STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Executive Director

February 28, 1992

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Re: Bradley v. NAACP Jobs Program
Docket No. ES-54-89

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

MERGIE L. BRADLEY,

Complainant Below/Appellee,

v. DOCKET NO. ES-54-89

NAACP JOBS PROGRAM,

Respondent Below/Appellant.

FINAL ORDER

On August 14, 1991, the West Virginia Human Rights Commission reviewed the final order and decision of Hearing Examiner Richard M. Riffe in the above-captioned matter. After consideration of the aforementioned and exceptions thereto, the Commission hereby modifies the hearing examiner's final order and decision and finds as follows:

CONTENTIONS OF THE PARTIES

Complainant contends that respondent discharged her on the basis of sex, i.e., pregnancy. Respondent maintains that complainant was discharged for poor performance.

FINDINGS OF FACT

Based upon the parties' stipulations of contested facts as set forth in the record of this matter, the Commission has made the following findings of fact:

1. The complainant, Mergie L. Bradley, was initially employed by respondent, NAACP Jobs Program, in August 1987 as a Cabell County GED Instructor.

2. In September 1987, complainant was transferred to Woodrow Wilson High School in Raleigh County, West Virginia as an Employability Instructor.

3. On November 2, 1987, complainant informed Carolyn Brown that she (Mergie Bradley) was pregnant.

4. Complainant was paid an annual salary of $14,084.00 (or $284.69 per week) as an Employability Instructor.

5. The position of an Employability Instructor is a twelve-month position, and Employability Instructors are paid throughout the twelve calendar months of the year.

6. Complainant was terminated from her employment by respondent on June 3, 1988.

7. After being terminated from her employment by the respondent, complainant returned to full-time employment, with the same or higher pay and comparable benefits, when she became employed as a full-time teacher with the Raleigh County Board of Education on November 15, 1988.

8. Between the time she was terminated from her employment with respondent and November 15, 1988, when she returned to full-time employment, complainant earned a total of $1,498.92 in mitigation of her lost wage damages.

Based upon a review of the record in this matter, the Commission has made the following findings of fact:

9. As an Employability Instructor for the respondent, complainant taught classes for which students received high school credit at Woodrow Wilson High School. Those classes were designed to help students become more employable and included placing students in jobs. During the school year 1987-88, Mergie Bradley was teaching at any one time between 28 and 34 students.

10. Complainant's immediate supervisor was Donald Barr. Mr. Barr, whose office was in Huntington at the main office of the NAACP Jobs Program, supervised instruction for all Employability Instructors throughout the state. Mr. Barr answered to Carolyn Brown, the Executive Director of the NAACP Jobs Program.

11. On October 21, 1987, complainant became aware that she was pregnant. Complainant called Barbara Rowell, Personnel Director of the respondent, to inquire about her insurance. After encouragement from Ms. Rowell, complainant telephoned Carolyn Brown on November 2, 1987, to notify her of her (complainant's) pregnancy.

12. After complainant informed Carolyn Brown of her pregnancy, Ms. Brown's attitude and conduct toward complainant began to deteriorate. This change in attitude was noted by Ms. Bradley, Donald Barr, Barbara Rowell and Claire Kelly, Jobs Specialist Consultant for respondent.

13. On November 4, 1987, Carolyn Brown summoned complainant to Huntington at which time she accused complainant of being stupid and insubordinate.

14. Carolyn Brown attempted to discuss complainant's recent performance evaluation with her during the November 4 meeting. It was complainant's understanding that Donald Barr would be a party to her evaluation review.

15. The performance evaluation in question was originally performed by Donald Barr, complainant's supervisor, during the month of October 1987. Mr. Barr's evaluation of complainant, while containing some criticism, indicated above-average performance.

16. Carolyn Brown completely "re-evaluated" complainant's performance, resulting in an unsatisfactory performance evaluation.

