STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
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Cecil H. Underwood
Governor

Herman H. Jones
Executive Director

July 3, 1997

Jan A. Creasey
Box 192
Cabin Creek, WV 25035

South Charleston Stamping and
and Manufacturing Plant
3100 MacCorkle Avenue, S.W.
South Charleston, WV 25303

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Charleston, WV 25326-1588

Re: Jan A. Creasey v. South Charleston
Stamping and Manufacturing Plant
Docket No. EH-123-92

Dear Parties and Counsel:

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

HERMAN H. JONES
EXECUTIVE DIRECTOR

HHJ/jk
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 West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity 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, person or entity 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

JAN A. CREASEY,

Complainant,

v. **DOCKET NO. EH-123-92**

SOUTH CHARLESTON STAMPING AND MANUFACTURING PLANT,

Respondent.

FINAL ORDER

On June 11, 1997, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision and Order denying the Respondent's motion to supplement the record. in the above-styled action issues by Administrative Law Judge Robert B. Wilson. After due consideration of the aforementioned, and after a thorough review of the transcript of record, motions filed, arguments and briefs of counsel, and the petitions for appeal and answers and Respondent's reply brief filed in response to the Administrative Law Judges's Final Decision and Order denying the Respondent's motion to supplement the record, the Commission decided to and does hereby, adopt said Administrative Law Judge's Final Decision and Order denying the Respondent's motion to supplement the record as their own, without modification or amendment.

It is, therefore, the order of the Commission that the Administratlive Law Judge's Final Decision and Order denying the Respondent's motion to supplement the record be attached hereto and made a part of this Final Order.

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

It is so ORDERED

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 1 day of July, 1997, in Charleston, Kanawha County, West Virginia.

HERMAN H. JONES, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAN A. CREASEY,

Complainant,

v. DOCKET NUMBER(S): EH-123-92

SOUTH CHARLESTON STAMPING
AND MANUFACTURING PLANT,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on the 1st day of April, 1996, in Kanawha County, at the Human Rights Commission; 1321 Plaza East; Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Jan A. Creasey, appeared in person and by counsel for the Commission, Brian J. Skinner, Assistant Attorney General. The respondent, South Charleston Stamping And Manufacturing Plant, appeared by its representative, William Markham and by counsel, Bryan R. Cokeley, with the firm of Steptoe & Johnson.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record

developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The complainant, Jan A. Creasey, is a fifty-one (51) year old male, who resides in Cabin Creek, West Virginia. The complainant filed a timely handicapped discrimination complaint under the West Virginia Human Rights Act, alleging that the respondent refused to consider him for employment on or about July 1, 1991, because of his handicaps of Throat Polypuses and Panic Attacks. Tr. page 16; Complaint.

2. The respondent, South Charleston Stamping and Manufacturing Plant, is a person and an employer as those terms are defined by W.Va. Code §§ 5-11-3(a) and 5-11-3(d), respectively.

3. The complainant has been employed for the past four years as a Crafts Worker II by the West Virginia Department of Highways. Prior to working for the Department of Highways, the complainant performed custodial and maintenance work for the Kanawha County Commission from 1987 through 1989. Tr. pages 18 and 19.

4. From September 1978 through June 15, 1987, the complainant worked for Volkswagen of America as a medium press operator, operating five different sheet metal press machines, which stamp and shape sheet metal for automobile body parts. The complainant had a total of thirteen (13) years experience operating stamping presses, including his work at Volkswagen of America, and three years at Jim Robbins Seat Belt Company in Knoxville, Tennessee, between 1969 and 1972. Tr. pages 20 and 23.

5. The complainant has suffered from a throat disorder called recurrent respiratory papillomatosis, since age four which has required approximately fifty-four (54) surgeries. The polyps grow on and around the complainant's vocal cords, entangling his windpipe. As a result of the condition, the complainant must undergo surgery to remove the polyps approximately every three to five years. Without this surgery the condition would cause death. Tr. page 24; Dr. Pollard Evid. Deposition pages 4, 5 and 11.

