STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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

GASTON CAPERTON
GOVERNOR

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

Quewanncoii C. Stephens
Executive Director

19 February 1991

Fred F. Holroyd, Esquire
209 West Washington Street
Charleston, WV 25302

Harley Mining, Inc.
1940 Harper Road
Beckley, WV 25801

Kathy L. DeLong
Post Office Box 58
Wharton, WV 25208

Mark Neil, Esquire
1800 Harper Road
Beckley, WV 25801

James R. Sheatsley, Esquire
Post Office Drawer AU
Beckley, WV 25801

Re: DeLong v. Maben Energy, et al.
Docket No. ES-519-87

Dear Parties and Counsel:

Herewith pleased find enclosed 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, 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,

Quewanncoii C. Stephens
Executive Director

QCS/jm
Enclosures
Certified Mail - Return Receipt Requested
cc: 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

KATHY L. DELONG,

Complainant,

v. DOCKET NO. ES-519-87

MABEN ENERGY, HARLEY MINING,
and DALE BIRCHFIELD,

Respondent.

FINAL ORDER

On 2 July 1990 the West Virginia Human Rights Commission issued an Order finding that Harley Mining, Inc. had unlawfully discriminated against complainant on the basis of sex and was liable to her for back pay and benefits. The Commission did not at that time make an award of back pay and benefits but, instead, gave respondent Harley Mining, Inc. an opportunity to file an affidavit or other verified documents indicating whether complainant would have at any time been laid off by respondent, thereby reducing the back pay award to reflect such event.

In its 2 July 1990 Order the Commission warned the parties that "failure to comply with this Order . . . shall result in the denial of relief or a refusal by the Commission to consider any untimely document or argument." The documents and/or information requested from respondent were to be submitted within ten (10) days from receipt of that Order.

As of 13 February 1991, respondent had filed no documents with the Commission regarding periods of lay off, despite ample opportunity to do so. For that reason, the Commission, at its meeting of 13 February 1991, decided to, and does hereby, accept the hearing examiner's recommendation in regards to back pay and benefits and awards to complainant back pay in the amount of $39,522.68 and vacation, holiday and leave benefits in the amount of $7,456.80.

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 further ORDERED that the Commission's Order of 2 July 1990 and the hearing examiner's recommended findings of fact and conclusions of law, as amended, be attached hereto and made a part of this Order.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 20th day of February, 1991 in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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

GASTON CAPERTON
GOVERNOR

TELELPHONE 304-348-2616

Quewanncoii C. Stephens
Executive Director

2 July 1990

Fred F. Holroyd, Esquire
209 West Washington Street
Charleston, WV 25302

Harley Mining, Inc.
1940 Harper Road
Beckley, WV 25801

Kathy L. Delong
P. O. Box 58
Wharton, WV 25208

Mark Neil, Esquire
1800 Harper Road
Beckley, WV 25801

Dale A. Birchfield, President
Maben Energy Corporation
41 Eagle Road
Beckley, WV 25801

James R. Sheatsley, Esquire
P. O. Drawer AU
Beckley, WV 25801

Re: Kathy L. Delong v. Maben Energy Corp., et al.
Docket No. ES-519-87

Gentlemen and Ms. Delong:

Enclosed please find the order of the Commission affirming the recommendations of the hearing examiner with certain modifications. Please be advised that additional material is required from Harley Mining, Inc. and complainant, and that the same must be filed, with me, in accordance with the timelines set forth in the Commission's order.

Sincerely,

Quewanncoii C. Stephens
Executive Director

QCS/jm

Enclosure

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KATHY L. DELONG,

Complainant,

v. DOCKET NO. ES-519-87

MABEN ENERGY CORP.,
HARLEY MINING, INC.,
and DALE A. BIRCHFIELD,

Respondents.

ORDER

On 11 April 1990 the West Virginia Human Rights Commission reviewed the recommended findings of fact and conclusions of law filed in the above-styled matter by hearing examiner Gail Ferguson. After consideration of the aforementioned, and a thorough review of the transcript of record, the arguments and briefs of counsel, and the exceptions filed in response to the hearing examiner's recommendations, the Commission decided to, and does hereby, rule as follows:

1. The hearing examiner's recommendation that Dale A. Birchfield be dismissed as a party respondent in this matter is adopted and, therefore, it is ADJUDGED, ORDERED, and DECREED that the complaint as filed against Dale A. Birchfield be, and the same is hereby, dismissed with prejudice.

2. The hearing examiner's recommended findings of fact and conclusions of law regarding Maben Energy Corporation are adopted in their entirety and, therefore, it is ADJUDGED, ORDERED, and DECREED that the complaint as filed against Maben Energy Corporation be, and the same is hereby, dismissed with prejudice.

3. The hearing examiner's recommended findings of fact and conclusions of law regarding Harley Mining, Inc. are adopted with the following modifications and amendments:

(a) In the subsection entitled "Conclusions of Law," paragraph 10 is modified to read: "As a result of the unlawful discriminatory actions of the respondent, the complainant is entitled to back pay and vacation, holiday, and leave benefits in an amount to be determined by a later order of the Commission."

(b) In the subsection entitled "Relief and Order," paragraph 3 is modified to read as follows: "Respondent shall pay to complainant back pay in an amount to be determined by later order of the Commission."

4. Due to the inadequacy of the record as placed before the Commission regarding whether or not complainant would at any time have been laid off by respondent Harley Mining, Inc., we hereby grant respondent the opportunity to file an

affidavit or other verified document indicating which periods, if any, it believes that complainant is not entitled to back pay due to layoff.

The above-requested documents shall be served on the Executive Director of the Commission, with a copy to opposing counsel, within ten (10) days from receipt of this order. The complainant shall have ten (10) days from the date of receipt of these documents to file a response.

The parties are advised that it is the intent of the Commission to award back pay beginning on 29 August 1987, the date on which respondent hired Randall Scott Bell, an individual who was clearly less qualified than complainant. This date is selected because at the time the respondent chose Mr. Bell, it already had, in hand, acceptable references concerning complainant's experience, skills, and work habits as a coal miner. The back pay period, unless evidence shows otherwise, will conclude on the date that the final order herein is entered.

Failure to comply with this order of the Commission shall result in a denial of relief or a refusal by the Commission to consider any untimely document or argument. It is the intent of the Commission to issue a supplemental order regarding relief on or before 15 September 1990.

Finally, while the Commission is hesitant to condemn the exclusive use of in-house references and word-of-mouth hiring as recruitment techniques, given their usefulness in a rural state such as West Virginia, it is the intent of the Commission to subject such recruitment practices to great scrutiny to determine if they are being used as a subterfuge for discrimination. Here, reviewing the composition of Harley's workforce, the clear skills of complainant as opposed to some of the males actually hired by respondent, the lack of supplementary and simultaneous recruitment techniques, and the use of informal and subjective selection practices, we are led to the conclusion that the practices as used by Harley Mining, Inc. were, indeed, designed as a subterfuge for discrimination and that they, in fact, resulted in the discriminatory treatment of complainant.

It is, therefore, the ORDER of the Commission that the hearing examiner's recommended findings of fact and conclusions of law be attached hereto and made a part of this order, except as amended by this order.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 2d day of July, 1990 in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KATHY L. DELONG,

Complainant,

v. DOCKET NUMBER: ES-519-87

MABEN ENERGY CORP.,
HARLEY MINING, INC.,
AND DALE A. BIRCHFIELD,

Respondents.

HEARING EXAMINER'S RECOMMENDED DECISION

A public hearing, in the above-captioned matter, was convened on July 7, 1988, in Raleigh County, at the Raleigh County Public Library, Beckley, West Virginia. The Hearing Panel consisted of Gail Ferguson, Hearing Examiner, and Nathaniel Jackson, Hearing Commissioner.

The complainant, Kathy L. Delong, appeared in person and by counsel, Antoinette Eates, Assistant Attorney General. The respondent, Maben Energy Corp., was represented by William Stover and its counsel, Mark M. Neil, Esq.; the respondent, Harley Mining, Inc., was represented by Larry Presley and its counsel, Fred F. Holroyd, Esq.; and respondent, Dale A. Birchfield, appeared in person and by counsel, James R. Sheatsley, Esq.

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 hearing examiner 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.

PRELIMINARY MATTER

On April 15, 1987, the complainant, Kathy L. DeLong, filed a verified complaint with the West Virginia Human Rights Commission (hereinafter commission) alleging that the respondent, Maben Energy Corp., had discriminated against her on the basis of sex by failing to hire her in violation of the West Virginia Human Rights Act (hereinafter Act), WV Code §5-11-9(a). On July 24, 1987, the complainant filed an amended complaint adding Harley Mining, Inc. and Dale A. Birchfield as respondents. The commission issued a letter of determination finding probable cause to believe that the Act had been violated. This matter was then set for public hearing in compliance with WV Code §5-11-10.

Thereafter, on April 29, 1988, the complainant filed a motion to amend the complaint to add Birchfield Mining and M.A.E. Services, Inc. as respondents to this proceeding. Alternatively, the respondents filed motions to dismiss this matter as to Dale A. Birchfield and Maben Energy Corp. Rulings on these motions were deferred by the undersigned examiner pending the public hearing.

Upon review of the entire record related specifically to the various motions filed by the parties, the examiner recommends as follows:

Complainant's motion to amend complaint to add Birchfield Mining, Inc. is denied as said amendment is jurisdictionally untimely, absent a showing that said amendment relates back to the original filing date through identity of interest with Maben Energy Corp. or Harley Mining, Inc.;

Complainant's motion to amend complaint to add M.A.E. Services, Inc. is denied inasmuch as it is also untimely and because there is insufficient evidence that M.A.E. Services, Inc. owns an interest or exercises control over Maben Energy Corp. or Harley Mining, Inc.; and

Respondent's motion to dismiss Dale A. Birchfield as a party respondent is granted. The complainant has failed to show that Dale A. Birchfield individually is a proper party inasmuch as there has been no evidence addressed from the complainant or any other source that Dale A. Birchfield is an employer within the meaning of the Act or that Birchfield, individually, engaged in any conduct which is determined to be unlawful under WV Code §5-11-9.

The complaint is dismissed as to respondent Maben Energy Corp. for reasons set forth in the below enumerated findings of fact and conclusions of law. However, it should be noted that complainant's argument, that Maben Energy Corp. and Harley Mining, Inc. are one and the same, is rejected notwithstanding commonality as to officers and directors as reflected in their respective articles of incorporation. There is simply insufficient evidence to show that Harley Mining is so organized and controlled by Maben Energy Corp. as to be its agent or instrumentality for the purpose of hiring decisions.

Having determined that Maben Energy Corp. and Harley Mining, Inc. are separate entities, the issue then, is whether either or both of these respondents discriminated against the complainant, on the basis of her gender in violation of the Act, and if such discrimination did occur, what should the remedy be?

I.

MABEN ENERGY CORPORATION

FINDINGS OF FACT

1. The complainant, Kathy Delong, is a female.

2. On March 23, the complainant submitted her resume and sought work at Harley Mining, Inc., in the Beckley, West Virginia area.

3. The respondent, Maben Energy Corp, operates a coal preparation plant in Raleigh County, West Virginia.

4. The respondent employs no hourly underground coal mining employees.

5. The respondent never received a resume or application for employment from the complainant.

6. The respondent, Maben Engery, is not an agent or instrumentality of Harley Mining, Inc.

7. The respondent, Maben Energy Corp., did not refuse to hire the complainant.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Act has jurisdiction over the subject matter contained herein.

2. The complainant has failed to establish that respondent, Maben Energy Corp., discriminated against the complainant, based on her gender in violation of the West Virginia Human Rights Act.

3. The complainant has failed to establish that respondent, Maben Energy Corp., owned any interest or exercised any control over the hiring practices of respondent, Harley Mining, Inc.

RELIEF AND ORDER

Therefore, based upon the evidence and pursuant to the above findings of fact and conclusions of law, it is hereby the recommendation of the undersigned hearing examiner that the complaint against Maben Energy Corporation be dismissed.

II.

HARLEY MINING, INC.

FINDINGS OF FACT

1. The respondent, Harley Mining, Inc., is engaged in the business of underground mining in the Beckley, West Virginia area.

2. The complainant, Kathy DeLong, is a female who applied for a position as a coal miner at Harley Mining, Inc. on or about March 23, 1987.

3. The complainant began working as a coal miner in the fall of 1977. She worked in the mines for approximately five years. She is certified as an underground coal miner. In the five years that the complainant was employed as a coal miner, she worked at Eastern No. 4 Mine (Wharton), Eastern No. 2 Mine (Lightfoot) and at Westmoreland Mines.

4. The complainant voluntarily left employment as a miner in 1982 to raise her family.

5. The complainant's prior experience in mining included performing the duties of a pinner helper-single head pinner, a miner helper, a general laborer, a beltman, and a scoop operator. The complainant had also previously performed as a roof operator, certified carpenter, welder and office worker.

6. Respondent, Harley Mining, Inc., did not accept applications at its mine site. However, the complainant was informed by a foreman at Harley Mining that the mine was hiring, and he directed her to turn in her resume at the Davison mine site.

7. The complainant's resume was accepted by Larry Presley, a mine superintendent of Davison Mining and respresentative of Harley Mining, Inc. at the hearing.

8. Upon reviewing her resume, which listed her experience as a beltman, Presley stated to the complainant, "[y]ou mean beltperson."

9. Of the 70 or more applicants applying for a position with Harley Mining, the complainant was the only female who applied for a position as a coal miner.

10. After the complainant turned in her resume to Presley, her husband conferred with UMWA field respresentative, and the complainant then mailed a copy of her resume to the main office of Maben Energy.

11. A copy of the complainant's resume, which was mailed to Maben Energy's office, was marked received on March 30, 1987, with a Harley Mining stamp.

12. After the complainant turned in her resume she went on several occasions to the Davison mine site and the new Birchfield mining site to speak with Dale A. Birchfield or Presley about her application, but was refused entry by security guards.

13. The complainant was not hired by the respondent.

14. The complainant and her husband saw an increasing number of new male employees working on the respondent's mine sites when she attempted to speak with Birchfield and Presley, subsequent to her application.

15. After the complainant filed her complaint alleging sex discrimination with the commission, she received a letter from

Harley Mining signed by Dale A. Birchfield requesting job references.

16. The complainant executed a Letter of Authorization to Divulge Information enabling respondent to contact her job references.

17. John Fairlie and Bernard Adkins, former supervisors of the complainant, sent favorable written job references regarding the complainant to respondent.

18. Male applicants were not required to submit written references prior to their hiring by the respondent.

19. In the coal mining positions the complainant held in the past, she was never warned, reprimanded, criticized or disciplined in any way about her job performance by her supervisors, nor did she have any attendance problems.

20. Paul Ritchie, a co-worker of the complainant's for nine months during 1980, found the complainant to be a good, competent and safe miner, carrying her share of the job duties and responsibilities at the mine.

21. It is not necessary to have a miner's certificate, such as the complainant's, renewed, nor is it necessary to take refresher courses to keep the card up-to-date.

22. The respondent did not offer the complainant a job.

23. Following the period of time the complainant applied for employment, the respondent hired the following males: Eric Legg; John Parsons; Larry Brown; Randall Scott Bell; Andrew Sparks; Scott Wilson; and Bruce Brackett.

24. Eric Legg was hired by respondent as a security guard and a nightwatchman on the third shift. He was later transferred into a mining job due to his ability to run a forklift and front endloader. He was no more qualified than the complainant but he was known by existing employees.

25. John M. Parsons, hired on May 11, 1987, by respondent, had only three and one-half years experience in the coal mines as a general laborer, compared to the complainant's five years coal mining experience. Parsons' only other work experience is as a carpenter. Even though Parsons was hired as a uni-haul operator, that fact is of no import because he applied for the position of shuttle car operator and scooper, both positions that the complainant was qualified for. No where on Parsons' employment documentation was there reference to any experience he has as a uni-haul operator. In addition, this witness testified to the on-the-job training received by several of its employees.

26. Larry D. Brown was hired by respondent on May 11, 1987, as a scoop operator. Brown has less than five years experience as a general laborer at Beckley Coal Company according to his employment documentation. He listed five present Maben Energy employees as job references. Complainant was clearly more qualified than this employee.

27. Randall Scott Bell was hired on August 29, 1987, by the respondent. Bell has two months experience as a drill operator and two months experience as a carpenter according to his employment documentation. Bell lists several of respondent's em-

ployees as personal references. The complainant was more qualified.

28. Andrew H. Sparks was hired by the respondent on May 11, 1987. His past work experience included less than two years at Quinland Coals as a warehouse clerk, one year as a gas station attendant, one year as a store clerk, and two years as a laborer for Beckley Building Services. In addition, on his resume, he lists work experience as a beltman under Larry Presley at Davison Mines. Though no indication is given as to the length of time Sparks was a beltman, a review of his resume indicates, at most, it was for a period of less than one year. The complainant was more qualified.

29. Scott Wilson was hired by the respondent as a general laborer on April 25, 1987. His only work experience is as a cook, a dock worker, a welder's helper and a painter. The complainant was more qualified.

30. Bruce Brackett's only coal mining experience was two years as a supply man and nightwatchman with Davison Mining. He was supervised by Presley. Brackett is now employed as a unihaul operator at Harley Mines.

31. An analysis, of the actual qualifications of male applicants hired during the relevant period, reveals that the complainant is qualified or more qualified than many of the males hired.

32. The date of an application for employment was not considered by respondent in its hiring decisions.

33. In making its hiring decision, the respondent placed significant weight upon the recommendation of individuals already employed by the respondent, or known by Larry Presley.

34. Although Presley testifies that he did not hire the complainant because she failed to list references on her resume, as early as May 26, 1987, the respondent contacted a past employer of the complainant, Peabody Coal Company (formerly Eastern), and received a good reference regarding the complainant.

35. Presley refers to employees from Maben Energy, Harley Mining, Birchfield Mining and Davison Mining collectively as "in-house references."

36. Through July 1988, there were no women working at Harley Mining, Inc.

37. The complainant was humiliated and became depressed because of respondent's actions toward her, such feelings continue to the present.

38. The complainant sought other employment subsequent to March 23, 1987, both in her chosen occupation and outside it.

39. Subsequent to March 23, 1987, the complainant was hospitalized for a total of 8 days and, thus, for this period, complainant was unable to work.

40. The 1984 UMWA collective bargaining agreement was in effect in March, 1987, when the complainant applied for a position with the respondent. The 1988 UMWA contract became effective on February 1, 1988. If the complainant had been hired by

the respondent, she would have been paid at a grade 5 level pursuant to the UMWA contract.

41. The UMWA contracts in force, based on coal miners with respondent at grade five, made daily rates as follows:

1/1/87	-	$121.32
4/1/87	-	$121.72
7/1/87	-	$122.12
10/1/87	-	$124.12
1/1/88	-	$124.52
2/1/88	-	$126.52
2/1/89	-	$129.32

42. I. WAGES

If complainant had been hired by respondent she would have received the following wages:

From 3/23/87 to 4/1/87 = 7 working days at $121.32 daily = $ 849.24

From 4/1/87 to 7/1/87 = 65 working days at $121.72 daily = $ 7,911.80

From 7/1/87 to 10/1/87 = 66 working days at $122.12 daily = $ 8.059.92

From 10/1/87 to 1/1/88 = 66 working days at $124.12 daily = $ 8,191.92

From 1/1/88 to 2/1/88 = 20 working days at $124.52 daily = $ 2,490.40

From 2/1/88 to 7/7/88 (date of hearing) = 103 working days at $126.52 daily = $13,031.56

SUBTRACT for hospitalization = 8 days at
$126.52 daily = $ 1,012.16

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TOTAL WAGES $39,522.68

II. LEAVE DAYS

a. For the year 1987, if complainant had been hired by respondent on March 23, 1987, pursuant to the 1984 UMWA contract, the complainant would have been credited with 5 personal days =

5 days at $122.12 daily = $ 610.60

b. For the year 1988, if complainant had been hired by respondent on or about March 23, 1987, pursuant to the 1988 UMWA contract, the complainant would have been credited with 5 personal days =

5 days at $126.52 daily = $ 632.60

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TOTAL LEAVE DAYS $1,243.20

III. HOLIDAYS TO DATE OF HEARING

Had the complainant been hired on March 23, 1987, she would have been credited with the following holidays, pursuant to article XII of the 1984 union contract, and article XII of the 1988 union contract =

April 1, 1987	at	$121.72	= $ 121.72
May 25, 1987	at	$121.72	= $ 121.72
July 4, 1987	at	$122.12	= $ 122.12
August 15, 1987 (Complainant's Birthdate)	at	$122.12	= $ 122.12
Sept. 7, 1987	at	$122.12	= $ 122.12
Nov. 11, 1987	at	$124.12	= $ 124.12
Nov. 26, 1987	at	$124.12	= $ 124.12
Nov. 27, 1987	at	$124.12	= $ 124.12
Dec. 24, 1987	at	$124.12	= $ 124.12
Dec. 25, 1987	at	$124.12	= $ 124.12
January 1, 1988	at	$124.52	= $ 124.52
April 1, 1988	at	$126.52	= $ 126.52
July 4, 1988	at	$126.52	= $ 126.52

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TOTAL HOLIDAYS TO DATE OF HEARING $ 1,730.08

IV. VACATION PAY

Had the complainant been hired on March 23, 1987, she would have been credited with 14 vacation days pursuant to article XIII of the 1984 union contract and 14 vacation days pursuant to Article XIII of the 1988 union contract =

14 days at	$122.12	= $ 1,709.68
14 days at	$126.52	= $ 1,771.28

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TOTAL VACATION PAY $ 3,480.96

V. FLOATING VACATION PAY

Had the complainant been hired by Harley Mining on March 23, 1987, she would have been credited with four floating vacation days in 1987 pursuant to article XIII of the 1984 union contract and four floating vacation days in 1988 pursuant to article XIII of the 1988 union contract =

4 days at $124.12	= $	496.48
4 days at $124.12	= $	506.08
		==========
TOTAL FLOATING VACATION PAY	**$**	**1,002.56**

DISCUSSION

The complainant established a prima facie case of sex discrimination. West Virginia Code §5-11-9 places the burden on the complainant to show that she is a victim of illegal discrimination. In general, a prima facie case of discrimination can be proven by direct or circumstantial evidence, or by inferential evidence, or by a combination of evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792,; Texas Department of Community Affairs v. Burdine, 450 U.S. 248,; State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., __WV__, 329 S.E. 2d 77 (1985).

Under the McDonnell Douglas formulation the complainant establishes, by inference, a prima facie case showing discrimination in hiring if he or she proves: (a) the complainant belongs to a protected class; (b) the complainant was qualified for the job which the employer was seeking applicants; (c) that despite her overall qualifications the complainant was rejected for the job; and (d) that after the complainant's rejection, the job remained open and the employer continued to seek applications from persons of complainant's qualifications. As the West Virginia Supreme Court of Appeals notes, the requirements of the McDonnell Douglas prima facie case are not inflexible and must be tailored to each factual situation. State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., supra. The task of proving a prima facie case is not intended to be onerous. Texas Dept. of Community Affairs v. Burdine, supra, 450 U.S. at 253.

If the complainant established a prima facie case under McDonnell Douglas, the burden shifts to the employer to rebut the presumption of discrimination by articulating a legitimate nondiscriminatory reason for its actions. The employer need not prove the legitimate nondiscriminatory reason but must only articulate it. It is sufficient if the respondent's evidence raised a genuine issue of fact as to whether or not it discriminated illegally against the complainant. Shepherdstown V. F. D. v. West Virginia Human Rights Commission, __WV__, 309 S.E.2d 342 (1943); Texas Dept. of Community Affairs v. Burdine, supra; Furnco Construction v. Waters, 438 U.S. 567, (1978);

If the employer articulates a legitimate nondiscriminatory reason for its actions, the complainant may still prevail by persuading the trier of facts that a discriminatory reason more likely than not motivated the employer, or indirectly by showing that the employer's explanation is a pretext and unworthy of credence. The ultimate burden of proof always rests on the complainant. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983); McDonnell Douglas Corp. v. Green, supra,

The West Virginia Supreme Court of Appeals recently proposed a general test for determining a prima facie case of illegal employment discrimination. In order to make a prima facie case, a complainant must prove the following:

1. The plaintiff is a member of a protected class;

2. That the employer made an adverse decision concerning the plaintiff; and

3. But for the plaintiff's protected status, the adverse decision would not have been made.

The court stated that direct proof is not necessary to prove the third element. What is required of the plaintiff, is to show some evidence which would sufficiently link the the employer's decision and the complainant's status as a member of the protected class to the adverse employment action so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence, the court stated, could come in through proof of "a case of unequal or disparate treatment between members of the protected class and

others," or through elimination of the apparent legitimate reasons for the adverse decision. Conaway v. Eastern Associated Coal Corp., __WV__, 358, S.E.2d 423 (1986). The court noted that the Conaway test does not overrule or modify its previous tests in the cases cited herein.

The complainant, in the case at bar, has clearly made her prima facie case. Kathy DeLong is a woman, and, therefore, is a member of a protected class.

The complainant applied for work as a coal miner with the respondent, and she was not hired.

The testimony of the respondent is that there are no women employed as coal miners at Harley Mining. The complainant was the only female who applied during the relevant period. The respondent makes no effort to recruit women for job openings at its mines.

The complainant was qualified for the positions for which the respondent was accepting applications. Complainant worked as a coal miner for approximately five years. She performed the tasks of a general laborer and various other specific job duties. The complainant was more qualified than many of the males who applied and were hired for positions with the respondent.

The respondent's defense is pretextual. Once the complainant has established a prima facie case, the respondent must articulate a legitimate nondiscriminatory reason for its actions.

The respondent articulates several defenses to the complainant's charge of sex discrimination in hiring. The respondent

alleges the complainant's lack of qualification by disputing her miner's certification card. The respondent elicited testimony that the complainant must have had her card renewed and that she needed an 80 hour retraining period.

The complainant has demonstrated that this articulated reason is pretextual. The card itself reveals that there is no date of expiration, and, therefore, no need for renewal. A UMWA representative and the complainant testified that, once issued, the miner's certification card is good for life with no need for renewal or retraining. Indeed, though the respondent attempts to assert the alleged failure of the complainant to update her certification as a reason for its failure to hire her, the respondent's own witness testified that he never checked complainant's certification prior to respondent's refusal to hire her, nor did he attempt to find out whether or not she had a retraining course. It is impossible, then, for the respondent to assert any validity for its actions based on information which it never had when making its hiring decision.

The respondent further explains that it failed to hire the complainant because the complainant did not know any of respondent's present employees, nor did she list personal references on her resume. This assertion of respondent fails also, as pretextual.

First, though the complainant did fail to specifically identify references on her resume, she listed three prior employers and provided her telephone number, so that respondent could call her if it needed more information. A quick telephone

call to either the complainant or any of the personnel offices of her past employers would have resulted in job references for the complainant.

Further, pretext is demonstrated in respondent's assertion that it did not have time to check the references of persons who failed to list references on their resume. The respondent's testimony is basically that it had such a large volume of references that it could not check the qualifications of applicants such as the complainant who failed to identify such references. As early as May 26, 1987, the respondent did, indeed, check the complainant's qualifications. Specifically, the document titled "Investigative Report," and drafted by Special Security International for it client, Harley Mining, states the following:

> "A check with Peabody Coal Company/Emill Martin/304-344-3311 revealed that records indicated they had no problems with Kathy Lea DeLong and that they would hire her again."

Such evidence clearly contradicts respondent's assertions that it failed to hire the complainant because it did not have time to contact her past employers. The respondent obviously did contact at least one of complainant's past employers and obtained a positive reference regarding her work performance.

In spite of respondent's background check on the complainant beginning on May 26, 1987, the respondent sent a letter to the complainant dated May 28, 1987, requesting three written job references. Although there was testimony that such a request was unusual, respondent stated that, in complainant's case, such a

request was necessary because she had failed to identify job references on her resume. Again, the pretextual nature of respondent's request for three written job references is demonstrated, in that it had already independently obtained a positive reference from at least one of complainant's past employers during the same period.

The complainant supplied written job references to the respondent. Both references are positive. Bernard Adkins, the complainant's supervisor at Eastern No. 4 Mine (Wharton), rated the complainant as excellent and good in the categories of safety and attendance, respectively. He rated complainant as an excellent general laborer and a good conveyor system specialist. Adkins also states that he would hire the complainant if possible.

The job reference from John Fairlie, complainant's supervisor while she was a red hat at Eastern No. 4 Mine (Wharton), is also positive. He rated the complainant as an excellent general laborer. He indicated she was excellent in the areas of safety and attendance. He rated the complainant as an average scoop operator and added that she was a beginner at the time and that he was unable to rate her further as he did not observe her once she became an accomplished operator.

The respondent attempts to gain much support for its position from a statement by Fairlie in his reference to the effect that the complainant would allow a section boss to make a monkey out of himself by doing her work if he was so inclined. The meaning of this statement is ambiguous, though, as Fairlie

also states that, "Kathy would stand on her own merits and do her job and won the respect of old timers." If any significance can be obtained from Fairlie's statements, they seem to be a commentary on the actions of complainant's section boss rather than on complainant's abilities and performance. In addition, the respondent's own check with Peabody (formerly Eastern) indicated that it had no negative reports regarding the complainant, and that it would hire her again. Finally, the respondent failed to call Fairlie as a witness to elaborate on his statements, if indeed they were intended to reflect negatively on the complainant's work performance.

The respondent's discriminatory hiring practices are described in a most damaging way by respondent's own witness, Larry Presley, the person responsible for hiring at Harley, Birchfield and Davison Mines. Presley repeatedly testified to the great advantage applicants have if they know present employees of respondent and have listed these acquaintances as job references. Presley stated as follows, in response to questions from respondent's attorney, Mr. Holroyd:

> "Q. What is your basis that you use whether or not to hire people?
>
> A. Upon receiving the resume from an individual, I look over their resume. Most often on all resumes, people will put down references to contact.
>
> A lot of the people seeking jobs put peoples' names that are employed by Davison Mining, Harley Mining, Birchfield Mining, individuals that I myself or other supervisory people might know.
>
> We can get a verbal reference from these individuals.

> Q. Do you do that when somebody lists one of your employees or one of the related company's employees, do you check with those employees to see whether or not that person would be a good person to work for you?
>
> A. I feel like that's the most reliable source I have to go on, is the individuals that do work for the company, particularly foremen, and particularly foremen that these applicants have worked for in the past."

Presley indicated that male applicants were hired because various present employees of respondent who were acquainted with the applicants provided positive verbal references. Specifically, Presley received positive verbal references with regard to Larry Brown from a foreman at Birchfield Mine, Brown's uncle at Davison Mine and three other acquaintances of Brown who worked at Davison and Harley Mines. With regard to Bruce Brackett, Presley testified that he was personally acquainted with Brackett. Presley did not testify as to any references checked regarding Brackett. When explaining why Randall Bell was hired, Presley stated that Bell's father worked at Davison Mines and gave his son a good reference. In addition, Bell was acquainted with four male employees at Davison Mining and several male employees at Harley Mining.

Presley testified that he also contacted various "in-house" references with regard to hiring John Patterson. Regarding Andrew Sparks, Presley testified that he had personally observed Sparks "over a period of years and knew that he would make an extremely good man." In addition, Presley testified that he spoke to several other employees at Harley with regard to Sparks.

There is no evidence that any male applicants were required to submit written references as the complainant was required to do. The respondent's reliance on the informal verbal references of its own employees with regard to hiring decisions is glaringly apparent from respondent's own admissions in its testimony. Case law has repeatedly held that the use of referrals from current employees as a source of new hires may violate Title VII if the employer's work force does not reflect the sexual composition of the relevant labor market, because such referrals perpetuate a discriminatory pattern of employment. United Stated v. Georgia Power Co., 474 F.2d 906, (5th Cir. 1973); Reed v. Arlington Hotel Co., 476 F.2d 721, (8th Cir. 1973), cert. denied, 414 U.S. 920, 94 S. Ct. 153, 38 L. Ed. 2d 103.[1/]

The touchstone is the makeup of the employer's work force. Nance v. Union Carbide Corp., 397 F. Supp. 436, (W.D. N.C. 1975), case remanded, 540 F.2d 718, (4th Cir. N.C. 1976), vacated on other grounds, 431 U.S. 952, (1977). In the instant case, respondent's witness admitted that it has no female employees, nor does respondent make an effort to recruit women for its job openings. The respondent's hiring practices are simply a perpetuation of the "good old boy" network resulting in a work force made up entirely of males. A qualified female applicant such as Kathy DeLong stands no chance of being hired by an employer such

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[1/] The complainant did not proceed on the basis of alleging disparate impact, systemic or pattern and practice of discrimination, but rather on the theory of disparate treatment.

From March 23, 1987, to the present, the complainant was available for work on all but eight days that she was hospitalized. Therefore, the complainant should be awarded appropriate damages for the entire period from March 23, 1987, to the present, minus eight days, as the respondent has continued to the present day in its discriminatory refusal to hire the complainant.

CONCLUSIONS OF LAW

1. Kathy DeLong is an individual aggrieved by an unlawful discriminatory practice and is a proper complainant for purposes of the West Virginia Human Rights Act. WV Code §5-11-10.

2. Harley Mining, Inc., is an employer as defined by WV Code §5-11-3(d), is subject to the provisions of the Human Rights Act.

3. The complainant, filed a complaint on April 15, 1987; and the amended complaint, filed on July 24, 1987, was timely filed.

4. The West Virginia Human Rights Commission has proper jurisdiction over the complainant and Harley Mining Inc. and subject matter of this action pursuant to WV Code §5-11-8, §5-11-9 and §5-11-10.

5. At all times referred to herein, the complainant is and has been a citizen and resident of West Virginia within the meaning of the WV Code §5-11-2.

6. The complainant has established a prima facie case of sex discrimination.

7. The complainant has proven that the reasons articulated by the respondent for failing to hire the complainant are pretextual.

8. The respondent, therefore, discriminated against the complainant on the basis of her sex in violation of WV Code §5-11-9(a), by denying her employment.

9. The complainant exercised due diligence in seeking other employment upon the respondent's failure to hire her.

10. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to back pay in the amount of $39,522.68 and vacation, holiday and leave benefits in the amount of $7,456.80.

11. 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 $2,500.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

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. Respondent shall immediately place complainant in a position for which she applied;

3. Respondent shall pay to the complainant backpay in the amount of $46,979.48 as set forth in Conclusion of Law number 10;

4. Respondent shall pay front pay until the time that the complainant is placed in a position for which she applied;

5. Respondent shall pay complainant incidental damages in the amount of $2,500.00 as compensation for humiliation, embarrassment and mental distress, loss of personal dignity and loss of income; and

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

Entered this 19 day of January 1990.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER