



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
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CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

ARCHA MOORE, JR.
Governor

February 9, 1987

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RE: Crouch v. E. I. DuPont de Nemours, Inc.
ES-471-83 & EH-472-83

Dear Parties:

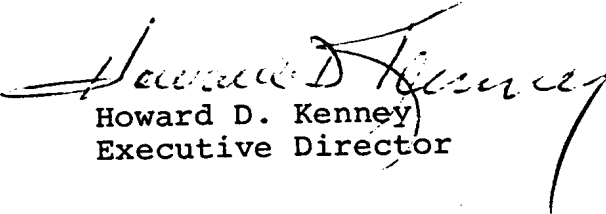
Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the county wherein the petitioner resides or does business,

Susan J. Crouch
February 9, 1987
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or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within thirty (30) days, the Order is deemed final.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/mst

Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SUSAN J. CROUCH,

Complainant,

v.

DOCKET NOS. ES-471-83 &
EH-472-83

E. I. DUPONT, DE NEMOURS, INC.,

Respondent.

FINAL ORDER

After consideration of the Recommended Decision of the Hearing Examiner and Exceptions thereto relating to Docket No. ES-471-83 of the above-captioned matter, Docket No. EH-472-83 having been withdrawn by the complainant, the Commission does hereby adopt the Proposed Findings of Fact and Conclusions of Law of the Hearing Examiner as its own with the modifications set forth below.

The Commission amends the Examiner's Recommended Decision by modifying Proposed Conclusion of Law No. 13 as follows:

"13. The respondent is hereby prohibited from taking any adverse action whatsoever against Mrs. Crouch or against any other person for testifying in the this matter."

Proposed Conclusions of Law Nos. 15, 16 and 17 are deleted.

Proposed Conclusion of Law No. 18 is modified as follows:

"18. The respondent shall cease and desist from applying its employment policies, particularly its policies relating to discipline, leave, attendance, tardiness and other terms and conditions of employment in an unlawful discriminatory manner."

It is hereby ORDERED that the Hearing Examiner's Recommended Decision be attached hereto and made a part of this Order except as amended by this Order.

Accordingly, it is hereby ORDERED that:

1. The Respondent shall cease and desist from discriminating against individuals on the basis of sex as proscribed by the WV Human Rights Act, particularly as it relates to its implementation of employment policies relating to discipline, leave, attendance, tardiness and other terms and conditions of employment;
2. The respondent shall immediately reinstate the complainant to the position of operator at Step No. 7 with full and uninterrupted benefits and seniority;
3. The respondent shall pay to the complainant backpay in the amount of \$79,778.40 for the period between December 28, 1982 and December 28, 1985; with an additional award of \$543.20 for each week from December 28, 1985 until the date of her reinstatement. Additionally the complainant shall be provided 10% interest per year compounded annually from the date of December 28, 1982 to the date of payment in full by the respondent;
4. The respondent shall pay to the complainant \$5,000.00 as compensation for humiliation, embarrassment, and emotional and mental distress;
5. The respondent shall expunge the complainant's file of any documentation surrounding the issue of probation, dismissal or any other negative factors involving the issues litigated in cause of action.
6. Respondent shall post and maintain in its offices or place of business in a permanent place where it is clearly visible, the poster of the Human Rights Commission advising its employees of their rights under the WV Human Rights Act. Such poster shall be augmented by a statement by the respondent that it will implement its employment practices and policies in a consistent, uniform and objective manner; and

7. Respondent shall provide to the Commission proof of compliance with this Order within 35 days of service of said Order by copies of cancelled checks, affidavit or other means calculated to show such proof.

By this Order, a copy of which shall be sent by certified mail to the parties, the parties are notified that they have ten days to request reconsideration of this Order, and that they have the right to judicial review.

Entered this 6th day of February, 1987.

RESPECTFULLY SUBMITTED,

BY Betty G. Hamilton
BETTY HAMILTON
VICE CHAIR
WV HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SUSAN J. CROUCH,
Complainant,

v.

Docket Nos. ES-471-83
EH-472-83

E. I. DuPONT, INC.,
Respondent.

EXAMINER'S RECOMMENDED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

This matter matured for public hearing on the 11th and 12th of March, 1986, at the Daniel Boone Building, 405 Capitol Street, Charleston, West Virginia, before the Honorable Theodore R. Dues, Jr. The presence of a hearing commissioner was previously waived by the parties.

Appearing at the hearing were the Complainant, in person, and by her counsel, Mary Beth Kershner. The Respondent appeared by its counsel, John Lawless and William Herlihg. Also present on behalf of the Respondent was Randy Dossat.

After considering the testimony of record, the documentary evidence and the proposed findings submitted by the Complainant and the Respondent on April 15, 1986, the Examiner makes the following recommended decision.