6. For the past several years, surgery has been performed by Dr. Romeo Lim at the Eye and Ear Clinic in Charleston, West Virginia, with the use of a laser. The procedure requires complainant to stay overnight at the Clinic and sometimes up to three days. After surgery, complainant requires approximately one month to recuperate. The complainant's treating physician determines the length of the

recuperation period and makes the decision when complainant may return to work. As a result of the procedure, the complainant can use his voice not at all initially and then only sparingly thereafter, and may eat only soft foods. Tr. pages 25-28; Commission's Exhibit No. 1.

7. During the period when complainant worked for Volkswagen of America, surgery was ordered by his physician. Complainant would then inform the company's medical staff of the treating physician's recommendation through the company nurse who would assist in completing the insurance forms. Upon being released to return to work by his treating physician, complainant would inform the respondent's medical staff, Dr. Eckman, who would examine him prior to his being permitted to return to his job. Complainant's supervisors would then be notified that he was permitted to return to employment by return to work passes provided by the company physician. Tr. pages 37-40, 89; Commission's Exhibit Nos. 3 and 4.

8. Complainant also suffers from agoraphobia associated with severe panic attacks. This condition's onset began gradually with nervousness and eventually reached a severity in which the complainant believed he was experiencing a heart attack. Symptoms included chest pains, numbness of the arm and hand, sweating and crying. This condition was treated with medications and counseling. Over a period of months, the severity of the condition was reduced through treatment. However, the complainant continues to occasionally suffer from the symptoms, including feelings of being trapped, chest pains and numbness. Tr. pages 29-34; Commission's Exhibit No. 1.

9. Complainant experienced symptoms of agoraphobia during the early 1980's while employed by Volkswagen of America. The condition

affected his ability to perform his job, including getting to and from work, and as a result, complainant was unable to work for a period of eight months during 1984 and 1985. Upon receiving permission to return to work from his treating physician, complainant was initially refused permission to return to work by the plant physician, Dr. Eckman, because of the medication complainant was taking. Eventually, complainant was permitted to return to his job after he filed a union grievance and the company agreed to be bound by the opinion of a third independent physician. Tr. pages 31-35, and 90.

10. Volkswagen of America completed a shut down of the South Charleston plant in 1987, resulting in the termination of complainant's employment there along with approximately 1,000 other jobs. Tr. pages 117 and 160.

11. Following the closing of the Volkswagen of America plant, a group of approximately eight former Volkswagen of America employees, including Mr. Robert G. Vicars, met with an investor to discuss the possibility of establishing an independent automotive stamping plant. After determining that an independent metal stamping operation could make a go of it at the South Charleston site, the respondent's management team set out to identify a core group of former Volkswagen of America employees, referred to as "blue chippers", with which to start up operations. Tr. pages 114, 115, 125, 156 and 195.

12. The respondent was started in 1988 as a corporation located in South Charleston at the former Volkswagen of America facility, producing sheet metal stampings for original equipment manufacturers, or OEMs. The respondent produces both exterior and interior

automotive body parts such as doors, roofs, hoods, deck lids, and floor pans. Tr. pages 115 and 117.

13. Robert G. Vicars has been the Human Resource Manager for the respondent since its inception in 1988. Mr. Vicars was also employed by Volkswagen of America from September 1981 through July 1986. Mr. Vicars held positions with Volkswagen of America as an Automotive Engineer and General Foreman on the floor of the Manufacturing Department. Tr. pages 114-117.

14. Mr. Vicars' duties as Human Resource Manager with the respondent include the administration of all of the company's personnel functions, including hiring, record maintenance for both hourly and salaried employees, and any and all disciplinary actions including discharge. Mr. Vicars was the ultimate decision maker with regard to hiring decisions. Tr. page 118.

15. Complainant filed his complaint alleging discrimination on the basis of handicap on September 25, 1991, after he was denied employment with the respondent. Complainant completed several applications with the Job Service. Despite complainant's experience with metal stamping, he was not hired or even interviewed for a position with respondent. On at least two occasions, the complainant attempted to contact the respondent by letter, but received no response. On at least one occasion complainant went to the plant and asked to speak with Bill Markham, but was told he was not available. Complainant filed the complaint after determining that individuals with little or no metal stamping experience were being hired by the respondent, and, after concluding that the reason for his failure to be considered was the fact that he had a history of throat polyps and

agoraphobia. Tr. pages 41-43, 45-48 and 50; Commission's Exhibit Nos. 4 and 5.