17. On January 4, 1988, complainant was off work due to a Raleigh County school vacation. It is an undisputed policy of the respondent that Employability Instructors take school holidays in accordance with the calendar of the particular school at which they are placed. On this date, Carolyn Brown telephoned complainant and insisted that she be available for a telephonic staff meeting later that day. Complainant requested, but did not receive, compensatory time for the telephonic staff meeting. Employability Instructors ordinarily receive comp time for telephonic conferences.

18. On April 4 and April 11, 1988, complainant made herself available for the weekly telephonic staff meetings, but never received the phone call. Complainant later learned that the conference for those dates had been canceled. Complainant did not participate in the previous conference at which the cancellations were announced. Complainant applied for comp time, for a total of one hour, for the time she made herself available on those two occasions. Not only was the application for comp time not approved by Carolyn Brown, but Ms. Brown considered this action by complainant to be a "falsification of time records."

19. Complainant was criticized by respondent for failing to certify all of her students -- three in particular. However, complainant's predecessors and successors experienced similar difficulty in obtaining accurate information required for certification.

20. Another single and pregnant employee of respondent was not terminated; however, this employee worked in the main office in Huntington and did not have contact with students.

21. Carolyn Brown in reference to complainant's pregnancy made several remarks regarding complainant's suitability as a proper role model for students.

22. Complainant's performance met reasonable expectations for Employability Instructors with the NAACP Jobs Program, and her admitted shortcomings were of the type which were tolerated in other Employability Instructors who were not single and pregnant.

23. Complainant was fired effective June 3, 1988, allegedly for falsifying time records and insubordination.

DISCUSSION

I. THE WEST VIRGINIA HUMAN RIGHTS ACT PROHIBITS AN EMPLOYER FROM DENYING AN APPLICANT AN EQUAL EMPLOYMENT OPPORTUNITY BECAUSE OF SEX.

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act (hereinafter "HRA" or "Act"). W. Va. Code § 5-11-1 et seq. Section 5-11-9(a)(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment. . ."

The term "discriminate" or "discrimination" as defined in § 5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of sex . . ." Discrimination based upon pregnancy constitutes illegal sex discrimination under the West Virginia Human Rights Act. Frank's Shoe Store v. West Virginia Human Rights Commission, 365 S.E.2d 251 (W. Va. 1986); Montgomery General Hospital v. West Virginia Human Rights Commission, 346 S.E.2d 557 (W. Va. 1986). Discrimination against unwed women is no less sex discrimination if the employer does not discriminate against married pregnant women. Doe v. Osteopathic Hospital of Wichita, Inc., 333 F. Supp. 1357 (D.C. Kan. 1971); Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975); Ponton v. Newport

News School Board, 632 F. Supp. 1056 (E.D. Va. 1986); Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987).

Given this statutory framework, to recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful pregnancy discrimination, or the Commission acting on her behalf, must ultimately show by a preponderance of the evidence that:

(1) the employer excluded him or her from, or failed or refused to extend to him or her, an equal opportunity;

(2) pregnancy was a motivating or substantial factor causing the employer to exclude the complainant from, or fail or refuse to extend to her, an equal opportunity, Price Waterhouse v. Hopkins, 490 U.S. ___, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); and

(3) the equal opportunity denied a complainant is related to any one of the following employment factors: compensation, hire, tenure, terms, conditions or privileges of employment.

A complainant or the Commission may prove a case by direct evidence of discriminatory intent or, as is more often done in disparate treatment cases, such as the case sub judice, by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and adopted by our Supreme Court in Shepherdstown Volunteer Fire Department v. State Human Rights Commission, 309 S.E.2d 342 (W.

Va. 1983). The McDonnell Douglas method requires that the complainant or Commission first establish a prima facie case of discrimination. The burden of production then shifts to respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the complainant or Commission must show that the reason proffered by respondent was not the true reason for the employment decision, but rather a pretext for discrimination. The term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." West Virginia Institute of Technology v. Human Rights Commission, 383 S.E.2d 490, 496 (W. Va. 1989), citing Black's Law Dictionary, 1069 (5th ed. 1979). A proffered reason is a pretext if it is not "the true reason for the decision." Conaway v. Eastern Associated Coal, 358 S.E.2d 423, 430 (W. Va. 1986).

