STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
215 PROFESSIONAL BUILDING
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CHARLESTON, WEST VIRGINIA 25301
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ARCH A. MOORE, JR.
Governor

August 16, 1985

Richard Fuller
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Consolidation Coal Co.
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RE: Fuller v. Consolidation Coal Co.
ER-111-82

Gentlemen:

Herewith please find the Order of the WV Human Rights Commission in the case of Fuller v. Consolidation Coal Co.

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, 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

RICHARD FULLER,

COMPLAINANT,

V. DOCKET NO. ER-111-82

CONSOLIDATION COAL, CO.

RESPONDENT.

FINAL ORDER

During its meeting held on July 18, 1985, the Commission reviewed the entire record in this case. Upon examination of the record, exceptions filed herein and the proposed Order and Decision of the Hearing Examiner it was decided to adopt the proposed Order and Decision of the Hearing Examiner and incorporate the same and make it a part hereof, subject to the following:

> The Commission agrees with the conclusion of the Hearing Examiner's finding in fact number 11 and further finds that the Complainant has indeed prevailed and that the Complainant has incurred medical bills in the amount of $6654.46. That the sum of $600.00, which represents the deductible amounts which would have been paid by the Complainant, should be deducted from said sum and that the Complainant therefore should recover the sum of $6,054.46 from the Respondent.

In view of the foregoing, it is ORDERED that:

1. That the Complaint of Richard Fuller, Docket No. ER-111-82 be sustained.

2. That the Respondent rehire the Complainant into his former position at a rate of pay comparable to what he would have received but for the discriminatory termination.

3. That the Respondent pay Complainant the sum equal to the wages he would have earned but for the Respondent's unlawful termination of Complainant's employment. Such wages for said period from the date of the Complainant's discharge to the date of the hearing herein, would be $101,500.00 for regular wages; $25,100.00 for Saturday wages; and $7,765.50 for overtime wages other than for Saturday wages less the sum of $6,000.00 which represents the amount actually earned by Complainant since the time of his discharge. Respondent's are further ORDERED to pay the Complainant interest on the total amount of backwages owed him at the statutory rate of ten percent.

4. That the Respondent pay to Complainant the sum of $2,000.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of the discriminatory treatment toward him by the agents and employees of Respondent.

5. That the Respondent pay to the Complainant a reasonable attorneys fee in the amount of $21,500.00.

6. That the Respondent pay Complainant the sum of $2,114.37 for costs reasonably expended by Complainant and reasonably necessary to the litigation of this matter.

7. That as set forth above, the Respondent pay to the Complainant the sum of $6,054.46 representing the medical expenses incurred by the Complainant.

8. The Respondent is ORDERED to cease and desist from discriminating against individuals on the basis of their race in making decisions regarding termination of employment.

9. The Respondent is ORDERED to cease and desist from participating in discrmination or acquiesing to discrimination at Respondent's PURSGLOVE No. 15 Coal Mine and to insure that this cease and desist Order is carried out, the Respondent is ORDERED to carry out the following:

a. The Respondent is to submit to the WV Human Rights Commission, within 60 days, a plan to investigate and eradicate any type harrassment which is reported formally or informally to supervisory personnel.

b. This plan shall provide affirmative steps to eradicate and prevent future incidents of racial harrassment.

c. The plan shall further specify appropriate disciplinary actions to be taken against employees, including management personnel, who engage in racial harrassment.

d. That following the submission of said plan, the Respondent shall be required to make quarterly progress reports to the Commission regarding the actions which has taken pursuant to the plan, including statements as to all discplin-

ary action taken against employees found to have engaged in racial harrassment. This quarterly reporting requirement shall continue for a period of one year from the date the plan was submitted and approved by the Commission, unless otherwise extended.

10. That the Respondent has 15 days from the entry of this Order to file with the Commission's exceptions to its finding of fact number 11 by Motion of Reconsideration, and should the Respondent fail to file such Motion, this Order will become final as provided by law.

It is further ORDERED that a copy of this Order shall be served by certfied mail upon the parties, and they are hereby NOTIFIED that they have 15 days in which to file a Motion for Reconsideration, and that this Order is subject to judicial review as provided by law.

Entered this 13th day of August, 1985.