16. As a result of not being hired, complainant suffered depression and humiliation as he struggled to hold on to temporary jobs despite his extensive metal stamping experience. Tr. pages 52 and 53.

17. Judgments regarding what former Volkswagen of America employees were blue chippers were based on the collective memory of respondent's management team. Respondent did not have access to Volkswagen of America personnel records when making their hiring decisions, but did have a list of former Volkswagen of America employees. Employees identified as blue chippers were encouraged to apply for employment with respondent through the Job Service, which screened applicants and forwarded applications for employment to the respondent based on their hiring requirements. Applications forwarded from job service, were then reviewed by respondent's management team, with some candidates being offered interviews. Except in the case of blue chippers, Volkswagen of America experience was considered a negative factor as respondent sought to avoid problems it felt were rooted in the culture at Volkswagen of America. If a former Volkswagen of America employee's application were received, inquiry would be made among the respondent's Volkswagen of America alumni to determine whether the employee was missed in the initial identification of blue chippers. Tr. pages 121-123, 126-128, 155, 158, 197, 198, 211 and 212.

18. Respondent commenced operations in May 1988 with approximately 25 employees. As conditions warranted, additional

employees were hired, with the majority of the respondent's first 200 employees being former Volkswagen of America blue chippers. Most employees hired after this initial 200 had no Volkswagen of America experience, former Volkswagen of America employees making up only a third of respondents' current work force. Tr. pages 158 and 159.

19. Mr. Vicars received the complainant's July 2, 1991 application from Job Service. Since Mr. Vicars did not recognize complainant from his application, Mr. Vicars asked Bill Markham about the complainant. Mr. Vicars relied upon the opinion of Mr. Markham because he was one of the original management team, who together with Mr. Vicars had recognized the most former Volkswagen of America employees in the process of identifying the blue chippers respondent wanted to hire. Mr. Markham informed Mr. Vicar that he did not recall a whole lot about complainant but that it seemed he may have had an attendance problem. On this basis complainant's application received no further consideration. Tr. pages 128-132; Commission's Exhibit No. 6.

20. Eight individuals were hired from the group of applications that included the complainant, and more were hired later during the year. Tr. page 132.

21. Two individuals hired in August 1991 did not possess any metal stamping experience, another no work experience at all. Two individuals with Volkswagen of America experience were hired in August 1991, Roger Atkins and Donald Ronk. Neither Mr. Atkins or Mr. Ronk were identified as blue chippers in 1988 when the respondent started up its operations at the plant. Tr. pages 139 and 140.

22. Mr. Vicars first indicated that he had no intention of hiring anyone with Volkswagen of America experience in 1991. Later Mr. Vicars admitted that there were blue chippers who had been overlooked in the initial hiring in 1988 but were later hired in 1991, those being Mr. Atkins and Mr. Ronk. However, Mr. Ronk's application indicates that he first applied and was interviewed by respondent in 1989. Mr. Vicars indicated that their application interest was brought to his attention by some of respondent's employees who vouched for them. The respondent never made it known that its employees could nominate former Volkswagen of America employees for employment with respondent. At the Public Hearing in this matter Mr. Alva Sanson, currently employed by respondent as a quality assurance team leader, vouched for complainant's being a good employee as himself, based upon his experience with the complainant at Volkswagen of America. Tr. pages 108, 109, 127, 139, 140, 178 and 179.

23. Bill Markham is employed by respondent as a quality assurance manager and has been a member of the respondent's management team since the initial discussions about the possibility of reopening the South Charleston facility as an independently owned automobile parts producer for original equipment manufacturers. Tr. page 189.

24. Mr. Markham was previously employed by Volkswagen of America. He held the positions of supervisor on the production floor, industrial engineer, general supervisor and senior industrial engineer. Mr. Markham held the position of supervisor on the production floor in 1978 when he in all likelihood would have directly supervised complainant. From 1980 through the later part of 1985, Mr.

Markham worked as a general supervisor for Volkswagen of America where he essentially supervised the supervisors there. Tr. pages 190-192.

25. Mr. Markham was required to deal with resolution of union grievances as general supervisor. At the time of the public hearing, Mr. Markham did not recall complainant's grievance filed in 1985. Tr. pages 208-210.