Even where an articulated legitimate, nondiscriminatory motive is shown by the respondent to be nonpretextual, but in fact a true motivating factor in an adverse action, a complainant may still prevail under the "mixed-motive" analysis. This analysis was established by the U.S. Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. ____, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), and recognized by the West Virginia Supreme Court of Appeals in West Virginia Institute of Technology v. West Virginia Human Rights Commission, 383 S.E.2d 490, 496-97, n.11 (W. Va. 1989). If the complainant proves that her pregnancy

played some role in the decision, the employer can avoid liability only by proving that it would have made the same decision even if it had not considered pregnancy.

II. THE COMMISSION ESTABLISHED A PRIMA FACIE CASE THAT THE COMPLAINANT WAS FIRED FROM HER EMPLOYMENT BECAUSE OF HER PREGNANCY.

In an action to redress an unlawful discriminatory practice in employment, the initial burden is on the complainant or the Commission to prove by a preponderance of the evidence a prima facie case of discrimination. In a case of alleged termination because of pregnancy, the prima facie burden is met upon a showing that: (1) complainant belongs to a protected group, that is, she was pregnant; (2) she was qualified to remain in that position; (3) she was removed from her position; and (4) the respondent thereafter sought or retained others with equivalent qualifications who were not pregnant. See, Montgomery General Hospital v. West Virginia Human Rights Commission, 346 S.E.2d 557 (W. Va. 1986). The prima facie burden is not onerous, but is merely designed to eliminate "the most common nondiscriminatory reasons" for an applicant's rejection. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

Here, there can be no doubt that the Commission established a prima facie case of discrimination. First, it is undisputed that Mergie Bradley is a female who became pregnant during or

just prior to October 1987, while she was employed by the respondent. She made known her pregnancy to her employer. Clearly, she is a member of a group protected by the Human Rights Act. Second, although the respondent disputes the quality of Ms. Bradley's work, it is clear that she met the minimum objective qualifications for the position. Despite criticisms that were directed at her, she was permitted to and did perform the job for most of a school year. Her qualifications and performance were consistent with others who held the same type of position, and her immediate supervisor considered her performance to be satisfactory. Third, it is undisputed that Ms. Bradley was fired from her position. Finally, the evidence shows that others with equivalent qualifications who were not pregnant were retained.

III. RESPONDENT HAS ARTICULATED LEGITIMATE REASONS FOR COMPLAINANT'S TERMINATION.

Having established a prima facie case, the Commission created a "presumption that the employer unlawfully discriminated against" the complainant, Burdine, 450 U.S. at 254; Shepherdstown, 309 S.E.2d at 352, and "the burden then shifted to the defendant . . . to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason." Burdine, at 254. Though the burden on respondent is only one of production, not persuasion, to accomplish it a respondent "must clearly set forth through the introduction of

admissible evidence the reason for the [complainant's] rejection." Ibid. The explanation provided "must be clear and reasonably specific," Burdine, at 258, "must be legally sufficient to justify a judgment for the defendant," Id. at 254, and it must be both legitimate and nondiscriminatory. Id. at 254.

If the respondent articulates a legitimate, nondiscriminatory reason for rejecting the complainant, then the issue becomes whether the offered reason was, in fact, the reason or a reason for the adverse action. "[T]he complainant [or the Commission] has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for unlawful discrimination." Shepherdstown, at 352. The Commission "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, at 256.

The respondent has met this burden of articulating a legitimate, nondiscriminatory reason for firing the complainant. In the May 23, 1988 termination memo to Mergie Bradley, the respondent articulated two reasons for her termination. The first involved the complainant's application for compensatory time for two occasions, one on April 4, 1988 and one on April 11, 1988, for which complainant was accused of "falsification of time

records." The second involved the complainant's failure to "get students certified by Employment Security" for which Ms. Bradley was accused of failing to follow personnel policies and thereby engaging in "insubordination and actions which cause discredit to the agency." These articulated reasons are clearly and reasonably specific, and were the only reasons offered by respondent at the time of complainant's termination.

