first class mail to the Secretary of State, 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 28th day of February, 1992 in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

BEFORE THE STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

LAURA McALLISTER BILLS

Complainant,

v. DOCKET NO. ES-363-84

WEST VIRGINIA DEPARTMENT
OF TAX AND REVENUE

Respondent.

HEARING EXAMINER'S FINAL ORDER

This matter came on for hearing on 16 August 1991 in the Human Resource Center public hearing room, 1321 Plaza East, Charleston, West Virginia. The complainant appeared in person; the Commission appeared by counsel, Shirin Paul; the respondent appeared by Kelly Talbott, its counsel. Any proposed findings of fact and conclusions of law submitted by the parties have been considered and reviewed in relation to the record in this case. All argument of the parties has likewise been considered. To the extent that the proposed findings, conclusions and argument are consistent with this Order they have been adopted; to the extent 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 to the outcome of this case, irrelevant, cumulative or not supported by the evidence. To the extent that the testimony of any witnesses is not in accord with the findings of fact as stated herein, such testimony was not credited. To the extend that any finding of fact should have been labeled a conclusion of law or vice versa, they should be so read. The findings of fact are based upon the testimony and documentary evidence produced, upon the credibility of witnesses and

upon the plausibility of the evidence in view of other evidence of record taking into account each witness's motive and state of mind, strength of memory and demeanor while on the witness stand and considering whether a witness' testimony was internally consistent and the bias, prejudice, and interest, if any, of each witness:

FINDINGS OF FACT

1. Complainant, Laura Bills is a female who was born on 5 May 1947.

2. Respondent, West Virginia Department of Tax and Revenue, is an employer as that term is defined by W.V. Code § 5-11-3 (d).

3. On or about 26 September 1983 the complainant provided notice that she would resign effective 25 October 1983.

4. On or about 7 December 1983 Ms. Bills filed a verified complaint with the West Virginia Human Rights Commission charging the Tax Department with unlawful discrimination on the basis of sex, a violation of the West Virginia Human Rights Act. Thereafter, the Tax Department denied in writing that it had violated the Act and stated that Ms. Bills had resigned of her own volition and that it had not committed unlawful discriminatory acts against her.

5. The complainant began State employment in December of 1981 when she began working for the Department of Welfare. On 16 September 1982 she was transferred from the Department of Welfare to the Tax Department as an Auditor I, the classification she held with the Department of Welfare. The

remainder of her tenure was served in the Local Government Relations section of the Tax Department.

6. Her duties increased and expanded due to her competence and the employer's trust in her abilities.

7. It was unanimously agreed that the complainant was an excellent employee.

8. On 7 July 1983 the complainant's supervisors, Mack Parsons and Ron Preast, recommended that the complainant be promoted and that she receive a salary increase of 10%.

9. That request was denied and the respondent offered in evidence a memorandum dated 12 August 1983 which imposed a wage "freeze" upon all State departments. The respondent's witnesses testified that this policy directive precluded giving the complainant the promotion and raise recommended by her supervisor.

10. In August of 1983 the complainant was advised by an undated form letter that she had successfully passed her Certified Public Accountant examination. On 1 September 1983, a second request for promotion of Ms. Bills, this time with a 25% increase in salary, was submitted by her supervisor, Mr. Preast. Respondent's witnesses testified that the same "freeze" precluded giving Ms. Bills this raise as well.

11. The denial of these raises or promotions eroded Ms. Bills' self confidence, lowered her self esteem, caused her self doubt, brought into question her future with the Tax Department and her work suffered as a result.

12. As results of the frustration that attended the denial of the requested promotions, Ms. Bills tendered her resignation from her employment with the Tax Department on 26 September 1983, to be effective 25 October 1983.

13. Within a few days following submission of her resignation but before her last day of work, she was asked to interview a gentlemen who was being considered as her replacement. It is unclear from the evidence whether any other applicants were interviewed, and if they were, by whom they were interviewed, but it is clear that Riley Smith was hired as a "provisional employee" to replace Ms. Bills. Provisional employees may be hired when there are no eligible applicants on the civil service roster.

14. During the period of time between the date that Ms. Bills tendered her resignation and the date that her job was offered to Riley Smith, Ms. Bills was a party to a meeting among Ron Priest, Mack Parsons, Helen Burgy and possibly others. Ms. Bills testified that the purpose of the meeting was to discuss a replacement for her. She testified that, at that meeting, one of the decision makers stated that "I don't think I can ask a man with a family to work for this kind of money", referring to

the salary that Ms. Bills had been earning as an Auditor I. Although neither Priest nor Parsons recall the comment, I credit the complainant's testimony both because it was sincere and because it was corroborated. Helen Burgy testified that, although she did not specifically recall who was in attendance at the meeting, she did specifically recall that that comment had been made.

15. I find Ms. Burgy to be a uniquely qualified witness for several reasons. First, she had neither interest nor bias in the outcome of this litigation. She is a busy professional at Columbia Gas and was reluctant to come to the hearing to testify. She declined to attend the hearing voluntarily and came only when a subpoena was personally served upon her at her place of employment on the day of the hearing. She has a unique perspective on the Tax Department because she hired on in the 1960's as a secretary and worked her way up through the years through the positions of audit clerk, tax examiner, assistant director of Local Government Relations (the section in which Ms. Bills worked at the time of the events that gave rise to this claim), director of inspection supervisors (the name given to the same section after a reorganization), and ultimately to the position of deputy tax commissioner. She is now a C.P.A. and has been since 1990. Her testimony was considered, dispassionate and frank. I credit it entirely.

16. Ms. Burgy testified that an attitude prevailed in the Tax Department that men should make more money than women for

equivalent work. She testified that there was gender stereotyping concerning which jobs were "suitable" for men and which were suitable for women. She testified that the attitude was so pervasive that it had become the subject of jokes in the section. She stated that being a woman held one back in the Local Government Relations section. She stated that the antecedents of these attitudes and stereotyping could be traced to the early sixties but that gender-biased attitudes and stereotyping could still be found in the section when she became the assistant director of that section in April 1986.

17. Although Ms. Burgy testified that females were presented barriers to advancement in the Local Government Relations section, she described a fortuitous circumstance which arose that enabled her to break free of the restraints so imposed by applying directly to the tax commissioner for her first management level job.

18. When Mack Parsons, Ms. Bills' supervisor, testified, he said that her temperament was that of a "typical woman"; that she reacted angrily to frustrations when a man might have "rolled with the punches". When the audience in the hearing room reacted to the "typical woman" comment, Mr. Parsons quickly added that he was "just kidding"; I, however, find the comment revealing of underlying attitudes.

19. Mr. Smith was informed on the day that he was interviewed that he would be hired into Ms. Bill's position. This was prior to

the position being posted. It was only when the position was posted on 4 October 1983 that Ms. Bills learned that her position was being posted as a Tax Examiner III.

20. Although the Civil Service Commission found that Riley Smith was eligible for a higher classification (Tax Examiner III) and a higher step level (5A) than Ms. Bills (who was only eligible for Tax Examiner II at a step level of 4A), I nevertheless find that Ms. Bills was more qualified than Mr. Smith for her position. The work that Ms. Bills did was accounting work and she was a C.P.A.; Riley Smith was not. The entire reason that the Civil Service Commission employee deemed Ms. Bills to be eligible only for Tax Examiner II while deeming Smith eligible for Tax Examiner III was that he considered Smith to have more than 2 years of accounting experience and Bills to have less than 2 years of accounting experience. This was absolutely nonsensical, however, because Ms. Bills had actually taught accounting at a local community college. The Civil Service Commission did not deem her teaching time to be appropriately counted towards her 2 years experience requirement. In my estimation, one who teaches accounting should be credited for a year of experience for each year of teaching. The complainant's uncontroverted testimony was that Smith's past relevant experience was more in the nature of clerical work, while hers was more in the nature of accounting. The civil service worker testified that he couldn't even take into account in his rating the fact that Ms. Bills was a C.P.A.

21. Ms. Bills testified quite persuasively that she was outraged when she saw the posting because she had been trying to get an upgrade for months and had been unable to do so, while the respondent was now hiring a man who was less qualified in at a much higher salary level than she had been receiving. Other witnesses corroborated that she was profoundly distraught by this turn of events.

22. The respondent's former personnel director (who is now a Senior Personnel Specialist in the Division of Personnel), June Sydenstryker, at first testified that she had offered Ms. Bills the option of rescinding her resignation and accepting a promotion to Tax Examiner II, Step 4A. (Transcript, page 209, 210) Ms. Sydenstryker later recanted this testimony, saying that she did not have the authority to offer such an opportunity. She said that she had suggested that complainant ask her supervisor about such an option (Transcript, page 222.). In fact, Ms. Bills testified, and I do find, that she had never even been informed that Civil Service rated her as qualified for the Tax Examiner II grade. She testified that she first learned this at the 16 August 1991 hearing. She says that she asked both Jean Sydenstryker and Herschel Rose, the personnel officer and tax commissioner respectively, whether they were offering her to stay on at the same pay and in the same position and each said that the offer was for her to rescind her resignation and stay on at the same paygrade in the same job classification.

23. The complainant testified, without contradiction, that she conferred with Ron Preast after her job was posted as a Tax Examiner III to see if she could stay on in her position in an elevated paygrade and that he indicated to her that since they had hired Riley Smith she would have to reapply through the Civil Service Commission and wait for an opening. Finally, she indicated on her exit interview, Commission Exhibit 24, "It is incomprehensible to me how the Tax Department can justify paying the person who is going to replace me a higher salary and giving that person a higher job classification. I believe it is unfair and discriminatory in nature." It seems unlikely that she would have written this if she had been offered the promotion and raise.

24. Ms. Bills was emphatic during rebuttal that she would have stayed with the respondent if they would have offered her any raise at all; that she would have accepted even a "crumb".

25. Ms. Bills became tearful when she described the adverse effects that this employment action had upon her, using words such as "outraged" and "overwhelmed". She promptly filed a complaint with the Human Rights Commission.

26. The complainant mitigated her damages by working at a series of jobs beginning with the private practice of accounting and culminating in her current job with the March-Westin Company.

DISCUSSIONS AND CONCLUSIONS

A. Discrimination based on gender is illegal.

West Virginia Code §5-11-9 provides in pertinent part: "It shall be an unlawful discriminatory practice...for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment." The term "discriminate" is defined at Code §5-11-3(h): "...to exclude from, or fail or refuse to extend to, a person equal opportunities because of...sex..." Failure to promote due to gender is unlawful under the Human Rights Act. Thomas v. H.R.C., 383 S.E.2d 60 (W.V. 1989); Currey v. H.R.C., 360 S.E.2d 387 (W.V. 1987); See also, Price Waterhouse v. Hopkins, 490 U.S._____, 104 L.Ed. 268, 109 S.Ct. ____ (1989).

In passing the Act, the Legislature made the simple but momentous announcement that sex is not relevant to the selection, evaluation, promotion or compensation of employees. The Legislature's intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.

In Price Waterhouse, supra, the Supreme Court interpreted the words "because of", as used in our Act and in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000ee et seq., as follows:

> "We take these words to mean that gender must be irrelevant to employment decisions. To construe the words 'because of' as colloquial shorthand for 'but-for causation,' as does Price Waterhouse, is to misunderstand them.
>
> "But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then

> ask whether; even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs of § 703(a)(1) ('to fail or refuse'), in contrast, turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of §703(a)(1), is whether gender was a factor in the employment decision at the moment it was made. Moreover, since we know that the words 'because of' do not mean 'solely because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations--even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account."

The Supreme Court went on to state that the complainant was initially required "to prove that the employer relied upon sex-based considerations in coming to its decision." They noted that the employer could then avoid a finding of liability if it could "prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person."

In both Price Waterhouse and in the West Virginia Supreme Court's decision in W.V. Institute of Technology v. H.R.C., 383 S.E.2d 490 (W.V. 1989), the Courts cautioned future legal analysts to distinguish carefully the mixed motives cases from those involving "pretext", such as McDonald v. Sante Fe Trail, 427 U.S. 273 (1976). Justice McHugh dropped a footnote in W.V. Tech which explained:

> " 'Pretext' cases, such as this one, are to be distinguished from 'mixed motive' cases, that is, cases involving a mixture of legitimate and illegitimate motives, such as Price Waterhouse v Hopkins, _____U.S. _____ 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989). As cogently explained by Justice White, concurring in Price Waterhouse, the issue in pretext cases is whether either an

> illegal motive or a legal motive, but not both, was the true motive behind the decision. In 'mixed motive' cases, however there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate and at least one of which is illegitimate. U.S. at _____, 109 S.Ct. at 1796, 104 L.Ed.2d at 294.
>
> "In mixed motive cases once complainant proves that a prohibited factor (race, gender, national origin, etc.) played a motivating part in the employment related decision, the employer may avoid a finding of liability only by proving by a preponderance of the evidence that the employer would have made the same decision even if the employer had not considered the prohibited factor." Id. at note 11. (Emphasis in original.)

The instant claim is not a "pretext" case. I don't believe that any individual in the Tax Department made a conscious decision to thwart Ms. Bills' career advancement due to her gender and then hide the decision behind a pretextual gloss. Rather, I believe that gender was a factor that affected the decision making process at the time the employment decision was made. Thus, I believe, a Price Waterhouse analysis is appropriate.

I reach this conclusion on the basis of my analysis of the facts of this claim viewed against the backdrop of the Price Waterhouse decision. The Supreme Court explained:

> "In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."

As I explain more fully in Section C, infra, I do believe that gender stereotyping was operative and prevented Ms. Bills from being promoted.

B. Gender stereotyping which affects employment decisions is unlawful sex discrimination.

The Court stated that gender stereotyping which works a hardship on women in the workplace is within the reach of Title VII:

> "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' " Quoting, Los Angeles Dept. of Water v. Manhart, 435 U.S. 702 (1978), quoting Sprogis v. United Air Lines, 444 F.2d 1194 (7th 1971).

In Price Waterhouse sex stereotyping was found to exist because some of the partners whose comments were solicited concerning Ms. Hopkins' suitability for partnership described her in a gender stereotyped manner, because Price Waterhouse relied upon the partners' comments in deciding whether to promote her and because the man who delivered the board's decision not to offer her partnership told her she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry."

The Supreme Court declined to state precisely what evidence is required to prove that stereotyping was operative in a particular employment decision:

> "By focusing on Hopkins' specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, 'standing alone,' would or would not establish a plaintiff's case, since such a decision is unnecessary in this case."

C. Gender stereotyping affected the employment decision-making process in this case.

In the case at bar I find evidence of gender stereotyping in Ms. Bills' workplace generally, and with regard to the respondent's failure to promote her in particular. In general, I found persuasive the testimony of Helen Burgy that there were headwinds to advancement for women in the Local Government Relations section, in the notion that certain jobs were unsuitable for women because they involved travel, in the fact that there was an attitude that men should make more than women and in that these attitudes were so pervasive that they were the subject of jokes within the section. Ms. Burgy, it will be recalled, stated that these attitudes both predated and postdated Ms. Bills' tenure.

In particular, with respect to the failure to give Ms. Bills a promotion, I found evidence of gender biased stereotyping in the comment of one of the supervisors that they couldn't get a man with a family to work for the money paid to Ms. Bills, in her supervisor's comment at the hearing that her temperament was that of a "typical woman" who reacted angrily to frustrations rather than rolling with the punches as a man might, and in the fact that the respondent

hired a less qualified male to perform Ms. Bills' duties at a much higher salary level than she had been working.

D. The law of constructive discharge.

In Hopkins v. Shoe Show, 678 F. Supp. 1241 (S.D.W.V. 1988) Judge Haden applied the Fourth Circuit's standard for assessing whether a plaintiff has been constructively discharged:

> "In order to:
> 'establish a constructive discharge the employee must have been subjected to intolerable working conditions, thus forcing the employee to quit. Also, 'the employer's actions must be intended by the employer as an effort to force the employee to quit.'" Citing McKinney v. K-Mart Corp. 649 F.Supp. 1217, 1219(S.D.W.V.1986)(citations omitted).
> "Intolerability of working conditions...is assessed by the objective standard of whether a 'reasonable person' in the employee's position would have felt compelled to resign." Id., quoting Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir.1985).

I was impressed by how conservative this standard of proof appeared so, there being no West Virginia authority on point, I conducted some research into constructive discharge consisting, primarily, of reading Larson's Employment Discrimination, § 86.50, "Constructive discharge", and the cases in the annotations therein. Professor Larson stated that the doctrine of constructive discharge originally found little application in discrimination cases because of :

> "the exacting standards of the rule as applied in those days: the Tenth Circuit, for example, stated that the doctrine applied 'when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job.' The word 'deliberately'...connoted an express employer intent to get rid of the employee, and the early discrimination cases on point seem to accept this demanding burden of proof." (Citations omitted.)

Professor Larson then noted that a more lenient rule had developed in the Fifth, Sixth, Ninth and D.C. Circuits. My research reveals that the Third Circuit and even the Tenth Circuit are now following a more lenient standard. (Cf. Irving v. Dubuque Packing Co. 689 F.2d 170 (10th Cir. 1981).) For example Professor Larson reports that in "Vaughn v. Pool Offshore Co. [the Fifth Circuit] ruled that it is sufficient if the employer created working conditions which were so difficult or unpleasant that a reasonable person would resign." As Larson notes, the "focus shifts, therefore, away from the employer, and toward the employee's work environment and his reasonable state of mind."

Professor Larson notes that claims of "constructive discharge have generally not succeeded in cases where they are based [solely] on unequal pay, denial of a pay raise, denial of a promotion, ...or general inequality of working conditions." I added the bracketed word "solely" because the cases he has collected reveal that a constructive discharge will be found where there is one of the foregoing adverse employment situations and the presence of "aggravating factors".

An example of a case in which failure to promote was held to be actionable due to the presence of additional aggravating factors is EEOC v. Miller Brewing Co., 650 F.Supp.739 (E.D. Wis. 1988). A black brewery employee complained that he had not been promoted, had been evaluated unfairly, was treated less favorably than white employees, and in general was picked on because he was black. The court acknowledged that a failure to promote does not in itself constitute constructive discharge, but when combined with the other

factors in this case, it created a triable issue as to constructive discharge, precluding summary judgment for the employer.

Professor Larson collects and digests a series of cases which establish as the more liberal rule that failure to promote or inequality of pay or denial of a pay raise can constitute a constructive discharge, but only if there are additional aggravating factors. The inquiry in these cases is not what the employer intended, but whether a "reasonable person would feel compelled to resign." Cf. Hanlin v. Pitman-Moore, Inc., 42 F.E.P. 669 (Minn. 1986); Stephney v. Hospital for Joint Diseases, 48 F.E.P. 775 (S.D.N.Y. 1986); Bempah v. Kroger Co., 51 F.E.P. 195 (S.D. Ga. 1989); Davis v. Pioneer Nut and Screw Co., 49 F.E.P. 1293 (E.D. Mich. 1989); Pittman v. Hattiesburg Schools, 25 F.E.P. 1349 (5th Cir. 1981).

Judge Haden's application of the Fourth Circuit's rule in Shoe Show is not, of course, binding upon West Virginia courts or upon this Commission. I believe that our Supreme Court of Appeals would adopt, and therefore I adopt, the more liberal rule just stated rather than the Fourth Circuit's "employer intent" rule. I base this assessment upon two principal factors: First, our Supreme Court often cites to the statutory rule of liberality found in the Human Rights Act at Code § 5-11-15; second, our Court is generally inclined to grant plaintiffs the benefit of the doubt in questions of law. (Cf. Blankenship v. General Motors Corp., WVSCA Slip. Opinion No. 19949 (June 27, 1991), Syll.pt.3: "...whenever there is a split of authority in other jurisdictions on an issue about which this Court has not yet spoken, the trial Court should

presume that we would adopt the rule most favorable to the plaintiff.")

E. Ms. Bills was constructively discharged.

This is a difficult issue and a close call; I've gone both ways on this particular issue but finally resolve it in favor of the complainant. Make no mistake, this (like the conclusion in the foregoing section relative to which law to apply) is a "liberality rule" conclusion. Analyzed subjectively, I do absolutely believe that Ms. Bills quit her job because of the repeated frustrations caused by the repeated failures to provide her with a pay raise or a promotion. I now conclude, too, that it was objectively reasonable for her to quit in light of certain aggravating factors, the presence of which illuminate the unlikelihood of her ever receiving equitable treatment in this gender stereotyped atmosphere.

I am not unmindful of the fact that Ms. Bills may be a particularly sensitive person. Ms. Bills became tearful several times during her hearing and even retreated, crying, from the hearing room at one point (when she heard her former employer testifying that she had been approved by Civil Service as eligible for an upgrade to Tax Examiner II). There is, of course, no "thin skull rule" when it comes to assessing whether a reasonable person would have quit--indeed the reasonable person test demands an objective rather than a subjective analysis. It could certainly be argued that a hypothetical reasonable person would not leave her job without other viable employment options awaiting her given the comparitively benign nature of the "aggravating factors" present in

this case as compared to the EEOC v. Miller Brewing Co. case, supra.

The aggravating factors that are present in this case are the pervasive gender biased stereotypical attitudes extant in the Local Government Relations Section as described by Ms. Burgy at the hearing and as set out in Finding No. 16. In a typical pretext case an employer would refuse to promote a woman because of his bias against women and then hide the real motive behind a phony excuse. In that case the only thing the victim might observe would be her failure to receive the promotion and she would then have to infer the intent from the fact that a less qualified man was promoted in her stead; her day to day experience might well be free from overt sexism. In the instant case the gender bias was so pervasive that it had become the subject of jokes in the section; in other words, it was palpable. It was plain to Ms. Bills (or to a hypothetical reasonable person) that a woman would never "get ahead" in this environment, and so it was reasonable for her to seek career opportunities elsewhere. A rule that would require a woman to stay in this environment in order to recover would be a harsh rule indeed. The institutionalized and relatively overt sexism Ms. Bills encountered is more pernicious and difficult to endure than that in the hypothetical pretext case described above; the feelings she had must be rather akin to those experienced by black Americans in the days of separate facilities.

F. Ms. Bills' damages

If I am wrong on the constructive discharge issue, then Ms. Bills' damages would be limited to the difference between what she

would have made as an Auditor I with periodic increases and upgrades for seniority and what she would have made as a Tax Examiner II with similar raises. The record is not sufficiently developed to arrive at a sum certain for this measure of damages, although I suspect that it would be a figure to which the parties could stipulate.

Assuming that I am correct on the constructive discharge issue, then Ms. Bills' damages are her lost wages at the pay grade which she should have been in absent the discrimination, Tax Examiner II, less mitigation. (I conclude that she exercized reasonable diligence in mitigating her damages.) It is highly speculative when or even whether she would have moved to Morgantown with her husband if she had received the raises and promotions to which she was entitled, so I have calculated her damages as terminating on the last day of 1985, the date her mitigation income exceeded what she would have made working for the State. (Commission Exhibit 29.)

The Commission did a poor job of developing complainant's damages at the hearing, but I can nevertheless arrive at a sum certain. Commission's Exhibit 29 was marked for identification at transcript page 45, but was neither moved nor admitted into evidence. Standing alone, it provides but a little illumination into Commission counsel's theory of damages. It purports to show salary increases in May and in August of 1984. I have inferred that the Commission inferred that there were two raises given to all State employees that year based upon Riley Smith's pay record. (See, Joint Exhibit 1, page 2.) The testimony indicated, however, that the 15 May 1984 raise Mr. Smith received was in recognition of

completing his probationary period (Transcript page 229), and it was therefore, individualized to him. June Sydenstriker's testimony did indicate that the 1 July 1984 raise was "across the board"; that everyone would have gotten it and that such raises were expressed as a certain percentage raise. (Transcript pg 229.) Simple math indicates that Smith's increase was 7.5%, so we may infer that Ms. Bills, too, would have received a 7.5% raise on that date. Inferring again from Exhibit 29, the Commission apparently (?) assumes Ms. Bills would have received some sort of increase to $1,996 per month in 1985, but they offer no proof to like effect.

Finally, the Commission indicates in a conclusory fashion in its calculations in Exhibit 29 (which, again, was neither admitted into evidence nor supported by testimony) that benefits at the rate of 16.2% should be added to Ms. Bills damages. There was, however, no evidence admitted which supports this notion and, while I'm sure benefits are worth <u>something</u> (probably 16.2%, in fact) I can't enter an award without evidence to support it. Not even the liberality rule relieves the complaint of the burden of proving her damages. Thus, I calculate Ms. Bills' damages as follows:

Tax Examiner II at Step 4A paid $1,474.00 per month, or $17,688 per year or $48.46 per day. (<u>See</u>, Respondent's Exhibit E.)

1983 - 25 October through 31 December = 67 days	
times $48.46=	$3,246.82
minus 1983 mitigation =	<u>-994.45</u>

equals 1983 special damages= $2,252.37

1984 - 1 January through 30 June =

181 days times $48.46= $8,771.26

Now we add a 7.5% pay raise, which increases her annual salary to $19,014.60 or $52.09 per day.

1984 1 July through 31 December = 184 days

times $52.09 =	$9,584.56
1984 First 1/2 =	$ 8,771.25
plus 1984 Second 1/2 =	9,584.56
equals 1984 lost income =	$18,355.82
	$18,355.82
minus 1984 mitigation=	626.39
equals 1984 special damages	$17,729.43

1985 1 January through 31 December =

	$19,014.60
minus 1985 mitigation	-11,671.25
equals 1985 special damages	$ 7,343.35

Special damages for 1983	$ 2,252.37
plus 1984	17,729.43
plus 1985	7,343.35

equals total specials of $27,325.15

Emotionally, Ms. Bills was profoundly affected by this employment action, and I award her our statutory limit of $2,500.00 for general damages.

$27,325.15
2,500.00
= $29,825.15

Interest at 10% per Code §56-6-31 is $2,982.51 per year or $8.17 per day.

15 October 83 through 31 December 83 = 67 days times $8.17= $547.48 interest for 1983 plus $2,982.51 x 8 years ($23,860.08) = $24,407.56 less $8.17 per day if paid before 15 October 1991 or plus $8.17 per day if paid after 15 October 1991. Damages of $29,825.15 plus interest of $24,407.56 equals $54,232.71. Thus the plaintiff's total damages are $54.232.71 if paid on 15 October 1991.

ORDER

In light of the foregoing it is hereby Ordered that the respondent shall pay the complainant damages in the amount of $54.232.71 on 15 October 1991; and the respondent shall cease and desist from engaging in unlawful discriminatory practices.

Any party aggrieved by this Order may prosecute an appeal herefrom pursuant to Code §29A-5-4 and 5-11-11. (See, Exhibit 1, attached hereto.)

ENTER: RMR 30 September 1991

WEST VIRGINIA HUMAN
RIGHTS COMMISSION

RICHARD M. RIFFE
HEARING EXAMINER

§77-2-10. Appeal to the Commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the Commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the examiner, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

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

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

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

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

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

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

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

EXHIBIT NO. 1

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

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

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

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

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

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

CERTIFICATE OF SERVICE

I, Richard M. Riffe, Hearing Examiner 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 30 (revised) September, 1991 to the following:

Laura McAllister Bills
Suite 416 Peoples Building
179 Summers Street
Charleston, WV 25301

West Virginia Department of Tax and Revenue
Building 1, Room W-300
Charleston, West Virginia 25305

Shirin Morad Paul, Esquire
Assistant Attorney General
812 Quarrier Street
L & S Building, 5th Floor
Charleston, West Virginia 25301

Kelli D. Talbott, Esquire
Assistant Attorney General
Division of Tax and Revenue
State Capitol
Room W-435
Charleston, West Virginia 25301

Tichenor Court Reporting
Post Office Box 180
Oak Hill, West Virginia 25901

Richard M. Riffe
Hearing Examiner