26. Mr. Markham had no specific recollection of supervising complainant when they were both employed by Volkswagen of America, and his recollection of complainant's attendance problem was derived from conversations with the supervisors under him when he held the general supervisor position. As general supervisor, Mr. Markham received daily and weekly activity reports issued by the personnel department which identified individuals who were absent from work and would note the reason for such absence including a notation if the leave was for medical reasons. Mr. Markham formed his impression that complainant was absent a great deal both from the absence reports and from conversations with the supervisors under him. Tr. pages 216-218, 99.

27. The respondent failed to consider complainant's application for employment based upon Mr. Markham's statement that complainant had an attendance problem while at Volkswagen of America.

28. Mr. Markham was aware that complainant's absences were based upon valid excused medical grounds when he made the comment to Mr. Vicars regarding his attendance problem. Any testimony to the contrary by Mr. Markham is incredible given the absence from work for an eight month period in late 1984 and early 1985, which would be noteworthy to a general supervisor regardless of the number of persons working for Volkswagen of America.

29. Mr. Markham may not have recalled the specific medical conditions giving rise to complainant's excused medical absences at the time Mr. Vicars made inquiry of him regarding what he could recall of complainant upon review of complainant's application for employment with respondent in 1991.

30. Complainant was perceived as having some medical condition which affected his ability to work by the respondent when it made its adverse employment decision, although the exact nature of those medical conditions may not have been known by respondent's agents.

31. Complainant's conditions of recurrent respiratory papillomatosis and agoraphobia and related panic attacks are handicaps as defined under the West Virginia Human Rights Act, as amended and in the Legislative rules promulgated thereunder, as being a record of both physical and mental impairments which substantially limited complainant's ability to work.

32. Complainant would have made $8.00 per hour in August 1991; $8.25 per hour in November 1991; $8.50 in February 1992; $9.00 per hour in May 1992; $9.50 per hour in August 1992; $10.00 per hour in November 1992; $10.20 per hour in January 1993; $11.70 per hour in February 1993; $11.95 per hour in January 1994; and $12.25 per hour in January 1995 working for respondent. Complainant's Exhibit No. 11.

33. Complainant would have worked two Saturdays and two Sundays per month at time and a half on Saturdays and double time on Sundays had he been employed by respondent. Tr. pages 151 and 152.

34. Respondent did not present the interim earnings of the complainant for the period between August 1991 and September 30, 1996,

during which complainant sustained lost back pay with respondent of $178,979.57.

35. Subsequent to the filing of Proposed Findings of Fact and Conclusions of Law and Memoranda of Law, respondent filed a Motion to Supplement the Record with interim earnings to which the Commission and complainant object. In response thereto, the Commission has moved for reopening of the record for the testimony of the complainant's wife, regarding her conversation with Mr. Markham, to which respondent object.

B.

DISCUSSION

West Virginia Code § 5-11-9(a) makes it unlawful "for any employer to discriminate against an individual with respect to ...hire...." The term "discriminate" or "discrimination" is defined in W.Va. Code § 5-11-3(h); and means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of...handicap..." West Virginia Code § 5-11-3(m), provides that the term "handicap" means a person who:

(1) Has a mental or physical impairment which substantially limits one or more of such person's major life activities. The term "major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

(2) Has a record of such impairment; or

(3) Is regarded as having such an impairment.

The Legislature had issued Legislatively promulgated Rules Regarding Discrimination Against The Handicapped, which defined a physical impairment under 6 W.Va. C.S.R. §77-1-2.2 (1991), as: "any physiological disorder or condition,...affecting one or more of the following body systems: neurological;...respiratory; speech organs...."

6 W.Va. C.S.R. § 77-1-2.4 (1991) provided that "physical or mental impairment" "includes, but is not limited to, such diseases and conditions as...emotional illness." 6 W.Va. C.S.R. § 77-1-2.5 (1991) provided that "substantially limits" means "interferes with or affects over a substantial period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person's major life activities. Examples of minor temporary ailments are colds or flu, or sprains or minor injuries." 6 W.Va. C.S.R. § 77-1-2.6 provided that "major life activities" "means functions such as...speaking, breathing...working, transportation,...."