During the hearing the respondent also presented evidence from which it may argue that deficient overall performance by the complainant was a reason for her termination. Although the inconsistencies in the way in which respondent has articulated its reasons for the termination cast doubt upon the credibility of those reasons, this reason, too, meets the burden of production in the sense that respondent has stated a third nondiscriminatory reason. The issue, therefore, is whether these reasons are pretext.

IV. THE COMMISSION PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE REASONS PUT FORWARD BY RESPONDENT ARE PRETEXT.

The third step in the theoretical proof scheme involves an evaluation of the motives or reasons proffered by the respondent for its adverse action. The question raised at this stage is not whether the offered reason might have justified the action, but whether it is "the true reason for the decision." West Virginia

Institute of Technology v. Human Rights Commission, 383 S.E.2d 490, 496 (W. Va. 1989) (Emphasis supplied).

The charge of "falsification of time records" set out first among the reasons for complainant's termination is clearly pretext. While the charge was no doubt stated in the termination letter as "falsification of time records" in order to justify immediate termination, it is very clear from the documentary evidence, as well as from the testimony of both Mergie Bradley and Carolyn Brown, that there was absolutely no falsification involved. Complainant merely applied for compensatory time for time she actually spent waiting for phone calls. She accurately reflected this on her time sheets and comp time claim form. Carolyn Brown disallowed the claim, as was common practice when she determined a particular after-hour activity listed by an Employability Instructor in a comp time application was not a proper basis for comp time credit. Pressed to explain why this was "falsification" in Ms. Bradley's case, Ms. Brown acknowledged that the only basis for calling it "falsification" was that she disallowed it. The evidence reveals that when other Employability Instructors sought comp time for activities where the application was disallowed, they were never charged or treated as "falsification." The charge of "falsification" against the complainant is a transparent attempt to make an "offense resulting in IMMEDIATE TERMINATION" out of what is at most a misunderstanding.

The second reason given for complainant's termination was her failure to "get some students certified," a reason the respondent termed "insubordination" and "actions causing discredit to the agency." Here, too, the charge is grossly overstated in order to mirror the language in the personnel manual which sets forth offenses resulting in immediate termination. It is more accurately a failure by complainant to accomplish all of the objectives established for her position. While failure to have students certified did pose a legitimate concern for the respondent, the evidence belies respondent's claim that this was the real reason for the termination. The evidence shows that all of the Employability Instructors had the type of certification problems which Ms. Bradley experienced. And because her classes were integrated into the student's school schedules, Ms. Bradley lacked authority from the school to remove students for failure to meet this certification requirement. Furthermore, it would hardly make sense to terminate a teaching employee for this stated cause a matter of days before the end of the school year. The alleged harm to the program by having three uncertified students in class (a harm which incidentally was never demonstrated) could not have been repaired by the termination of Ms. Bradley. Her termination at that time merely left the class without a teacher, to the detriment of all the students. The timing of the termination only makes sense if there was a punitive motive involved.

The third reason offered is complainant's overall performance. It is significant that this reason was not provided in the termination memo to Ms. Bradley but only articulated at the hearing. The record is replete with reprimands of Mergie Bradley by Carolyn Brown, some of which had merit and some of which did not. But a review of the evidence as a whole clearly reveals that the alleged deficient performance was not what motivated complainant's discharge.

The evidence clearly demonstrates that complainant's performance was consistent with reasonable expectations. Although Ms. Bradley had some deficiencies in her teaching, the evidence reveals that her performance was satisfactory overall. It is clear from the evidence that Ms. Brown was inconsistent in the standards she applied in judging complainant's performance as compared to other instructors. Complainant's March statistics for enrollment and placement show her to have been comparable to the other instructors, a fact Ms. Brown admitted on cross-examination. Ms. Bradley's failure to turn in lesson plans was evaluated as misconduct worthy of note, but not the similar and repeated failures of another Employability Instructor, namely, Carter Johnson. Her difficulties in obtaining certifications were treated as insubordination, while there is no evidence that her predecessor and successor, who experienced similar problems, were evaluated as harshly. Her applications for comp time were judged falsification, and one cited incident was given as the basis for accusing her of chronic falsification. On the other

hand, Carter Johnson's similar acts were not so judged to be "falsification," even when he reported time he spent with the basketball team as sick leave, and these acts were not judged by Ms. Brown as chronic even though the record contains evidence of numerous instances.

It is not sufficient for respondent to give legitimate, nondiscriminatory reasons for which the complainant could have been fired; the reasons must be those which actually motivated the adverse action. Hypothetical legitimate reasons which were not motivating factors are pretext. It is undeniable that complainant's job performance was subject to legitimate criticisms, but it did not fall below reasonable expectations or the standard to which other Employability Instructors were held. What is more, the pattern of conduct by Ms. Brown toward Ms. Bradley and the timing and circumstances surrounding complainant's termination clearly demonstrate that the alleged poor performance was not the true motivating reason.

V. RESPONDENT HAS FAILED TO PROVE THAT IT WOULD HAVE FIRED COMPLAINANT EVEN IF SHE WERE NOT PREGNANT.

If the complainant's pregnancy was in any way a factor or consideration in the adverse action by the respondent, even if the complainant's job performance was also a motivating factor, then under the "mixed motive" analysis it becomes the

respondent's burden to show that it would have fired Ms. Bradley even if her pregnancy had not been a factor or consideration.

A case is to be treated as a mixed motive, rather than a pretext, case where the adverse decision was motivated by both legitimate and illegitimate decisions.

> "Pretext" cases . . . 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. ___, 109 S. Ct. at 1796, 104 L. Ed. 2d at 294. In mixed motive cases, once a complainant proves that a prohibited factor 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. ___ U.S. ___, 109 S. Ct. at 1795, 104 L. Ed. 2d at 293.

West Virginia Institute of Technology v. West Virginia Human Rights Commission, 383 S.E.2d 490, 496-897, n.11 (W. Va. 1989); see also, Price Waterhouse v. Hopkins, 490 U.S. ___, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)

Complainant has established that Carolyn Brown's attitude toward her changed drastically on the date complainant disclosed her pregnancy to Ms. Brown. Prior to her announcement, complainant received a transfer and a pay increase. At that time, she characterized her relationship with Ms. Brown as good. Complainant testified that Ms. Brown's attitude and conduct toward her deteriorated immediately after that date, and the testimony of numerous witnesses bear this out.

Activities of the complainant which were approved for comp time only days before November 2, 1987 were no longer approved after that date when Carolyn Brown became aware of the pregnancy. The complainant's performance appraisal, completed by her supervisor, was entirely disregraded by Carolyn Brown in order to downgrade it substantially. Unsatisfied with the more moderate critiques offered by Donald Barr, Carolyn Brown eliminated him from the evaluation process. Ms. Bradley's legitimate concerns about the efficacy of doing job development at certain hours, even when validated by her supervisor, were given no consideration by Ms. Brown.

The evidence reveals that Ms. Brown reacted strongly and negatively to Ms. Bradley's pregnancy. There was the testimony of those who worked with Ms. Brown as to her statements about Ms. Bradley's pregnancy and their observations about her change in attitude; complainant's own testimony about Ms. Brown's change in

attitude; the documents which reveal inconsistent standards and a pattern of harassment; and even Ms. Brown's own statements.

In summary, the evidence clearly shows that Carolyn Brown was influenced by the complainant's pregnancy in her employment decisions regarding complainant. That influence colored her conduct toward Ms. Bradley after November 2, 1987, and up until her termination. This is all the Commission need show in order to place the burden back on the respondent.

". . .[I]f an employer allows [pregnancy] to affect its decision making process, then it must carry the burden of justifying its ultimate decision." Price Waterhouse, supra, 104 L. Ed. 2d 268, at 286.

> . . . the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's gender into account.

Price Waterhouse, 104 L. Ed. 2d 268, at 293. See also, West Virginia Institute of Technology v. West Virginia Human Rights Commission, 383 S.E.2d 490, 496-897, n.11 (W. Va. 1989)

Proving "that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." [Citations omitted].

> An employer may not, in other words, prevail in a mixed motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an

> employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing Judge Gesell that Hopkins' interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Price Waterhouse, 104 L. Ed. 2d at 289.

Certainly the respondent has carried no such burden. On the contrary, the evidence is that other Employability Instructors exhibited the same or similar problems and were not fired. Carter Johnson, who was more guilty of "falsifying" records, and who had chronic problems with lesson plans, was not disciplined, even when his substance abuse problems posed a far more serious risk of "discrediting the agency" than did any offense of which Ms. Bradley was accused. Brenda Cline, another Employability Instructor, demonstrated chronic problems in job development which were not severely disciplined. Nor were complainant's predecessor and successor disciplined for failure to certify students.

VI. THE OVERWHELMING PREPONDERANCE OF THE EVIDENCE SUPPORTS THE COMMISSION'S CHARGE OF UNLAWFUL DISCRIMINATION.

"It is incumbent upon [the factfinder] to make the ultimate determination whether there was intentional discrimination on the part of respondent." Shepherdstown, 309 S.E.2d at 353. In short, the factfinder "must decide which party's explanation of the employer's motivation it believes." U.S. Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478, 1482 (1983). "In this regard, the trier of fact should consider all the evidence, giving it whatever weight and credence it deserves," Id. at 1481, n.3, and decide whether, in the final analysis, respondent treated complainant "less favorably than others" because of his race. Furnco Construction Corporation v. Waters, 438 U.S. 567, 577 (1978).

In determining which side to believe, it is up to the factfinder to assess the credibility of witnesses and the persuasiveness of the evidence. Westmoreland Coal Company v. Human Rights Commission, 382 S.E.2d 562, 567, n.6 (W. Va. 1989). He is free to choose to believe one witness and disbelieve another if he finds that the latter's testimony lacked credibility.

The evidence in this case, which has been cited and discussed above, clearly establishes that Mergie Bradley was

discriminated against by her employer because of her pregnancy. This discrimination initially took the form of unequal treatment on the job: especially harsh evaluation, inconsistent standards, extended probation, and a hostile work environment. While there were meritorious critiques of Ms. Bradley's performance, they were no more than those which were applied to other instructors. In spite of these discriminatory conditions of employment, complainant's performance was consistent with reasonable expectations. Nevertheless, as consummation of the discriminatory patterns she was fired.

Mergie Bradley's testimony was reasonable, internally consistent, and consistent with other witnesses and documents. Six witnesses, including virtually all management staff of the NAACP Jobs Program, supported the claims of the complainant. The testimony of Carolyn Brown, however, was inconsistent with other witnesses and documentation, and contradictory in and of itself. Her testimony for the most part has been disregarded.

CONCLUSIONS OF LAW

1. The complainant, Mergie L. Bradley, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, W. Va. Code § 5-11-10, and the Rules of Practice and Procedure Before the West Virginia Human Rights Commission.

2. The respondent, NAACP Jobs Program, is an employer as defined by W. Va. Code § 5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.

3. The complaint in this matter was properly and timely filed in accordance with W. Va. Code § 5-11-10.

4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W. Va. Code § 5-11-9 et seq.

5. Complainant has established a prima facie case of sex discrimination.

6. The respondent has articulated legitimate, nondiscriminatory reasons for its action toward the complainant.

7. Complainant has established the articulated reasons to be pretextual.

8. As a result of the unlawful discriminatory action of the respondent, complainant is entitled to back pay in the amount of $5,105.89 [23.2 weeks @ $284.69/week, less mitigation of $1,498.92], plus statutory interest.

RELIEF AND ORDER

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

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

2. Within 45 days of receipt of this Order, respondent shall pay to the complainant, $5,105.89, plus 10% statutory interest.

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