ISSUE

1. Whether the Complainant's discharge on December 28, 1986², was motivated by her gender or by non-pretextual legitimate job related reasons.

FINDINGS OF FACT

1. The complainant, Susan J. Crouch, was hired by E. I. DuPont De Nemours, Inc. (hereinafter referred to as "Respondent") on October 13, 1975. She was originally hired into the "labor gang," and was later promoted to operator in 1977.

2. Prior to 1981, Ms. Crouch was not the subject of any disciplinary or "corrective" actions by the Respondent.

3. When Ms. Crouch was promoted to the position of operator, Raymond Stamper became her foreman. He remained her foreman until 1980.

4. Mr. Stamper, during nearly the entire time that Ms. Crouch was a member of his crew, subjected her to sexual harassment. This harassment took the form, at first, of sexual innuendo, which Ms. Crouch attempted to dismiss as jokes. However, it then escalated to uninvited touching of Ms. Crouch's buttocks and breasts when she and Mr. Stamper were not observed by others. This occurred at least once a night when they were working the "evening" or "midnight" shifts.

5. On one occasion, these sexual advances by Mr. Stamper caused Ms. Crouch to run out of the building in which they were working, when she sought out John Bowling, another member of Mr. Stamper's crew, and told him of the incident. Mr. Bowling's testimony confirms this occurrence.

6. On one occasion, Ms. Crouch was so upset about the harassment that she went to see Frances Thomas, R.N., in "plant medical" to obtain some medication for her "nerves." While

there, she confided to Ms. Thomas the cause of her nervousness. Ms. Thomas' testimony confirms this, and Ms. Thomas also stated that Ms. Crouch was on that occasion visibly upset and crying, and was fearful that her failure to submit to Mr. Stampers' advances would effect her job. This incident is also confirmed by Respondent's Exhibit No. 6, Medical Records of Susan J. Crouch.

7. Frances Thomas advised Ms. Crouch to discuss her problem with someone in "Employee Relations" at the plant. Ms. Crouch did so, and talked to Bill Young in Employee Relations concerning sexual harrassment. Following her discussion with Mr. Young, the harrassment decreased for a time, but later began again.

8. When Ms. Crouch was pregnant with her third child, in 1978, Mr. Stamper moved her from her assignment in "Dry Flowables" to "SBU". In Dry Flowables, there was no heavy lifting involved. In SBU, Ms. Crouch was required to fill, lift, load, and stack fifty (50) pound bags routinely. She was about seven (7) months pregnant at that time, and was visably pregnant to any observer. This incident was entirely confirmed by Ruby Snead, who was also an operator in Mr. Stamper's crew. Ms. Snead also complained about Ms. Crouch's work assignment to Mr. Stamper, who was aware of Ms. Crouch's pregnancy.

9. Ms. Crouch was afraid to tell Mr. Stamper or any of respondent's supervisory personnel of her third pregnancy, because, when she began work on Mr. Stamper's crew shortly after the birth of her second child, he told her, "If you're smart, you

won't get pregnant again."

10. On one occasion, Mr. Stamper had disciplinary action taken against Ms. Crouch for a safety violation when, in fact, she had been following proper procedures. However, when Ms. Crouch produced written documentation that she had followed proper safety procedures, Dan Baurlee destroyed the "write up." Mr. Stamper was aware of the proper procedures, but still chose to take unwarranted punitive actions against Complainant.

11. Ruby Snead and John Bowling both confirmed that Ms. Crouch complained to them about sexual harrassment by Mr. Stamper. Mr. Bowling testified that Ms. Crouch did not want to be left alone with Mr. Stamper, and would try to persuade Mr. Bowling to accompany her when she and Mr. Stamper were working together, in order to avoid being alone with Mr. Stamper.

12. Ms. Crouch was never informed of the respondent's policies concerning sexual harassment. Ruby Snead testified that, while she has received such information from the respondent in recent years, she did not recall that it was made available to employees while Ms. Crouch was employed by respondent.

13. Mr. Bowling and Ms. Snead both testified that Ms. Crouch was a "good operator and was safety conscious." Indeed, Mr. Bowling stated that Ms. Crouch had been responsible for training him when he became an operator in 1978 or 1979. Ms. Snead testified that Ms. Crouch never refused a work assignment and "worked as hard as anybody." Both Mr. Bowling and Ms. Snead testified that Ms. Crouch was not late for work excessively; Mr. Bowling testified that other operators were late for work more

often than Ms. Crouch was, as did Ms. Crouch herself.

14. Sometime in 1980, Charles Baldwin became Ms. Crouch's foreman. One night after working the 4:00 p.m. to 12:00 a.m. shift, Mr. Baldwin offered Ms. Crouch a ride home when she was waiting on a bus. When they arrived at her home, Mr. Baldwin asked her to engage in sexual relations with him, and she refused. Mr. Baldwin's testimony substantially confirms this incident.