A person claiming discrimination based upon handicap may establish a prima facia case if such person (1) meets the definition of "handicap", (2) possesses the skills to perform the desired job with reasonable accommodation, and (3) applied for and was rejected for the desired job. Ranger Fuel Corporation v. West Virginia Human Rights Commission, 180 W.Va. 260, 376 S.E.2d 154 (1988); Anderson v. Live Plants, Inc., 187 W.Va. 365, 419 S.E.2d 305 (1992); Teets v. Eastern Associated Coal Corporation, 187 W.Va. 663, 421 S.E.2d 46 (1992).

Contrary to assertions by respondent, complainant clearly meets the definition of "handicap" both because of his condition of recurrent respiratory papillomatosis and his condition of panic attacks and agoraphobia. The recurrent respiratory papillomatosis causes complainant to have surgery periodically every three to five years resulting in his inability to work for periods lasting approximately one month. That condition affects his ability to speak and to breath, as complainant can tell when surgery will become necessary when he becomes increasingly short of breath and horse in his speaking. Thus recurrent respiratory papillomatosis is a "handicap" under the W. Va. Human Rights Act and the Legislative regulations. Similarly, panic attacks and agoraphobia are an emotional illness, which substantially affected complainant's ability to travel to and from work and kept him from work for a period of eight months until it was brought under control. See Commission's Exhibit No. 1 and findings of fact based upon the testimony of complainant. Thus panic attacks and agoraphobia are "handicaps" under the W. Va. Human Rights Act and the Legislative regulations as well. The complainant unquestionably applied for a job for which he was qualified with the respondent and was passed over while the position was filled with other less qualified individuals. It is therefore found that complainant has made a prima facia showing of discrimination on the basis of handicap.

A complainant may use circumstantial evidence to show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), and adopted by the West

Virginia Supreme Court in Shepardstown Volunteer Fire Department v. State Human rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Once the Commission has established a prima facia case of discrimination, the burden then shifts to the respondent to articulate a legitimate, non discriminatory reason for its action. After the respondent articulates a legitimate nondiscriminatory justification for its action, the complainant "must offer sufficient evidence that the employer's explanation was pretextual to create an issue of fact. If the employer has met its burden of production and the employee offers evidence of pretext, the trier of fact proceeds to decide the ultimate question, i.e., whether the adverse employment action taken against the plaintiff was the result of a forbidden motive." Skaggs v. Elk Run Coal Company, Inc., No. 23178, slip op. at 38 (W.Va. Sup. Ct. July 11, 1996).

Having established a prima facia case, the Commission created a presumption that the employer unlawfully discriminated against the complainant. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). "[T]he burden then shifted to the [respondent]...to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason." Burdine, 450 U.S. 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 [complainant's] rejection." The explanation provided "must be clear and reasonably specific," and "must be legally sufficient to justify a judgment for

the [respondent],...." Burdine, 450 U.S. at 258, 254. Respondent has presented evidence that it did not hire complainant because he was a former Volkswagen of America employee not identified as a blue chipper in the initial start up hiring; and was not identified as a blue chipper or vouched for by an employee of respondent who remembered him as a good worker from Volkswagen of America, thereafter. This explanation is however not persuasive when viewed in light of the preponderance of the evidence that makes it clear that complainant was not hired because he had an attendance problem while working at Volkswagen of America. The fact that Mr. Markham remembered this attendance problem and mentioned it to Mr. Vicars when Mr. Vicars considered and set aside complainant's application for employment, was undeniably the motivating factor in the decision not to hire the complainant.

Respondent argues that because neither Mr. Markham or Mr. Vicars knew complainant's particular conditions giving rise to his attendance problems, at the time the decision not to hire complainant was made, that precludes a finding of discrimination on the basis of handicap. Respondent cites numerous cases in support of this position. "In order to be within the protected class of handicapped persons under state and federal discrimination statutes, [a complainant] must establish that [the respondent] knew or should have known that he was handicapped." Dutson v. Farmers Insurance Exchange, 815 F.Supp. 349, 352 (D. or. 1993). A prima Facia case of discrimination cannot be established without proof that the employer had actual or constructive knowledge of an applicant's disability. Morisky v. Broward County, 80 F.3d 445, 448 (11th Cir. 1996). Where there is no genuine issue that

an employer did not know of an individuals disability when it made an employment decision adverse to that individual, a case of discrimination will fail. Muller v. Hotsy Corp., 917 F.Supp. 1389, 1409 (N.D. Iowa 1996). "An employer knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or through observation." Schmidt v. Safeway, Inc., 864 F.Supp. 991, 997 (D. Or. 1994). Courts will not impute knowledge of individuals alleged disability upon an employer where no communication of that disability was ever given to the employer. McIntyre v. Kroger Company, 863 F.Supp. 355, 358 (N.D. Tex. 1994). In Hedberg v. Indiana Bell Telephone Company, Inc., 47 F.3d 928, 932 (7th Cir. 1995), the Court held that the plaintiff must demonstrate that the defendant employer knew of the disability. This requirement is further refined in Monnette v. Electronic Data Systems Corp., 90 F.3d 1173, 1186 (6th Cir. 1996) in holding that the plaintiff must offer proof that the employer knew or had reason to know of plaintiff's disability. This requirement is even further explained in Burns v. City of Columbus Dept. of Public Safety, Div. of Police, 91 F.3d 836 (6th Cir. 1996) where the Court held that the plaintiff must establish that the defendant knew or believed that the plaintiff was disabled, or knew of the plaintiff's symptoms that were caused by the disability. (emphasis added)

The undersigned finds that Mr. Markham was provided with daily and weekly attendance reports which clearly indicated medical absences for each employee. Mr. Markham was aware of complainant's absences through both these reports and through contact with complainant's

immediate supervisors in his capacity as general supervisor at Volkswagen of America. These absences were for a continuous period of eight months on one occasion and on other occasions for continuous periods of approximately one month duration each. Thus the undersigned does not find that this instance is similar to that in either the Hedberg v. Indiana Bell Telephone Company, Inc., 47 F.3d 928 (7th Cir. 1995) case or the Larson v. Koch Refining Co., 920 F.Supp. 1000 (D. Minn. 1996) case cited for the proposition that there is no liability when there is awareness of attendance problems with no obvious link to the disability. This is not a case of occasional and intermittent absences or tardiness and laziness which could have many causes, few of them based in illness. It is certainly not a case where complainant seeks to recover for alcoholism as the definition of handicap under the W. Va. Human Rights Act specifically excludes that condition. This is a case where the cause of these absences were clearly rooted in excused medical conditions of which fact respondent's agent Mr. Markham was clearly aware. The respondent's argument is rooted in the false assumption that respondent had to be aware of complainant's exact medical conditions at the time his recollection was provided to Mr. Vicars. This is clearly contrary to the case law as cited, indicating that knowledge of the symptoms caused by the disability is sufficient to create liability. Here, the respondent knew that complainant had symptoms from physiological conditions which rendered him unable to work for long periods of time, which by definition is "handicap" under the W. Va. Human Rights Act.

C.

CONCLUSIONS OF LAW

1. The complainant, Jan A. Creasey, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, W.Va. Code §5-11-10.

2. The respondent, South Charleston Stamping And Manufacturing Plant, 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 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 handicapped discrimination.

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

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to be hired to the next available position with the respondent as a Manufacturing Associate Catagory III, with front pay until hired by respondent.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of $178,979.57, plus statutory interest.

9. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of $3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

11. As a result of the unlawful discriminatory action of the respondent, the Commission is entitled to an award of costs in the aggregate amount of $872.75.

D.

RELIEF AND ORDER

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

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

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant back pay through September 1996 of $178,979.57.

3. The respondent shall hire the complainant for the next available Catagory III, Manufacturing Associate position, and pay front pay in the amount representing the difference between complainant's actual earnings and what he would have made working for respondent until such time that a position becomes available.

4. Within 31 days of receipt of this decision, the respondent shall pay to the Commission costs in the amount of $872.75.

5. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $3,277.45

for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

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

7. 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, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 11th day of December, 1996.

WV HUMAN RIGHTS COMMISSION

BY: _____
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAN A. CREASEY,

Complainant,

v. DOCKET NUMBER: EH-123-92

SOUTH CHARLESTON STAMPING
AND MANUFACTURING PLANT,

Respondent.

ORDER

With submission of The Respondent's Reply To The Memorandum Of Law Of The West Virginia Human Rights Commission, came respondent by counsel, Bryan R. Cokeley, and filed a Motion Of The Respondent To Supplement The Record, requesting that the record be reopened for submission of interim earnings information for purposes of calculating the back pay damages of respondent in the above styled action. A hearing was held by telephone on December 4, 1996 at which time said Motion To Supplement The Record was argued. At that time, Counsel for the Commission, Mary K. Buchmelter, made a motion to reopen the record for the purpose of including certain testimony of the complainant's wife regarding a telephone conversation with respondent's agent, Mr. Markham, which had been excluded as hearsay at Public Hearing, when it was related through the testimony of the complainant.

The telephone conference was adjourned to allow counsel to explore the possibility of compromise as to the supplementation of the record for the respective

information to which both parties had respectively objected. No agreement was reached and further argument was heard regarding the respective motions to reopen the record in a telephone conference on December 11, 1996.

During the course of the hearings, respondent represented that the issue of damages had not been an issue in the above styled action. The Commission indicated that it would not be prejudiced by submitting a new damage calculation which included the interim earnings information because that information had already been in the file for the case and the damage calculations had to be redone at the time of briefing when counsel noted that the interim earnings information had not been offered into evidence during the course of the hearing. It is apparent also that proposed stipulations had been prepared in advance of Public Hearing but there is no indication that those proposed stipulations covering interim earnings were ever actually sent to counsel for respondent.

The undersigned finds as fact based upon consideration of the foregoing and the standard practice of the Commission to enter into stipulations regarding back wage calculations, as well as the fact that no stipulations were entered into by the parties, that counsel for respondent in fact refused to stipulate to a back wage calculation and demanded strict proof thereof. Having required the Commission to present its proof of back wage damages, and upon discovering that counsel for respondent had failed to

present interim earnings to the undersigned, counsel for respondent now requests the undersigned to correct that oversight because the failure to do so will result in a windfall to the complainant should liability be upheld on appeal.

Counsel for respondent asserts that although it would be appropriate to reopen the record to correct the lack of interim earnings information, it would not be appropriate to reopen the record for the testimony of the complainant's wife, to clean up the record in that regard, ostensibly because there is a difference between damages and liability issues, which make the one appropriate but the other not. No case law was submitted for the undersigned's consideration justifying such a distinction. Counsel for respondent argues also that the supplementation of the record for the testimony of complainant's wife concerning her alleged conversation with Mr. Markham, regarding his illness and absence from work would require a much more extensive supplementation of the record requiring rebuttal and other evidence concerning that alleged conversation. Examination of the Transcript of Public Hearing at page 221 makes it plain that no rebuttal evidence is possible regarding complainant's testimony regarding that alleged telephone conversation because Mr. Markham can not say whether such a conversation occurred as he simply does not recall it. Thus it is found as fact by the undersigned that there would be no prejudice to the respondent by

allowing the supplementation of the record for that testimony. Counsel for respondent agreed to treat the letter of Ms. Buchmelter dated December 10, 1996 requesting permission to add the testimony of Mrs. Creasey to the record as a written motion to that effect, as made during oral arguments of December 4th and 11th, 1996.

After consideration of the foregoing, the undersigned ruled that the administration of hearings requires some point of finality in the submission of evidence. After the closing of the record in the Public Hearing and the initial submission of briefs is not the time to be bringing up additional matters when there is no unexpected development or newly discovered information which fairness requires to be addressed, or where such need for supplementation is timely requested prior to or in the course of the Public Hearing. The undersigned, while having a great aversion to the complainant's potential windfall, refuses to encourage noncooperation in stipulating to uncontested issues by allowing the respondent to supplement the record with interim earnings information which it inadvertently forgot to present after forcing the Commission to present its damage information at the Public Hearing. The undersigned ruled that the record would stand and would not be supplemented for either purpose, and requested that the parties vouch the record with the revised damage calculation and an affidavit of Mrs. Creasey regarding the alleged phone call, for possible appellate review.

It is so ORDERED.

Entered this 13th, day of December, 1996.

WV HUMAN RIGHTS COMMISSION

BY: _____
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE