STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 108A
Charleston, WV 25301-1400

TELEPHONE (304) 558-2616
FAX (304) 558-0085
TDD - (304) 558-2976
TOLL FREE: 1-888-676-5546

Bob Wise
Governor

Ivin B. Lee
Executive Director

VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

June 19, 2003

Kimberly Dombroski
54139 Robinwood Drive
Martins Ferry, OH 43035

Jonathon Matthews
Assistant Attorney General
Office of Attorney General
Civil Rights Division
P.O. Box 1789
Charleston, WV 25326

Ellen G. McGlone, Esquire
Joseph Mack, III, Esquire
Thorp, Reed & Armstrong, LLP
1 Oxford Center, 14th Floor
Pittsburgh, PA 15219

Denise Klug
Thorp, Reed & Armstrong, LLP
1233 Main Street
Suite 2001
Wheeling, WV 26003

Wheeling Hospital
One Medical Park
Wheeling, WV 26003

Re: Kimberly Dombroski v Wheeling Hospital
Docket Number: ED-16-01; EEOC Number: 17JA00295

Dear Parties:

Enclosed please find the **ADMINISTRATIVE LAW JUDGE'S FINAL DECISION** of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human

Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

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

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

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

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

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

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

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

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

10.8.b. Within the commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.d. Supported by substantial evidence on the whole record; or

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

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

If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the commission at the above address.

Very truly yours,

Phyllis H. Carter
Administrative Law Judge

PHC/lgt

Enclosure

cc: Ivin B. Lee, Executive Director
Lew Tyree, Chairperson
Paul Sheridan, Sr. Asst. Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KIMBERLY J. DOMBROSKI,

Complainant,

v.

Docket Number: ED-16-01
EEOC Number: 17JA00295

WHEELING HOSPITAL,

Respondent.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

This matter matured for public hearing on Thursday, May 9, 2002 at the Ohio County Library and on May 10, 2002 at the law offices of THORP, REED & ARMSTRONG LLP in Wheeling, West Virginia, pursuant to proper notice.

The Complainant, Kimberly J. Dombroski, appeared in person and by her attorney, Robert Goldberg, Assistant Attorney General. The Respondent, Wheeling Hospital appeared in person by its representative, Dan McGee, Director of Human Resources for Respondent, Wheeling Hospital; and, by its counsel Joseph Mack, III, Ellen G. McGlone and Denise D. Klug of THORP, REED & ARMSTRONG LLP.

All proposed findings submitted by the parties have been considered and viewed in relation to the adjudicatory record developed in this matter. All Proposed Findings of Fact, Conclusions of Law and Argument, as well as the Stipulation identified as Joint Exhibit 1 submitted by the parties, have been considered and reviewed in relation to the aforementioned record. To the extent that the Proposed Findings of Fact, Conclusions of Law and Argument advanced by the parties are in accordance with the findings, conclusions, the joint stipulation of the parties and legal analysis of the administrative law judge and 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 determined as not in accord

with a proper decision. To the extent that testimony of various witnesses is not in accord with the findings as stated herein, it is not credited. The deposition of Ms. Crook, a nurse at Wheeling Hospital, is placed under seal because during her deposition the identity of the patient in Room 343 was revealed. Also, the patient's name is struck from this record to protect his privacy.

I.

FINDINGS OF FACT

1. Ms. Dombroski is a registered nurse with a hearing disability. (Hr. Tr. Vol.. I, Joint Ex. 1, ¶ 9). She resides in Colerain, Ohio. (Hr. Tr.Vol. 1, p. 42). She is currently employed at Mount Carmel East in Columbus, Ohio in the emergency room. (Hr. Tr.Vol. 1, p. 46). She is licensed In West Virginia, Ohio and Pennsylvania. (Hr. Tr.Vol. 1, p. 47).

2. Ms. Dombroski is a person with a disability as that term is defined by the West Virginia Human Rights Act. (Joint Ex. 1, ¶ 9).

3. Wheeling Hospital is located in Wheeling, West Virginia and is a person and employer within the meaning of the Human Rights Act. The Hospital is non-profit with 276 beds and approximately 2200 employees. (Hr. Tr. Vol.. I Joint Ex. 1, ¶ 2).

4. The Hospital has a written equal opportunity policy which includes persons with disabilities. (Hr. Tr. Vol.. II, p.299, Vol. I, Resp. Ex. 8, p.2).

5. The Hospital has a written anti-harassment policy and a grievance procedure. (Hr. Tr. Vol.. II, pp. 299-300; Vol. I, Resp. Ex. 8, p.10).

6. Ms. Dombroski suffers from profound sensory neuro hearing loss or nerve deafness. This began around age 12-14. At the time of this hearing, Ms. Dombroski was 37 years old. (Hr. Tr. Vol. I, p.51).

7. Ms. Dombroski experienced a sharp decline in her hearing in 1998. (Hr. Tr. Vol. I, p.52).

8. During 2000, Ms. Dombroski received a cochlear implant. She was terminated from Wheeling Hospital on August 12, 1999. (Hr. Tr. Vol. I, p.53).

9. As a result of this disability, Ms. Dombroski is substantially limited in her ability

to hear. She is limited in terms of loudness and in clarity of speech. She is unable to hear the high pitch sounds in words. (Hr. Tr. Vol. I, p.47).

10. Ms. Dombroski is sometimes unable to hear speech unless the speaker is facing her. She has difficulty understanding individuals with heavy accents. She is unable to hear speech and other sounds over background noise. Noises, such as doors slamming, the sound of people walking down the hallway, and people talking make it more difficult. (Hr. Tr. Vol. I, p.47-50).

11. Ms. Dombroski earned an Associate Degree from Belmont Technical College in 1984 or 1985. She became a Paramedic in 1986. In 1989 she attended nursing school at West Virginia Northern in Wheeling, West Virginia. She received an Associate Degree in Nursing in 1992. She took and passed her West Virginia State nursing boards. In August of 2001, she received a Bachelor of Science Degree in Nursing from Wheeling Jesuit University in Wheeling , West Virginia. At the time of this hearing, she was enrolled in the Nurse Practitioner Masters' Track at Wheeling Jesuit College. (Hr. Tr. Vol.. I, pp. 44-45).

12. Wheeling Hospital hired Ms. Dombroski as a registered nurse on November 28, 1994. She worked there until August 16, 1999. (Hr. Tr. Vol.. I, Joint Ex. 1 ¶ 3).

13. When Ms. Dombroski applied for employment with Wheeling Hospital she did not inform the hospital that she involuntarily left her previous job with METS Paramedic Service. (Hr. Tr. Vol. I, p.245).

14. Ms. Dombroski was asked to resign from her position with East Ohio Regional Hospital. (Hr. Tr. Vol. I, pp.245, 248; Comp. Ex.3)

15. Ms. Dombroski worked as a registered Nurse in the Hospital's CV Stepdown Unit from November 28, 1994 through March 29, 1995. During this period of time, Diane DiProsperis was Nurse Manager of the CV Stepdown Unit. (Hr. Tr. Vol. I Joint Ex. 1 ¶ 3).

16. After Ms. Dombroski started working in the CV Stepdown Unit, the staff informed Diana DiProsperis that Ms. Dombroski was not answering patient call bells or the telephone and that she was avoiding physicians. (Hr. Tr. Vol. II, p.14).

17. Diana DiProsperis observed that at certain times Ms. Dombroski could not hear patient bells and the telephone ringing. (Hr. Tr. Vol. II, pp.15, 16, 18-19).

18. Diana DiProsperis observed that Ms. Dombroski would ask persons to whom she was speaking on the phone to repeat themselves several times. (Hr. Tr. Vol. II, p. 16).

19. Diana DiProsperis concluded that if Ms. Dombroski was in a patient's room and bells were going off that Ms. Dombroski could not hear them. (Hr. Tr. Vol. II, p. 16).

20. Diana DiProsperis did ask Ms. Dombroski about hearing aids. (Hr. Tr. Vol. II, p. 16).

21. Diana DiProsperis offered to accommodate Ms. Dombroski by making changes to the telephone units. (Hr. Tr. Vol. I, p. 57, Vol. II, pp. 14, 37).

22. Diana DiProsperis contacted the head maintenance department of Wheeling Hospital and asked if the tone of the bells on the telephone could be turned up higher. Diana DiProsperis was informed that the tone was as high as it could go and that there was no way to change the tones on the system. (Hr. Tr. Vol. II, pp. 16, 17).

23. Diana DiProsperis asked Ms. Dombroski if she wanted an amplifier for the phone. Ms. Dombroski indicated that she did not want an amplifier. (Hr. Tr. Vol. II, pp. 16, 17).

24. The nursing staff was concerned that Ms. Dombroski would not hear patient call bells if they were caring for patients in another room and not available to alert Ms. Dombroski if the phone was ringing. (Hr. Tr. Vol. I, pp.64-65;Vol. II, pp. 19, 20, 40).

25. Eleanor DiProsperis, a Clinical Nurse Specialist at the Hospital, started working with Ms. Dombroski in 1996 when she assumed the role of Patient Care Coordinator. She was Ms. Dombroski's immediate supervisor in the ICU. (Hr. Tr. Vol. II, pp. 153, 154, 155).

26. Ms. Dombroski never asked Eleanor DiProsperis to make the phones louder or make an accommodation for her. (Hr. Tr. Vol. II, p. 156).

27. Eleanor DiProsperis did talk with Ms. Dombroski about the telephones and as to whether Ms. Dombroski was having any problems and needed the phones amplified. Eleanor DiProsperis checked with the head of communications and was told that the volume of the phones were changed for the entire Hospital. (Hr. Tr. Vol. II, p. 156). She discussed this with Ms. Dombroski and told her that there was a button on the new phone system that increases the volume and to try it and if that did not help to come back and talk with her about it. Ms. Dombroski never got back with her.(Hr. Tr. Vol. II, p. 157).

28. Eleanor DiProsperis ordered an amplified hand set for Ms. Dombroski to use on the telephone in ICU. (Hr. Tr. Vol. II, p. 157).

29. When there were only two patients in CV Stepdown, only one nurse would be assigned to the unit. The Hospital was concerned that patient care could be negatively affected if Ms. Dombroski was the only nurse on duty and did not hear the pump alarm, call bell or the telephone ringing. (Hr. Tr. Vol. II, pp. 20, 23, 311; Comp's Ex. 5, pp 2,3; Comp's Ex.7).

30. Ms. Dombroski admitted that failure to hear pumps could be dangerous and that the Hospital's concern regarding her working alone in the unit was "reasonable and legitimate." (Hr. Tr. Vol. I, pp. 191-196).

31. In or about January of 1995, Diana DiProsperis wrote Daniel McGee ("Mr. McGee"), the Hospital's Human Resources Director, regarding her concerns about Ms. Dombroski's hearing disability and issues regarding accommodating the disability. (Hr. Tr. Vol. II, p. 22, Comp's. Ex . 5).

32. In February 1995, Diana DiProsperis recommended Ms. Dombroski be given permanent employment and an accommodation. (Hr. Tr. Vol.. II, p. 22, Comp's. Ex.5).

33. Mr. McGee concluded that the Hospital had a duty to accommodate Ms. Dombroski. At the end of her ninety- (90) day trial period of employment, she was hired as a permanent employee. She was then transferred from CV Stepdown to ICU as an accommodation of her hearing impairment. As a result of the transfer, she was placed in a unit where she did not have to work alone. (Hr. Tr. Vol. II, pp 311, 312, **38, 43, 45).**

34. Ms. Dombroski agreed to the transfer because it was a reasonable resolution to her hearing problems and because the work was more challenging, as well as a better use of her background and experience in intensive care nursing. (Hr. Tr. Vol. I, p 197 and Vol. II, p. 101).

35. On March 29, 1995, Ms. Dombroski was transferred to the respondent's ICU as an accommodation to her hearing loss. Ms. Dombroski remained a registered nurse in the ICU until her termination in August 1999. (Hr. Tr.Vol. I, Joint Ex. ¶ 3).

36. Ms. Dombroski's hearing declined sharply in the spring of 1998. During this time, she worked as a nurse in the ICU. (Hr. Tr. Vol. I, p. 52-53).

37. She informed her supervisor of the decline. (Hr. Tr. Vol. I, p. 53).

38. On August 11, 1999, Ms. Dombroski was scheduled to work from 7:00 a.m. to 7:00 p.m. She was assigned to work with the patients in rooms 343 and 344. These rooms shared a glass wall. Each room had a curtain which was usually closed to protect the patients' privacy. (Hr. Tr. Vol. I, pp. 138-139, 141-142, 225; Vol. II, pp. 63-64).

39. The patient in room 343 was a ninety- (90) year-old alert man with lung problems. The patient had a tracheotomy tube down his throat and was dependent on a ventilator to breathe. (Hr. Tr. Vol. I, p. 145, Vol. II, p.54, Taylor Dep. Tr. p. 49).

40. A ventilator-dependent patient cannot talk or call out for help. (Hr. Tr. Vol. II, p. 120).

41. A ventilator-dependent patient is dependent on a call bell for communication. A patient is oriented as to how to use the call bell because it is the method of communication used to contact the nurse when she/he is not in the patient's room. (Hr. Tr. Vol. II, p. 120-121).

42. The patient had a history of being anxious and of vomiting frequently while using the ventilator. (Hr. Tr. Vol. II, pp. 57-58, 123).

43. The patient was also afraid of dying. (Hr. Tr. Vol. II, p. 99).

44. Hospital personnel had been trying to wean the patient from the ventilator. (Hr. Tr. Vol. II, p. 54). Ms. Dombroski had a conversation with the Respiratory Therapist on the day in question, during which time the therapist stated that in her opinion the patient was not tolerating the wean well. (Hr. Tr. Vol. I, p. 152).

45. Weaning a patient from a ventilator can be a frightening experience. (Hr. Tr. Vol. II, pp. 126-127).

46. Linda Crook, staff nurse in the ICU was working as the charge nurse on August 11, 1999. (Hr. Tr. Vol. II, p. 50).

47. While making morning rounds, Ms. Cook found the patient in Room 343 terrified and his mouth full of vomitus. The vomitus had run over his face and mouth. Ms. Crook cleaned up the vomitus and reassured the patient. Ms. Cook showed the patient that the call bell was working and that she had turned it back on herself. She gave the bell back to the patient and let him try it so that he could see that the call bell was back on. (Hr. Tr. Vol. II, pp. 60-61).

48. Ms. Dombroski was not in the room at the time Ms. Crook came in and saw that

the patient had vomitus on his face and mouth. (Hr. Tr. Vol. II, pp. 60-61).

49. Ms. Dombroski was next door with another patient with the door shut. (Hr. Tr. Vol. II, p. 61).

50. Ms. Cook had taken care of the patient in Room 343 several times before. He had a history of vomiting. (Hr. Tr. Vol. II, pp. 53-54, 58).

51. The patient was very alert. He could mouth words, attempt to write things down on paper, and appeared to understand what was going on around him. (Hr. Tr. Vol. II, p. 58).

52. Ms. Crook very credibly testified the patient indicated that he had pushed the call button. Ms. Crook walked around the patient's bed and saw that the call button had been unplugged and the dead end plug was plugged into the socket. (Hr. Tr. Vol.. II, pp. 60-69). Ms. Crook reconnected the call button. (Hr. Tr. Vol. II, pp. 60-61).

53. The call bell in Room 343 had a long cord with a square box on the end . On this box were two buttons, one to turn the television off and on, and one to summon the nurse. (Hr. Tr. Vol. I, pp. 153).

54. Eleanor DiProsperis very credibly testified that the vomitus could have clogged the tubing attached to the ventilator, causing the patient's oxygen levels to drop which could have resulted in cardiac arrhythmia. The patient could have aspirated the vomitus which could lead to pneumonia. (Hr. Tr. Vol. II, pp. 164-65). This testimony was corroborated by Linda Ostrow, Associate Professor and Chair of Health Restoration at the West Virginia University School of Nursing. (Hr. Tr. Vol. II, p. 124).

55. Vomitus obstructs an airway and does not allow the patient to breathe properly on his own. (Hr. Tr. Vol. II, p. 123). The vomitus will obstruct the flow of air into the trachea and into the patient's lungs. (Hr. Tr. Vol. II, p. 124).

56. Ms. Dombroski admitted to Ms. Crook that she pulled the call button because the patient rang five times in two minutes. (Hr. Tr. Vol. II, p. 61).

57. Ms. Dombroski admitted that she unplugged the call bell while the patient was having trouble with his wean. She pulled the call bell out of the wall and inserted a dead-ender in the wall to stop the noise. (Hr. Tr. Vol. I p. 164).

58. There is no reason to disconnect a patient's call bell, even for the shortest period, because there is no guarantee that a nurse will remember to re-connect the call bell. Ms. Dombroski's actions constituted a very unsafe act on her part and one that put the patient's

life in danger. (Hr. Tr. Vol. II, p. 128, 149-150).

59. Without a working call button the patient had no way to communicate with the nurse's station and get assistance when he needed it. (Hr. Tr. Vol. II, p. 134).

60. When the call bell is unplugged it will sound an alarm at the nurses station unless the dead end plug is plugged into the socket. (Hr. Tr. Vol. II, p.70).

61. Ms. Crook informed Eleanor DiProsperis about the incident involving the patient in Room 343 in ICU and Ms. Dombroski. (Hr. Tr. Vol.. II p. 160-161).

62. Eleanor DiProsperis discussed the incident with Ms. Dombroski at which time Ms. Dombroski admitted that she unplugged the call bell because the patient rang too frequently and that irritated her. (Hr. Tr. Vol. II, p. 162-163).

63. Around 5:00 p.m. on August 11, 1999, Ms. Dombroski met with Eleanor DiProsperis and Mary Ann Glusich, during which time Ms. Dombroski again admitted that she unplugged the call bell because the patient had used it too frequently. (Hr. Tr. Vol. II, pp. 167-168, 210). Ms. Dombroski gave no further explanation and showed no understanding that what she had done was wrong. (Hr. Tr. Vol. II, pp. 210-211).

64. Subsequently, on August 16, 1999, Mary Ann Glusich terminated Ms. Dombroski because she intentionally took the patient's call bell away and because she not only defended her conduct but also did not appear to understand the seriousness of her actions. Mr. McGee and Ms. Dombroski's sister were present at the termination hearing. (Hr. Tr. Vol. II, p. 213).

65. At this meeting, Mary Ann Glusich informed Ms. Dombroski that Chris Kerwood might have to report the incident that occurred on August 11, 1999 to the State Board of Examiners for Registered Nurses because her actions constituted a violation of the Nurse Professional Act. (Hr. Tr. Vol. II, p. 212, Complainant's Exhibit 15).

66. Lynne Ostrow, Associate Professor and Chair of Health Restoration at the West Virginia University School of Nursing was certified as an expert witness. (Hr. Tr. Vol. II, pp. 103-108). She has worked and conducted research at the University for 29 years. Also, she is published. (Hr. Tr. Vol. II, pp. 103-108).

67. Ms. Lynne Ostrow stated that nurses who are hearing impaired are held to the same standards as nurses who are not hearing impaired. They take the same courses, and must pass the same examinations. (Hr. Tr. Vol. II, pp. 111-112).

68. Accommodations for hearing-impaired nurses are those that enable them to

perform the job for which they were hired and are qualified to do. Examples of accommodations include a stethoscope that would amply heart and lung sounds so that the nurse can hear those sounds on the patient (Hr. Tr. Vol. II, pp. 112-114), or an amplified telephone handset. (Hr. Tr. Vol. II, pp. 100-101).

69. Eliza Bishop, a hearing-impaired nurse, works for Wheeling Hospital. The hospital accommodated her. Unlike Ms. Dombroski, Eliza Bishop informed patients and their families, nursing staff and physicians that she is hearing impaired. She continues to work for the hospital. (Hr. Tr. Vol. I pp. 330-331 and Vol. II, pp. 32-33).

II.

DISCUSSION

West Virginia Code § 5-11-9(1) of the West Virginia Human Rights Act, makes it unlawful "for any employer to discriminate against an individual with respect to. . .hire, tenure, conditions or privileges of employment if the person is able and competent to perform the services required. . . ." The term "discriminate" or "discrimination" as defined in W. Va. Code § 5-11-3(h) means to "exclude from, or fail or refuse to extend to, a person equal opportunities because of disability. . . ." A person is considered disabled under the Act if he/she has–

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

(2) A record of such impairment; or,

(3) Being regarded as having such an impairment. . . .

Stone v. St. Joseph's Hospital, 538 S.E.2d at 399, n.14 (quoting W. Va. Code § 5-11-3 (m).

The West Virginia Human Rights Act "embraces the traditional employment discrimination theories of disparate treatment and disparate impact." Skaggs v. Elk Run Coal Co., 479 S.E.2d 561, 573 (W. Va. 1996); Barefoot v. Sundale Nursing Home, Syl. pt.6, 193 W. Va. 475,457 S.E. 2d. 152 (1995), West Virginia University v. Decker, 191 W. Va. 567, 447 E.E.2d 259 (1994); Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission, 181 W. Va. 251, 382 S.E.2d 88 (1989).

Complainant is preceding under a disparate treatment theory. There are three different analyses which may be applied in evaluating evidence in a disparate treatment case:

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by a three-step inferential proof formula, first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and, adopted by the West Virginia Supreme Court in Shepardstown Vol.unteer Fire Department v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a *prima facie* case of discrimination; the respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and, finally the complainant must show that the reason proffered by the respondent was not the true reason for the decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W. Va. 1986). Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and, where pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995). Although, discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S., 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the "mixed motive" analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed.2d 268 (1989); and, recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. "Mixed motive" applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not pre-textual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the complainant need only show that the complainant's protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the complainant's

protected class had not been considered. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d, at 164, n. 18.

Finally, a disparate treatment case may be proven by direct evidence of discriminatory intent. The burden shifts to the Respondent to prove by a preponderance of the evidence that it would have terminated the Complainant even if it had not considered the illicit reason.

In order to establish a case of disparate treatment for discriminatory discharge or failure to hire under W. Va. Code § 5-11-9, with regard to disability, the complainant must prove as a *prima facie* case, that:

(1) The complainant is a member of a protected class;

(2) The employer made an adverse decision concerning the complainant; and,

(3) But for the complainant's protected status, the adverse decision would not have been made. Conway v. Eastern Associated Coal Corp., 178 W. Va. 475, 358 S.E.2d 423 (1986). If the complainant satisfies the requirements of a *prima facie* case, then respondent must prove a legitimate nondiscriminatory reason for terminating the complainant.

Applying these standards, the parties have stipulated that Ms. Dombroski is a member of a protected status in that she is disabled because of a hearing impairment and that Wheeling Hospital terminated Ms. Dombroski on August 11, 2003. The employer made an adverse decision against the Complainant when it terminated her employment on August 11, 1999. However, Ms. Dombroski has failed to prove part three of the test, i.e. but for the complainant's protected status the adverse decision would not have been made. Therefore, Ms. Dombroski has not proven a *prima facie* case.

Even if Ms. Dombroski had established a *prima facie* case, Wheeling Hospital has shown by a preponderance of the evidence that it had a legitimate business reason for terminating Ms. Dombroski. The evidence overwhelmingly supports a finding that Ms. Dombroski intentionally unplugged the call bell of the patient in Room 343 and inserted in its place a dummy plug so that the buzzer at the nurse's station would not ring. The patient was a 90-year-old male who was on a ventilator and had a tracheotomy, or a tube down his throat. Without a working call button, when he was alone, he could not call the nurse's station for help. To expect the patient to shake the sides of his bed or write a note while vomiting is absurd. Ms. Dombroski put her own personal comfort above that of the patient's care. In so doing, she jeopardized the well being of the patient and put Wheeling Hospital in a difficult position. This

action was wrong and was obviously contrary to good nursing practices as well as hospital practices.

The accommodation issue has nothing to do with the termination and therefore it is not timely to consider it. Nor is it necessary to address the continuing violation issue at this time.

Under the burden shifting formula of McDonnell Douglas, Ms. Dombroski failed to show by a preponderance of the evidence that the reasons advanced by Wheeling Hospital for the termination were pretextual. Under the mixed-motive analysis of Price-Waterhouse, Wheeling Hospital has shown that Ms. Dombroski would have been terminated absent any unlawful discriminatory *animus* on its part.

III.

CONCLUSIONS OF LAW

1. Ms. Dombroski is a proper Complainant under the West Virginia Human Rights Act. W. Va. Code § 5-11-1, *et seq.*

2. Wheeling Hospital, the Respondent, is an employer and person as defined by W. Va. Code § 5-11–1 *et seq.* and is subject to the provisions of the West Virginia Human Rights Act.

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

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

5. The Complainant has not established a *prima facie* case of disability discrimination and has failed to prove by a preponderance of the evidence that she was subjected to discrimination based on her disability.

6. Respondent, Wheeling Hospital has articulated a legitimate non-discriminatory motive for terminating Ms. Dombroski from employment and that reason is not because of her hearing disability.

IV.

RELIEF AND ORDER

Pursuant to the above Findings of Fact and Conclusions of Law, this administrative law judge orders the following relief:

That the above captioned matter is dismissed against the Respondent, Wheeling Hospital, with prejudice, and stricken from the docket.

It is so **ORDERED**.

Entered this 9th day of June 2003.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Phyllis H. Carter

PHYLLIS H. CARTER
Administrative Law Judge
1321 Plaza East, Room 108-A
Charleston, WV 25301-1400
Phone: 304-558-2616 Fax 304-558-0085