15. Following this incident, Ms. Crouch's relationship with Mr. Baldwin deteriorated. Mr. Baldwin would single her out to send on assignments, regardless of the other members of the crew who were also not busy at the time.

16. Raymond Stamper testified that he had never sexually harassed Ms. Crouch; that he had not moved her to a job requiring heavy lifting when her pregnancy was advanced, and that he had always treated her fairly. However, in light of the testimony of Ruby Snead, John Bowling, and Frances Thomas, this testimony is not credible. In addition, Mr. Stamper admitted, on cross-examination, that he had vehemently opposed the assignment of Ms. Crouch to his crew due solely to her pregnancy.

17. On October 12, 1981, Ms. Crouch was working on the evening shift. She left the SBU Control Room and went to the "PACM" lunchroom, which was temporarily being used as the lunchroom for SBU. She went there to turn on the heat and get warm, because the control room was cold. As soon as she had turned on the heat and sat down, Mr. Baldwin entered and said, "You know better than that." Ms. Crouch did not understand his

comment until the following day, when Mr. Baldwin took her to meet with Penny Matheson, Area Supervisor for Production. Ms. Matheson informed her that Mr. Baldwin had found her asleep in PACM lunchroom the night before.

18. No one besides Mr. Baldwin witnessed this alleged sleeping incident. Mr. Baldwin was on the belief that Ms. Crouch should receive a "formal contact" as described in Respondent's Exhibit No. 10. However, Ms. Matheson recommended to the "Steering Committee" that Ms. Crouch be placed on a year's probation, the most severe "corrective action," short of dismissal. Ms. Crouch was not informed of the involvement of the Steering Committee, and was not given the opportunity to present her side of the issue to that committee.

19. Mr. Baldwin testified that Ms. Crouch had her coat wrapped around her and her feet propped up, and had deliberately left her job site to take a nap. However, Ms. Crouch, according to Respondent's Exhibit No. 1, was never informed that she was accused of deliberate wrongdoing. Further, Mr. Baldwin was unable to describe the coat Ms. Crouch was allegedly wearing.

20. Respondent's Exhibit No. 1 indicates that, on October 15, 1982, Ms. Crouch admitted that she had been "dozing" on the previous night. However, Ms. Crouch testified that she had never made such an admission on that date or at any other time. On October 19, when she was placed on probation, Ms. Crouch requested and received the attendance of four (4) other operators at the meeting. Respondent's Exhibit No. 1 reflects that at that time Ms. Crouch denied having been asleep. On

October 20, 1982, Ms Matheson and Mr. Baldwin hastily convened yet another meeting on this issue. Ms. Crouch was not notified of this meeting in advance and was unable to obtain witnesses to the proceedings. At that time, an addendum, which was never shown to Ms. Crouch, was added to Respondent's Exhibit No. 1, indicating that she again admitted that she had been asleep on October 14, 1982. However, in light of Ms. Crouch's testimony; in light of the fact that when other operators attended the meeting, there is recorded a denial of sleeping; and in, light of the haste with which the third meeting was called, denying Ms. Crouch the opportunity to have others present; the testimony of Mr. Baldwin and Ms. Matheson concerning the alleged admissions made by Ms. Crouch on this subject is not credible.

21. It is clear from the testimony that operators frequently fall asleep when they are not busy and are working night. In most cases, their foreman are aware of this and merely wake the operator up, giving them a mild verbal reprimand. This normally was the practice of Mr. Baldwin. Indeed, Mr. Baldwin testified that everyone who has ever worked on a shift has fallen asleep. Ruby Snead testified that she had never known of anyone else who had been disciplined in any fashion for being caught sleeping on the job. Albert Keeney, a retired foreman, testified that operators regularly fall asleep on evening and midnight shifts, that management knew this is the case, and that the rule against sleeping is applied more strictly by respondent to some employees than to others. Jessie Cobb also testified that sleeping was common among operators. John Bowling testified that

he had known only one other operator who was fired for sleeping on the job, and that that person had gone to sleep at least once a week during the four (4) to six (6) months that he and Mr. Bowling had worked together. Mr. Kenney testified that he would not have an employee placed on probation for a single sleeping incident.

22. It is indisputable that sleeping on the job is against the rules of the Respondent, and that this rule is important in terms of safety and plant discipline. However, it is equally indisputable that the Respondent has chosen to not enforce this rule, except in certain cases, such as in the case of Ms. Crouch.

23. During her employment by Respondent as an operator, Ms. Crouch was a hard-working, conscientious employee. This was established through her own witnesses, and was not disputed by Respondent's witnesses.

24. Respondent's Exhibit 1, the "Probation Report" of October 19, 1981, for Ms. Crouch, lists six (6) instances of tardiness in the previous twelve (12) months, and four (4) days of work missed entirely or in part due to illness over the previous (12) months, in addition to the alleged sleeping incident, as reasons for Ms. Crouch's probation. However, Ms. Crouch was led to believe that arriving at work twelve (12) minutes late or less was not considered "late" by the Respondent. This belief was reasonable in light of the fact that employees' pay is not reduced if they are twelve or fewer minutes late, and in light of the fact that it was not explained to her by her

supervision that this was a "pay practice" and distinct from the "attendance practice" requiring that employees be at their job site by starting time. Therefore, the instance of tardines listed for June 29, 1981, where Ms. Crouch arrived two (2) minutes late, should not have been included in the list of alleged misconduct. Further, the instance documented for September 12, 1981, when Ms. Crouch's bus took the wrong route and did not pick her up, should not have been included in this list, as she was late due to circumstances beyond her control. Larry Thomas, one of the witnesses for respondent, confirmed that normally such occurrences are not held against the employee. Additionally, on June 14, 1981, Ms. Crouch's regular ride to work failed to pick her up. On July 13, 1981, she was at the plant on time, but left her job site to change clothes as was the frequent practice of operators at the plant. Neither of these instances should have been included on the Probation Report.

25. In a similar vein, the four (4) days on which Ms. Crouch missed work due to illness should not have been listed on the Probation Report. Respondent's policy with regard to sick leave, as testified to by witnesses both for Ms. Crouch and for respondent, allows an employee to stay at home when sick, and does not require that they see a doctor until they miss the third day of work. On July 17, 1981, Ms. Crouch had called in sick due to vomiting and diarrhea. Mr. Baldwin required her to report to plant medical on that day. While apparently the plant physician declared her fit to work without an examination, Ms. Crouch's undisputed testimony that she vomited twice after being sent to

work. Additionally, because there was no women's restroom in the building where she worked, and because Mr. Baldwin did not allow Ms. Crouch to go to the restroom without permission, Mr. Baldwin's conduct was not reasonable. Because all four of these instances were listed in such a fashion as to imply that illness is an offense against the employer, Ms. Crouch believed that an incident of taking a day off due to illness while she was on probation would result in her discharge. The effect of this was to place an unwarranted burden upon Ms. Crouch, and was violative of respondent's own policies. In addition, it set the stage, and indeed made inevitable, the event which culminated in Ms. Crouch's discharge, as will be discussed further, infra. Further, Penny Matheson, on cross-examination, was unable to coherently explain the respondent's sick leave policy, and stated that "several instances" of illness would be held against an employee regardless of whether the employee had a valid, medically verified illness. Thus, it is clear that Ms. Crouch's fear of dismissal due to illness was clearly justified.

26. Ms. Snead is also "written up" on each occasion when she cannot work due to illness. This is true regardless of whether she has a doctor's excuse, and she had been subjected to additional suffering by being ordered to come into the plant when sick, and being made to wait for four (4) hours for the plant physician to send her home. She testified that male employees are not subjected to such treatment.

27. In January or February, 1982, Susan Crouch and L. E. Herndon, another operator, saw Charles Baldwin asleep in the SBU

control room. They observed this for ten (10) to fifteen (15) minutes before they had to leave to perform their duties. Ms. Crouch reported this incident, and Mr. Baldwin was soon transferred to a straight-day job. However, Mr. Baldwin testified that on no occasion was he ever disciplined for sleeping on the job. Albert Keeney had seen Mr. Baldwin asleep on the job more than once when Mr. Baldwin was an operator; nevertheless, the respondent did not discharge Mr. Baldwin, but rather promoted him to foreman.

28. After Mr. Baldwin was transferred, Larry Thomas became Ms. Crouch's foreman. On February 11, 1982, a Probation Follow-Up was held with Ms. Crouch by both Mr. Baldwin and Mr. Thomas. At that time, two (2) instances of tardiness were discussed with Ms. Crouch; on February 4, 1982, she arrived at the control room twenty (20) minutes late, and on February 11, 1982, she arrived eight (8) minutes late. However, she was in the plant on time in both instances. On February 4, 1982, she had arrived and gone to the control room and then left there to change clothes; as this was a practice permitted by supervision as discussed in No. 23, supra, this incident should not have been considered a violation of plant rules. Likewise, the incident of February 11, 1982, should not have been considered a violation, as Ms. Crouch was only eight (8) minutes late, for the reasons outlined in No. 23.

29. The second probation follow-up was conducted on March 11, 1982. This relates to an alleged safety violation on the part of Ms. Crouch, and allegedly leaving the job site early,

on March 9, 1982. Ms. Crouch's crew was labelling bottles and she rubbed a blister on her thumb early in the day. She was unable to wear gloves while performing this task because gloves would not have allowed her to peel the backing off the labels. Because she did not believe this to be a serious injury, she did not seek treatment for this until approximately 4:40 p.m., when she went to plant medical for a bandage. The rest of her crew left to take showers at the same time, because their unit was not operating that day. Mr. Thomas had instructed the crew that, that day after completing a certain amount of work, they could leave their job site to take their showers.

30. While Mr. Thomas testified that he would not allow his crew to take their showers earlier than thirty (30) minutes prior to quitting time, the testimony of other persons makes this somewhat incredible. John Bowling testified that operators were excused to take their showers as much as one and one-half (1 1/2) hours before their shift ended, depending upon whether their work was done. Charles Baldwin testified that he would allow his crew to begin their showers about seventy five (75) minutes before the end of the shift. These times, of course, would vary depending upon whether the units were operating and upon whether the day's work had been completed, and operators were required to report back to the job site after their shower to wait for their "relief." Additionally, Mr. Thomas did not refute Ms. Crouch's testimony that their unit was not operating that day, nor that the rest of the crew had gone to the shower when Ms. Crouch left for plant medical. In light of all this testimony, Ms. Crouch's

assertions concerning their incident of March 9, 1982, is credible, and it is clear that she should not have been reprimanded for either a safety violation or for leaving her job early on that date.

31. On April 28, 1982, another probation follow-up was conducted with Ms. Crouch by Mr. Thomas. Ms. Crouch had been twenty seven (27) minutes late in reporting to work on April 24, 1982. Ms. Crouch was also reprimanded for requesting cash advances of her pay; however, it is not a violation of respondent's rules to make such a request, and the decision on whether to grant such a request rests with the foreman. Therefore, it was not proper to reprimand Ms. Crouch for this request, nor to record this discussion in the probation follow-up report.

32. On June 24, 1982, another probation follow-up meeting was held. At that time, Ms. Crouch was informed that for the previous two (2) months she had no problems.

33. On July 29, 1982, another probation follow-up was conducted. Ms. Crouch had arrived at work thirty (30) minutes late on July 26, 1982, because her ride to work had not picked her up. This should not have been counted against Ms. Crouch, as the respondent does not normally penalize employees for tardiness when it is due to circumstances beyond their control. However, Ms. Crouch was also told that, on that date, that her performance in other areas was satisfactory. Ms. Crouch was not shown any of the probation reports, but was asked to sign them and "verify" their accuracy.

34. On October 12, 1982, the final probationary follow-up meeting was held. Ms. Crouch's probationary period was extended for another six (6) months, a clear violation of respondent's written policies. This extension was the result of four (4) instances of tardiness, three (3) of which, as discussed supra, should not have been considered, and the alleged "safety violation," which also, as discussed supra, should not have been considered. At that time, Ms. Crouch had not committed any bona fide offense against respondent for nearly six (6) months. Indeed, the only genuine rule violation during the entire year of probation had been one (1) instance of tardiness on April 24, 1982. Further, the record is clear that Ms. Crouch violated none of respondent's rules between October 12, 1982, and December 26, 1982. The decision to extend probation was made without discussing it with Ms. Crouch in advance of the decision, and without allowing her to present any information or argument concerning its appropriateness.

35. After the original probation was extended, Ms. Crouch was placed on "light" or restricted duty due to back trouble by the plant physician. However, Mr. Thomas required her to perform the full range of her duties during that time, which included lifting one hundred (100) to one hundred twenty-five (125) pounds. While Mr. Thomas testified that the heavy lifting was the responsibility of the "utility workers," Ms. Crouch uncontested testimony was that both operators and utility workers were required to do the lifting, as at least two (2) people were required to do the work properly.

36. On December 25, 1982, Ms. Crouch was scheduled to perform SBU "firewatch" duties on the 6:00 p.m., to 6:00 a.m. shift. She had volunteered for this duty one week before. The SBU building was not operating due to the holiday, and only Ms. Crouch was to work in that building. On that day, she had a severe toothache, and was prevented from sleeping during the day due to the pain. However, she was afraid that she would be dismissed if she stayed home, regardless of her condition. In light of the respondent's previous treatment of Ms. Crouch with regard to absence due to illness, this fear was entirely justified.

37. Ms. Crouch reported to work on the evening of December 25, 1982. She was taking aspirin for her toothache, and at one point asked to speak to Mr. Thomas before he left the area, but he left before she could discuss her problem with him. There were no physicians or nurses on duty at the plant that evening. When this is the case, who are sick employees to seek assistance from "safety men," or guards, who do not have adequate medical training and are not qualified to assist with medical problems. Therefore, Ms. Crouch did not have medical assistance or advise available to her on that evening.

38. At about 2:00 a.m., on the morning of December 26, 1982, Ms. Crouch took some medication, Zomax, which had been prescribed by plant medical for a backache. Some time after this, she fell asleep. Complainant's Exhibit No. 1 shows that drowsiness is a possible side effect of this medication, and Ms. Crouch had taken this medication in the past when it had

caused her to be drowsy.

39. At about 2:35 a.m., Ms. Crouch was awakened by Larry Thomas, Tom Keefer, and Jack Thompson. They asked her to accompany them to the office. Ms. Crouchf was asked to explain this incident by Mr. Thomas, but he left the office and asked Mr. Keefer and Mr. Thompson to accompany him to another room while she was attempting to explain. She was then sent home.

40. On December 28, 1982, Ms. Crouch was discharged by Respondent. Although Respondent's "corrective action procedure" specifies that dismissals are to be discussed with Biochemicals Manufacturing and Personnel and Industrial Relations Divisions, in Wilmington, Delaware, the testimony of respondent's witnesses indicate that the decision to discharge Ms. Crouch was made entirely by the local plant personnel.

41. After Ms. Crouch's discharge, she received unemployment compensation, and, when these benefits expired, she received Aid to Families with Dependent Children (hereinafter referred to as "AFDC") and food stamps. She had a great deal of difficulty in locating another job, most likely due to the fact that she had been discharged by respondent.

42. Ms. Crouch did locate a job in April, 1984, with Kanawha Janitor, which she is still performing. She is paid minimum wage, and began working eighteen (18) hours per week. Presently she works thirty-four (34) hours per week. She still is receiving AFDC assistance.

43. Ms. Crouch has suffered a great deal of humiliation, embarrassment, emotional and mental distress, and loss of

personal dignity as a result of this discharge. She has been unable to support her children, who have been forced to reduce their standard of living in conformance with their mother's drastically reduced income. In addition, her very well-being, and that of her children was threatened by the dismissal. The family was forced to move to less expensive housing; it was difficult, at times, to even buy food and clothing for her children. Her distress over this situation is still acute.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Act, W.Va. Code § 5-11-1 et seq., provides that:

"It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of West Virginia or its agencies or political subdivisions:

"(a) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or handicapped. Provided, that it shall not be unlawful discriminatory practice for an employer to observe the provisions of any bona fide pension, retirement, group or employee insurance, or welfare benefit plan or system not adopted as a subterfuge to evade the provisions of this subdivision." Code 5-11-9.

2. "Discriminate" and "discrimination" are defined as follows:

"The term 'discriminate' or 'discrimination' means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin,

ancestry, sex, age, blindness or handicap and included to separate or segregate." Code 5-11-3(h).

3. The case of State v. Logan-Mingo Mental Health Agency, Inc., _____ W.Va. _____, 329 S.E. 2d 77 (1985), establishes the criteria for determining whether a Human Rights complainant has established a prima facie case of unlawful discriminatory discharge:

"a complainant in a disparate treatment, discriminatory discharge case brought under the West Virginia Human Rights Act, Code 15-11-1, et seq., may meet the initial prima facie burden by proving, by a preponderance of the evidence, (1) that the complainant is a member of the group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct."

4. In this case, the first two elements of the three part test outlines above were not contested; specifically, that the complainant, Susan J. Crouch: (1) is a female, and thus "a member of the group protected by the Act," and (2) that she was discharged from employment by respondent.

5. Ms. Crouch has also proven the third element of a prima facie case of unlawful discriminatory discharge based upon sex. As discussed more thoroughly in Findings of Fact No. 21, supra, the evidence is overwhelming that the respondent's usual practice with regard to operators who fall asleep on the job is to not discipline these employees in any fashion. Indeed, respondent's own witness, Charles Baldwin, testified that everyone who is a shiftworker at the Belle plant falls asleep on occasion. The respondent offered no evidence to rebut this

testimony.

6. The respondent did appear to attempt to show that the first alleged sleeping incident on October 14, 1981, was the result of deliberate wrongdoing on the part of Ms. Crouch. However, this appears incredible in light of the fact that, at the time Ms. Crouch was placed on probation, she was not informed that she was accused of deliberate wrongdoing. Even more persuasive on this issue is the fact that Mr. Baldwin, Ms. Crouch's accuser, recommended only a "formal contact" as opposed to probation, to correct the alleged violation of respondent's rules, which he surely would not have done if Ms. Crouch had deliberately violated this rule. Finally, of course, as discussed in Findings of Facts nos. 19 and 20, the only witness to the alleged incident was Mr. Baldwin, who admitted that Ms. Crouch had rebuffed his sexual advances on an earlier occasion, and Ms. Crouch did and does deny that she was asleep on that date.

7. With regard to the admitted sleeping incident of December 26, 1982, the same reasoning as was applied in Nos. 5 and 6 above are equally applicable. In addition, the respondent, by creating more stringent rules with regard to sick leave for Ms. Crouch than for other employees, and contrary to their written sick leave policies, itself created a situation wherein Ms. Crouch was unable to conform her conduct to the prohibition against sleeping on the job.

8. The respondent's rule against sleeping on the job could be enforced against its employees stringently, if it is

done so consistently; in other words, if the same actions are taken by respondent on each occasion upon which any employee is found sleeping by supervision. However, for whatever reason, respondent has chosen not to do this. Rather, it enforced this rule in the case of Ms. Crouch, and not in the cases of males who slept on the job. Mr. Baldwin, for example, slept on the job at least twice while he was an operator. Not only was he not dismissed, he was promoted to foreman. This sort of selective enforcement of rules is prohibited by Code 5-11-9. See E.E.O.C. v. Brown & Root, Inc., 688 F.2d 338 (5th Cir. 1982), cited with approval in State v. Logan-Mingo Area Mental Health Agency, Inc., supra.

9. The other instances of alleged misconduct, presented by the respondent as additional reasons for placing Ms. Crouch on probation, and for extending that probation on October 12, 1982, do not survive close scrutiny. Three of the four instances of absence due to illness listed on the original probation report were clearly not violations of respondent's rules. The fourth, involving an incident in which Ms. Crouch was forced to return to work on the first day she was off sick, reflects the type of harassment to which Ms. Crouch was subjected, as respondent's policies do not allow for such treatment of employees. Further, four of the six instances of tardiness between October 19, 1981, and October 12, 1982, listed as reasons for the probation extension, should not have been considered by respondent, as discussed in Findings of Fact No. 23, supra. Further, three of the four instances of tardiness between October 19, 1981, and

October 12, 1982, listed as reasons for the probation extension, should not have been considered by respondent, as discussed in Findings of Fact Nos. 27-33, supra. Finally, the alleged safety violation, and resulting charge of leaving the job site early, as discussed in Findings of Fact No. 28, supra, were not valid instances of misconduct. Respondent failed, in the hearing on this matter, to establish that any "safety violation" had occurred, that the rest of Mr. Thomas' crew had not left their job site at the same time Ms. Crouch did, or that the general practice of foreman in the Belle plant does not include great flexibility in the time at which operators are allowed to leave the job site to take their showers. Thus, only one valid instance of misconduct on Ms. Crouch's part for the period of probation was established, i.e., that she was tardy without excuse on April 24, 1982, nearly six (6) months prior to the extension of her probation. As there is un rebutted testimony that some males employees are frequently late for work, and suffer no adverse effects whatsoever as a result, this single instance of "misconduct" is not sufficient to justify the extension of Ms. Crouch's probation.

10. In summary, respondent engaged in unlawful discriminatory practices when (1) it placed Ms. Crouch on probation on October 19, 1981; (2) extended the original probation on October 12, 1981; (3) created a special "rule" prohibiting Ms. Crouch from utilizing its sick leave benefits, contrary to its written policies; and (4) dismissed Ms. Crouch on December 28, 1982, for sleeping on the job.

11. Ms. Crouch is entitled to reinstatement as a Step 7 operator at the respondent's plant at Belle, West Virginia, with restoration of all seniority and benefits accumulated from October 1975, the date upon which she was hired, to December 28, 1982. In addition, she is entitled to all seniority and benefits which would have been accumulated from December 28, 1982, to the present. These benefits include, but are not limited to, seniority and tenure; raises, vacation benefits; pension; and any other benefits which accumulate to the credit of employees of the respondent. In short, Ms. Crouch is entitled to be placed in exactly the same position as she would have been had respondent not engaged in the discriminatory actions described above.

12. Ms. Crouch is entitled to removal of all references to the probation, probation extension, and discharge from her personnel files, and the respondent may not take any adverse action, or deny her any promotion, pay raise, or any other benefit in the future based upon these disciplinary actions.

13. The respondent is hereby prohibited from taking any adverse action whatsoever against Ms. Crouch, or against any of the person who testified given in this matter.

14. At the time of her dismissal, Ms. Crouch was earning eleven dollars and ninety-nine cents (\$11.99) per hour. The current rate of pay for a Step 7 operator is thirteen dollars fifty-eight cents (\$13.58) per hour. Based upon these figures, she is entitled to seventy nine thousand, seven hundred and seventy-eight dollars, and forty cents (\$79,778.40) in back wages for the time between December 28, 1982, and December 28, 1985.

She is entitled to five hundred forty three dollars and twenty cents (\$543.20) for each week from December 28, 1985, until the date upon which she is restored to her job. She is also entitled to ten percent (10%) interest per year on these monies, compounded annually, from December 28, 1982, to the date upon which she is restored to her job. Code 5-11-8(h).

15. The West Virginia Human Rights Commission is empowered to award incidental damages to victims of unlawful discriminatory practices as compensation for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity. The purpose of making such awards, "is to secure compliance with the Commission's order and to depress the discriminator's ambition to repeat the misbehavior." State Human Rights Commission v. Pearlman Realty Agency, _____, W.Va. _____, 239 S.E.2d 145 (1977). In this case, the complainant has established that all of the above-mentioned injuries were inflicted upon her as a result of the respondent's conduct in the case of Ms. Crouch was an outrageous, flagrant, deliberate, and knowing violation of Code 5-11-9. For these reasons, and in order to deter the respondent from such practices in the future, Ms. Crouch is to be awarded for lost wages, including interest of ten percent (10%) per year, compounded annually, from the date of her dismissal to the date upon which she receives this compensation.

16. The respondent shall cease and desist from applying any policies to the complainant and to all others similarly

situated relating to sick leave which are in any fashion more punitive towards employees than its written policies in this area. Respondent will also refrain from taking any disciplinary actions towards complainant or others similarly situated with regard to sick leave which is not consistent with its written policies.

17. Respondent may not apply its policies with regard to tardiness and sleeping on the job to complainant or to others similarly situated without announcing, in writing, to all employees, at least thirty (30) days in advance, that it intends to begin such enforcement. Further, respondent shall not apply such policies to the detriment of employees in any event unless it does so consistently, treating all employees who are tardy or who fall asleep on the job in an identical manner. Finally, should respondent decide to enforce its rules in these areas, it will announce in writing to all employees the specific rules and the manner in which they will be enforced, including but not limited to, the difference, if any, between its pay practices and attendance practices, and the number of instances of tardiness and/or sleeping on the job which will result in disciplinary or "corrective" action, and the exact nature of the action which will occur. The written announcements referred to in this paragraph, if promulgated, shall be submitted to the Human Rights Commission and to counsel for the complainant for review and approval prior to their dissemination to employees.

18. The respondent shall cease and desist from all unlawful discriminatory practices, including but not limited to

those which were the subject of this proceeding.

19. In the event that in the future the complainant shall seek to leave, or actually leave the employment of respondent, and that the respondent receives a request for a reference regarding the complainant from prospective employers or others, the respondent shall make no mention of complainant's probation, probation extension, or dismissal, nor shall respondent make any mention of the alleged instances of misconduct for which complainant was disciplined between October 1980 and December 28, 1982.

PROPOSED ORDER

1. That the Respondent be prohibited from taking adverse action against the Complainant, or against any of the persons who testified on her behalf, during the course of these proceedings;

2. That the Complainant be reinstated to the position of operator, Step 7 with full vested and uninterrupted benefits and seniority;

3. That the Complainant be awarded back pay in the amount of \$79,778.40 for the period between December 28, 1982 and December 28, 1985; with the additional awarded sum of \$543.20 for each week from December 28, 1985 until the date of her reinstatement. Additionally the Complainant should be provided 10% interest per year, compounded annually, from the date of December 28, 1982 to the date of payment in full by the Respondent;

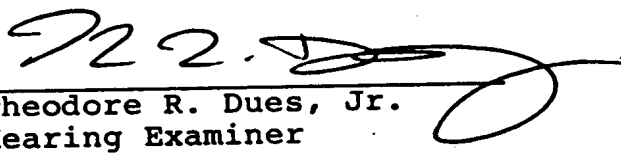
4. The Complainant should be awarded \$10,000 as compensation for humiliation, embarrassment, emotional and mental distress;

5. The Respondent should be ordered that it is to not apply its policies with regard to tardiness and sleeping on the job to the Complainant or any other employees similarly situated without providing notice of the same in writing to all employees no less than 30 days in advance of the date of implementation of such policies;

6. That the Respondent be ordered to expunge the Complainant's file of any documentation surrounding the issue of probation, dismissal, or any other negative factors involving the issues litigated in this cause of action; and that a cease and desist order issue prohibiting the Respondent from engaging in unlawful discriminatory practices.

DATED: May 28, 1986

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner

CERTIFICATE OF SERVICE

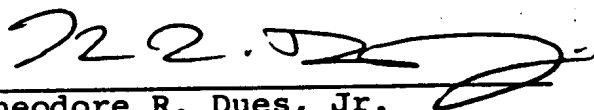
I, Theodore R. Dues, Jr., Hearing Examiner, hereby swear and say that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the following:

Mary Beth Kershner
Assistant Attorney General
State Capitol, Room E-26
Charleston, WV 25301

and

William Herligh, Esq.
P.O. Box 273
Charleston, WV 25321

by mailing the same by United States Mail on this 28th day of May, 1986.


Theodore R. Dues, Jr.
Hearing Examiner