WV HUMAN RIGHTS COMMISSION

BY: Mitchell D. Jackson
CHAIR/VICE CHAIR

STATE OF WEST VIRGINIA

HUMAN RIGHTS COMMISSION

RICHARD FULLER,

Complainant,

v.

CONSOLIDATION COAL COMPANY,

Respondent.

DOCKET NO. ER-111-82

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on March 19, 20 and 21, 1985 in Morgantown, West Virginia. The complaint was filed on August 19, 1981. The notice of hearing was served on December 18, 1984. A Status Conference was held on January 9, 1985. Subsequent to the hearing, respondent and complainant submitted written briefs and proposed findings of fact. In addition, the Human Rights Commission filed a brief in support of certain relief requested.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings , conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of

various witnesses is not in accord with the findings herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against him on the basis of his race by discharging him. Respondent maintains that complainant was discharged because of his loud, profane and the abusive language at respondent's office on June 9, 1981 and because he took a swing at an employee of respondent on June 9, 1981.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, on the record during the hearing, and in writting subsequent to the hearing, the Hearing Examiner has made the following findings of fact:

1. Complainant is black.

2. Complainant was employed by respondent on 27th day of September, 1971 to work in respondent's Pursglove number 15 coal mine.

3. Complainant worked in Pursglove number 15 coal mine on the afternoon shift from September 27, 1971 to and through February 4, 1981.

4. On February 5, 1981, complainant began a period of absence for disability. He was placed upon sickness and accident benefits during this time.

5. John Sickles and John Copeland, Jr., two white individuals, were granted exception to the deadline for payment of group medical insurance coverage premiums in April - May 1981.

6. On June 9, 1981, complainant went to the offices of respondent at Scott Avenue in Morgantown, West Virginia.

7. On June 12, 1981, J. Simpson, Superintendent of Pursglove number 15 Mine, notified complainant that he would be discharged for the reasons as set forth in his letter of that date.

8. On June 24, 1981, the decision of respondent to discharge complainant was upheld by an arbitrator.

9. Officials of respondent can recall no other instance where an hourly employee was discharged because of acts characterized as insubordination at the Morgan West Virginia Regional Office of respondent.

10. Any back wages or other financial benefits to which complainant may be entitled if he prevails herein are to be determined by the applicable wage rates and related provisions of the National Bituminous Coal Wage Agreements of 1978, 1981 and 1984.

11. In the event that complainant prevails herein and is reinstated to his position as a coal miner, complainant is entitled to payment for those medical and related expenses that would have been covered by any applicable medical and benefit plan for employees of respondent for the time period during which the bills were incurred less any deductibles that would apply.

12. If complainant had not been discharged by respondent on June 12, 1981,he would have earned one hundred one thousand five hundred dollars ($101,500.00) in regular wages, vacation pay, holiday pay, clothing allowances and bonuses from respondent to and through March 18, 1985.

13. Complainant would have earned twenty five thousand one hundred dollars ($25,100.00) if he had worked on every Saturday that work was available from June 12, 1981 to and through March 18, 1985.

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

14. Respondent is a corporation engaged in the business of producing

and extracting coal in West Virginia. It owns and operates the Pursglove number 15 coal mine.

15. The Pursglove number 15 coal mine is within the Northern West Virginia Region of the respondent. It is also a part of the Morgantown Operations located within the Northern West Virginia Region.

16. Polis is the Regional Manager for Industrial Employee Relations of respondent in the Northern West Virginia Region. He has held that position since 1976.

17. J. Simpson has been the Superintendent of the Pursglove number 15 coal mine since 1979.

18. From approximately 1973 to the date of his termination, complainant was classified as a shuttle car operator.

19. Three employees of Pursglove number 15 coal mine have been discharged for insubordination. Two of the three employees discharged for insubordination are black. Black employees constitute no more than five percent of the total of employees at Pursglove number 15 coal mine during the time frame relevant to the instant case.

20. During the course of his employment at respondent, complainant was subjected to repeated acts of racial harrassment by foreman of respondent, including racially derogatory comments, racially derogatory jokes, and discriminatory work assignments.

21. During the course of complainant's employment at respondent, the environment at respondent's Pursglove number 15 coal mine was heavily charged with racial discrimination including discriminatory work assignments against black employees, toleration of racially derogatory comments and jokes on coal cars, timbers, elevators and on other equipment, and repeated racially derogatory comments and jokes from management personnel, including the use of such words as "nigger" and "boy" in

reference to black employees.

22. The management of the Northern West Virginia Region of respondent, including the Superintendent of Pursglove number 15 coal mine, was aware of the pervasive racially discriminatory atmosphere at the Pursglove number 15 coal mine.

23. Although the management of Pursglove number 15 coal mine and the management of respondent's Northern West Virginia Region took steps to prohibit other improper behavior, such as the carrying of newspapers into the mines, it made no serious effort to discourage or to stop the systemic racial discrimination at the Pursglove number 15 coal mine.

24. On February 5, 1981, complainant began a period of absence for disability. He was placed on sickness and accident benefits during this time.

25. On approximately April 28, 1981, complainant went to the offices of respondent of Scott Avenue in Morgantown, West Virginia. His purpose for going to respondent's office was to check on his group health insurance in order to determine what steps he must take during the strike called by the United Mine Workers of America against mines owned and operated by members of the Bituminous Coal Owners Association, including respondent's Pursglove number 15 coal mine.

26. Selders, who is responsbile for compensation and benefits for the Northern West Virginia Region, had the discretion to forward late premiums to respondent's main office in Pittsburgh, Pennsylvania for acceptance by respondent. Selders refused to consider complainant's offer to pay his insurance premium because it was two days late.

27. While at respondent's offices on Scott Avenue in Morgantown, West Virginia on June 9, 1981, complainant got into an argument with respondent's employees Selders and Garrison.

28. During the course of the argument described in Finding of Fact number 27, complainant used the following profane phrases- "fucking with my money," and "God damn check."

29. During the course of the argument described in Finding of Fact number 27, Selders called complainant "boy."

30. During the course of the argument described in Finding of Fact number 27, complainant stated when told he must leave, that there was nobody there big enough to make him leave.

31. During the course of the argument described in Finding of Fact number 27, Garrison and Selders treated complainant in a patronizing manner.

32. During the course of the argument described in Finding of Fact number 27, complainant shut but did not slam the door to Garrison's office.

33. Subsequent to the argument described in Finding of Fact number 27, complainant went into Selder's office to express his concern about being called "boy."

34. Complainant did not hit, swing at, or strike Selders on June 9, 1981.

35. Instances of verbal abuse and physical assaults by white employees have occurred within the Northern West Virginia Region of respondent, under the jurisdiction of Polis, and in the Pursglove number 15 mine without resulting in the discharge of the white employees involved.

36. The conduct of complainant on June 9, 1981 at respondent's office on Scott Avenue in Morgantown, West Virginia was not substantially different from the conduct of white employees who were not discharged for their conduct.

37. Respondent's application of it's employee conduct rule number 4, upon which complainant's discharge is predicated, involves highly subjective criteria.

38. Neither Polis nor Simpson ever attempted to obtain complainant's

version of what occurred on June 9, 1981.

39. When a black employee files a grievance, respondent requires that the UMWA guarantee safety during the arbitration hearing.

40. Respondent fights grievances filed by black employees harder than it fights grievances filed by white employees.

41. Ryan, the person charged by respondent with equal employement opportunity monitoring and investigating allegations of discrimination, was considered by respondent to be incompetent yet was retained in that position until 1984.

42. If complainant had not been fired by respondent, he would have earned approximately $7,765.50 for overtime work other than for Saturday work, from the time of his discharge until the date of the hearing herein.

43. From June 12, 1981 through March 18, 1985 complainant had various odd jobs and short term employment and during that period of time he earned no more than $6,000.00.

44. During the course of his employment at respondent complainant was absent approximately 1/3 of the time.

45. From June 12, 1981 to March 18, 1985, in the event complainant had not been discharged, complainant would not have been absent a significant number of days because of respondent's implementation of an absentee control policy which went into effect on or about July, 1981 under the 1981 UMWA-BCOA contract.

46. Complainant was subjected to humiliation, embarrassment, emotional and mental distress, loss of personhood, and loss of personal dignity as a result of the discriminatory treatment toward him by the agents and employees of the respondent.

47. Complainant's attorney, Allan N. Karlin, reasonably expended 215.4 hours in preparing and in litigating the instant case.

48. An hourly wage of one hundred dollars ($100.00) per hour is reasonable for the legal services rendered by complainant's attorney in the instant case.

49. Complainant expended $2114.37 for costs reasonably necessary in the litigation of this matter.

CONCLUSIONS OF LAW

1. Richard Fuller is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act. West Virginia Code, Section 5-11-10.

2. Consolidation Coal Company is an employer as defined in West Virginia Code, Section 5-11-3 (d) and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case that respondent discriminated against him on the basis of his race by firing him.

4. Complainant has shown that the reasons articulated by respondent for the termination of complainant's employment are pretextual.

5. Respondent discriminated against complainant on the basis of his race in violation of West Virginia Code, Section 5-11-9(a) by terminating his employment.

6. By knowingly tolerating pervasive and obvious racial discrimination at its Pursglove number 15 coal mine, respondent violated the Human Rights Act.

DETERMINATION

The preponderance of the evidence in this matter sustains the complaint.

DISCUSSION

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E. 2d 342, 352-353 (WVa 1983); McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, complainant has established a prima facie case of discrimination by proving facts, which if otherwise unexplained, raise an inference of discrimination. Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). The parties have stipulated that complainant is black and that he was discharged by respondent for insubordination. Complainant has proven that although black employees constitute no more than 5 percent of the total number of employees at respondent's Pursglove number 15 mine during the time frame relevant to this case, two of the three employees discharged for insubordination at Pursglove number 15 mine were black. Complainant has also demonstrated that respondent permitted a pervasive atmosphere of racial harassment and racial discrimination at Pursglove number 15 coal mine. Specifically both management personnel and co-workers freely used the terms "nigger" and "boy" to refer to and to describe black employees. Both management employees and other employees engaged in the telling of racial jokes; J. Simpson was among those who participated in such jokes. Black employees at Pursglove number 15 mine

were given the least desirable job assignments. Racial slurs were frequently on display written on coal cars and on other equipment at the mine. Complainant in particular was singled out for racially discriminatory treatment. Respondent denies or attempts to diminish the significance of these allegations, but complainant and a parade of corroborating witnesses, both white and black, presented credible testimony supporting these allegations. The testimony of respondent's witnesses denying these allegations or attempting to minimize the impact of these allegations was not credible because of the demeanor of such witnesses and because of the other deficiencies as described below. Although an employer is not responsible for the racial prejudices of an employee's co-workers, the employer is under a duty to take steps to control or eliminate the overt expression of those prejudices in the employment setting. Anderson v. Methodist Evangelical Hospital, Inc. 3 E.P.D. Paragraph 8282 (W.D.Ky. 1971), aff'd 464 F. 2d 723 (6th Cir. 1972); Fekete v. U.S. Steel Corporation 353 F. Supp. 1177 (W.D.Pa. 1973). Because the acts of a supervisor are construed to be the acts of an employer, an employer is deemed to have notice of the actions of its supervisors and any racial insults or racial harassment of employees by an employer's supervisory personnel is unlawful. Calote v. Texas Educational Foundation, Inc. 578 F. 2d 95 (5th Cir. 1978); Anderson v. Methodist Evangelical Hospital, Inc., supra. Thus, in addition to establishing prima facie case of discriminatory termination, the facts as proven by complainant regarding respondent's toleration of and participation in the racial harassment at it's Pursglove mine number 15 is in itself a violation of the Human Rights Act, and a cease and desist order regarding such racial harassment and discrimination is appropriate. Because such racial harassment and discrimination at respondent's Pursglove number 15 coal mine is an integral part of the discriminatory termination alleged by complainant, and because such racial harassment and discrimination constitutes a continuing violation,

complainant's charge of discrimination with regard to such racial harassment and discrimination is not time barred as respondent argues.

Respondent has articulated legitimate non-discriminatory reasons for its termination of complainant. Respondent has presented evidence that complainant was discharge because his conduct on June 9, 1981 at respondent's office on Scott Avenue in Morgantown, West Virginia violated respondent's employee conduct rules, rule number 4. Specifically respondent presented testimony at the hearing that on June 9, 1981, complainant used profane and abusive language and that complainant took a swing at respondent's employee Selders.

Complainant has proven that the reasons articulated by respondent for complainant's discharge are pretextual by showing that the employer's proffered explanation is unworthy of credence and by proving that a discriminatory reason more likely motivated the employer. Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). Firstly, complainant has demonstrated that white employees of respondent have engaged in similar conduct to that which complainant engaged in, but have not been discharged. For example, one white miner swore at J. Simpson severely and used extremely abusive and threatening language, but the white miner was not discharged. J. Simpson had also heard of people being swung at, but never discharged any of the white employees involved in those incidents. Selders called complainant "boy." Selders denied complainant's testimony that Selders had called complainant "boy," but because of Selders' evasive demeanor during his testimony and because of a prior inconsisent statement to the effect that he could not remember calling complainant that name as opposed to his testimony during the hearing denying that he called complainant that name, the testimony of Selders in this regard is less credible than the testimony of complainant. Moreover, the evidence

revealed that one employee once hit a supervisor in the head with a thermos bottle.

Secondly, the criteria used by respondent in evaluating whether the conduct of an employee violates rule number 4 are highly subjective. Subjective employment criteria are not in themselves violations as of the fair employment laws, but the use of subjective criteria does warrent special scrutiny and has been viewed with disfavor and skepticism. Rowe v. General Motors 475 F. 2d 348, 359 (5th Cir. 1972). The reason for the skepticism and special scrutiny of subjective employment criteria is illustrated by the manner in which respondent applied such criteria in the instant case. Apparently, racial name calling is not considered "abusive" language. An example of the subjective nature of respondent's application of this work rule is J. Simpson's testimony regarding the requisite "intent to clobber" required before any given conduct will constitute a violation of employee conduct rule number 4. The highly subjective nature of the application of this work rule when coupled with the pervasive atmosphere racial harassment and discrimination at Pursglove number 15 mine may explain why two of the three discharged for insubordination at that mine are black, while black employees constitute no more than 5 percent of the total employees at that mine.

Thirdly, complainant has proven that complainant's race was a factor in the decision to fire him. Although the evidence is clear that complainant did use some profanity on the day in question, the evidence reveals that he did not make threats or take a swing at Selders. Respondent's witnesses perception of complainant's conduct is infected by racial stereotyping. The testimony of Dr. Schofield, an expert pyschologist called by complainant explains that in general white's perceptions of ambiguous behavior of blacks as being aggressive. In the instant case, the profanity used by complainant was directed to matters involving money; no profanity

was used to persons. Thus, the profanity was not of a threatening nature. With regard to the incident involving Selders, Selders testified that complainant took a swing at him. Complainant denied it. Complainant's testimony is more credible than a testimony of Selders because of the very evasive demeanor of Selders on cross-examination plus the several deficiencies in Selders' testimony. Selders demonstrated a very selective memory during his testimony at the hearing. For example, he remembered with specificity that complainant came to his office at 11:10 a.m., yet he did not remember whether complainant swung at him with an open hand or a fist or whether complainant used his left hand or his right hand. Additionally, Selders' testimony also included contradictions regarding whether he had called complainant "boy" and regarding Selders' involvement in the termination of complainant's benefits.

The evidence suggesting that complainant's race was a factor in the decision to fire him is buttressed by the opinion of Dr. Schofield, an expert psychologist called by the complainant. It was the opinion of Dr. Schofield that race was a factor in the decision to terminate complainant. Among the bases for her opinion were the following: Polis' display of racial animus by labeling race as distinctive; respondent's witnesses unfounded references to complainant as "militant"; and the application of general factors and research to the particular facts of the instant case.

Fourthly; the testimony of respondent's witnesses is less credible than the testimony of complainant and his witnesses because of their demeanor plus various deficiencies in the testimony of respondent's witnesses. Polis' demeanor during his testimony greatly diminished his credibility. He laughed openly during his testimony about the subject of defacing an Human Rights Commission poster. Polis' testimony included contradictions regarding the key point of who fired complainant. During

complainant's case, Polis testified as an adverse witness that Simpson fired complainant and that Simpsom had the right to veto any discharge of complainant. In respondent's case, however, Polis testified that he personally fired complainant and that he would have done so even if Simpson had objected. This testimony contradicts Polis' prior testimony as well as respondent's answers to interrogatories. Polis' testimony also includes contradictions regarding Garrison. Polis testified that Garrison was good at handling people, but Polis was forced to admit that Garrison gets nervous easily and that Polis evaluated Garrison as a good clerk but recommended that he be moved from his job as benefits worker to that of an accounting clerk. Simpson testified that racial discrimination is prohibited by respondent's employee conduct rules, yet such conduct rules do not mention discrimination. Simpson also testified that there is no discrimination at Pursglove number 15 mine, yet the evidence in this case reveals that the pervasive discrimination at Pursglove number 15 mine is obvious.

Fifthly, that the reasons articulated by respondent for complainant's termination are pretextual is demonstrated by the fact that Polis never asked complainant for his version of what happened on June 9, 1981 before firing him.

Sixthly, respondent treats grievances filed by black employees differently than it treats grievances filed by white employees. Rowan testified that the UMWA must guarantee safety during an arbitration hearing whenever the grievance is black. This point was denied by respondent's witness Dennison, but the testimony of Rowan is more credible because of Dennison's evasive demeanor during cross-examination. Additionally Rowan testified that respondent fights the grievances of black employees harder than those filed by white employees.

Seventhly, Ryan, the person charged by respondent with equal employment opportunity monitoring and investigations of alleged discrimination was considered by respondent to be incompetent at his job, yet he was retained in that position until 1984.

The decision by the arbitrator regarding complainant's discharge, which was introduced into evidence at the hearing, is accorded little weight. Such decision by the arbitrator does not consider or address the issue of discrimination. Alexander v. Gardner -Denver 415 U.S. 36 (1974).

Relief

The Human Rights Commission, by its counsel, seeks an extensive cease and desist order in view of its opinion that respondent has committed or practiced discrimination at its Pursglove number 15 coal mine. Respondent objects to such relief on the basis primarily that it was not apprised of the fact that such relief would be sought by the Commission until after respondent had rested its case in chief. The allegations of racial discrimination and harassment at Pursglove number 15 coal mine, however, are clear from the face of the complaint and were proven by abundant evidence during the course of the hearing herein. Accordingly, respondent's argument that it did not know of these allegations or requested relief is not meritorious, and respondent's right to notice under the due process clauses of the Constitution of the United States and the West Virginia Constitution have not been violated. The Hearing Examiner notes, however, that the cease and desist order requested by the Commission includes items pertaining alleged sexual harassment. Because sex harassment was not an issue in the instant case, there is no evidence of such sex harassment in the record. Accordingly, any request for relief based upon sexaul harassment must be rejected. Otherwise the relief

requested by the Commission is appropriate.

With regard to monetary damages, the parties have stipulated with regard to the amount of wages and Saturday wages that complainant would have been entitled to had he not been discharged. With regard to overtime wages other than Saturday the record reveals that complainant would have been entitled to 50 days of overtime at the rate of one hundred fifty-five dollars and thirty-one cents($155.31) per day, for a total of seven thousand seven hundred sixty-five dollars and fifty cents ($7,765.50). Complainant's actual earnings since the date of his discharge were no more than six thousand dollars, and such amount should be deducted from the total back pay award to which he is entitled. Complainant is also entitled to interest at the statutory rate of ten percent.

The evidence at hearing revealed that complainant was absent from work while employed at respondent approximately 1/3 of the time. Respondent argues that because of this absentee rate, 1/3 of the wages to which he is entitled should be deducted from the back pay award. Because respondent implemented an attendance control program shortly after complainant's termination, complainant would not have been absent at the same high rate that he had been absent before his discharge had he been employed by respondent after July, 1981. Additionally, respondent has not demonstrated to what extent complainant's absence during his tenure as an employee at respondent was caused by disability. It should be noted that the Hearing Examiner expressly rejects the argument of complainant that his absenteeism was to some extent justified because he had been discriminated against. The Human Rights Act provides the mechanism for employees who believe they have been discriminated against, and various other statutory and adminstative systems exist for relief of such alleged discrimination, but under no circumstances is an employee justified in remaining home because

he had been discriminated against in the absence of a showing of constructive discharge.

Complainant claims over six thousand dollars in medical bills which would have been covered under his insurance at respondent were incurred by his family after the date of his discharge. Neither complainant's brief nor complainant's proposed findings of fact link the six thousand dollar figure to evidence in the record. Moreover the Hearing Examiner can not locate any evidence in the record that would justify a conclusion that complainant has expended that amount of money on medical bills since the date of his discharge. Accordingly, such relief will not be granted.

Complainant's attorney has submitted a verified petition for attorney's fees and a petition for costs. The petitions are itemized, and the petition for attorneys fees is supported by affidavits from Professor Cleckley and Professor Bastress. Respondent concedes that the hourly rate of one hundred dollars per hour is appropriate for Mr. Karlin and that the figure of 215.4 hours is appropriate. Because counsel for complainant has indicated that an hourly rate of $100.00 per hour is acceptable to him, the Hearing Examiner will not set a higher rate even though the Hearing Examiner is tempted to do so because of the vast experience and high level of training of Mr. Karlin as well as the great level of skill demonstrated by him during the instant hearing. Johnson v. Georgia Highway Express 488 F. 2d 714 (5th Cir. 1974).

Complainant has also demonstrated that he has reasonably expended costs in the amount of $2,114.37. It is concluded that such costs were reasonably necessary in the litigation of this matter. The figure stated includes the costs of the employment of a law clerk for purposes related to the instant case. The only items of costs which respondent attacks as unjustified are those related to the testimony of Dr. Schofield. Respondent contends that such testimony was speculative and not helpful

to complainant. As the discussion above indicates, however, such testimony was fully credited and very helpful to complainant's case. Respondent's argument with regard to these costs is rejected.

Complainant has provided testimony regarding his humiliation, embarrassment,and loss of personhood and dignity caused by respondent's discrimination against him. Complainant has not shown that the $20,000.00 award of incidental damages is justified. Indeed, such a large amount may be inappropriate when the matter is not tried before a jury. Accordingly, the Hearing Examiner recommends that the complainant be awarded $2,000.00 for such incidental damages.

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner recommends the following:

1. That the complaint of Richard Fuller, Docket No. ER-111-82, be sustained.

2. That respondent rehire complainant into his former position at a rate of pay comparable to what he would be receiving but for the discriminatory termination.

3. That respondent pay complainant a sum equal to the wages he would have earned but for respondent's unlawful termination of complainant's employment. Such wages for the period from the date of complainant's discharge to the date of the hearing herein, would have been $101,500.00 for regular wages, $25,100.00 for Saturday wages; and $7,765.50 for overtime wages other than for Saturday wages less the sum of $6,000.00 which represents amount actually earned by complainant since the time of his discharge. Respondent should also be ordered to pay complainant interest on the amount of back pay owed him at the statutory rate of ten percent.

4. That respondent pay to complainant the sum of $2,000.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of the discriminatory treatment toward him by the agents and employees of respondent.

5. That respondent be ordered to pay complainant's reasonable attorney's fees in the amount of $21,500.00.

6. That respondent be ordered to pay complainant the sum of $2,114.37 for costs reasonably expended by complainant and reasonably necessary to the litigation of this matter;

7. That respondent be ordered to cease and desist from discriminating against individuals on the basis of their race in making decisions regarding termination of employment;

8. That respondent be ordered to cease and desist from participating in discrimination or acquiesing to discrimination at respondent's Pursglove number 15 coal mine:

A. That respondent be ordered to submit to the Human Rights Commission a plan to investigate and eradicate any type of racial harassment which is reported formally or informally to supervisory personnel, and found to exist.

B. Such plan shall provide affirmative steps to eradicate and prevent future incidents of racial harassment.

C. Such plan shall specify appropriate disciplinary actions to be taken against employees, including management personnel, who engage in racial harassment.

D. Respondent shall be required to make quarterly progress reports to the Commission regarding the actions which it has taken pursuant to the plan described above, including statements as to all disciplinary actions taken against employees found to have engaged in racial discrimination

or harassment. The quarterly reporting requirement shall continue for a period of one year, unless extended by the Commission because the Commission is not satisfied with the progress demonstrated by respondent.

9. That respondent report to the Commission within forty-five days of the entry of the Commission's Order, the steps taken to comply with the Order.

James Gerl
Hearing Examiner

ENTERED: May 20, 1985

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing Proposed Order and Decision by placing true and correct copies thereof in the United States Mail, postage prepaid, addressed to the following:

Allan N. Karlin
160 Chancery Row
Morgantown, WV 26505

Richard J. Klein
Consolidation Coal Company
Consol Plaza
Pittsburg, PA 15241

C. David Morrison
Steptoe & Johnson
P. O. Box 2190
Clarksburg, WV 26302

Roxanne Rogers
Human Rights Commission
1036 Quarrier Street
Charleston, WV 25301

on this 20th day of May, 1985.

James Gerl

James Gerl