STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
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Cecil H. Underwood
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Ivin B. Lee
Executive Director

VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

January 10, 2001

James H. Gee
PO Box 777
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Re: Gee v. WV Div. of Corrections
EH-195-98

Dear Parties:

Enclosed please find the undersigned administrative law judge's final decision in the above-referenced matter. Pursuant to 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.

Yours truly,

Gail Ferguson
Administrative Law Judge

GF/mst

Enclosure

cc: Ivin B. Lee, Executive Director
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES H. GEE,

Complainant,

v. Docket Number: EH-195-98

WEST VIRGINIA DEPARTMENT
OF CORRECTIONS,

Respondent.

ADMINISTRATIVE LAW JUDGE'S

FINAL DECISION

A public hearing in the above captioned-matter was convened on the 31st day of August, 1999, the evidentiary deposition of complainant's physician, Jung Lee, M.D., was taken on September 13, 1999 and the hearing reconvened on March 24, 2000 in Kanawha County, West Virginia. Post hearing briefs were received through June 5, 2000..

The complainant, James H. Gee, appeared in person and his case was presented by Senior Assistant Attorney General Paul R. Sheridan, Counsel for the West Virginia Human Rights Commission. The respondent, West Virginia Department of Corrections, was represented by its counsel, Assistant Attorney General Leslie K. Tyree..

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed

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

A.

Findings of Fact

1. The complainant, James H. Gee, at the time of hearing, was a resident of Charleston, West Virginia. He was employed as a correctional officer by the respondent from February 1995 through November 1997 at which time he was terminated.

2. The respondent, West Virginia Department of Corrections, is a subdivision of the State of West Virginia which operates correctional facilities within the state, including the facilities at Mount Olive, West Virginia. The respondent is a person and an employer as those terms are defined by the West Virginia Human Rights Act.

3. After the complainant graduated from high school, he joined the United States Army. He was trained and served as a military policeman and graduated from the Military Police Academy. He also received advanced training on various police-related subjects while in the Service. Complainant was in the Army for a total of eight years, including four years on

active duty and four years in the Reserves.

4. It is undisputed that the complainant was well qualified for the position of correctional officer.

5. In addition to his position as correctional officer, the complainant served as a member of the Correctional Emergency Response Team, or CERT. This team assisted with a variety of circumstances which required specialized handling. The CERT team members were selected based upon their particular training and experience.

6. In 1991, during the time that complainant was in the Army, he was diagnosed with hypertension.

7. The complainant was ultimately issued a ten percent disability from the military because of his hypertension.

8. The complainant's hypertension significantly limited one or more of his major life activities. Since its diagnosis, complainant's hypertension has usually been under control, but at times when it gets "out of control." it can be debilitating. The complainant's hypertension puts him at a heightened risk of damage to his eyes, for stroke and kidney failure.

9. Dr. Jung Lee, a licensed physician and an employee of the Department of Veterans Affairs Hospital in Beckley, West Virginia, testified that he began treating the complainant in January 1998, shortly after he had been terminated by the respondent. Dr. Lee testified that complainant's hypertension, also known as high blood pressure, is a physiological disorder affecting the cardiovascular system. Dr. Lee testified that there are many complications commonly associated with hypertension, including hypertrophy of the

heart, kidney problems and problems with the eyes. In addition, it causes light headedness, headaches and sometimes blurry vision. Dr. Lee testified that the symptoms and limitations described by the complainant are consistent with hypertension.

10. Hypertension can ordinarily be controlled with medication, but it is usually necessary to use more than one type of medication in combination. These medications must be regulated in combination and typically must be varied and adjusted in order to keep the blood pressure at a healthy level. Various factors, including emotional stress, can disrupt the balance and cause a person's hypertension to become uncontrolled.

11. In addition to the limitations imposed by the hypertension itself, the complainant also suffers significant limitations on major life functions as a result of some of the drugs he has been prescribed to control his hypertension. Some medications he has used have caused nausea or light headedness, and other dysfunctions.

12. Because of the side effects caused by the medications prescribed for his hypertension, the complainant has had his medications changed at various times since his hypertension was diagnosed. When the medications are changed, ti sometimes takes a period of time to notice the effects and side effects and adjust the medications and dosages. Sometimes during these periods, the hypertension is less well controlled and can reassert its limitations on the complainant's life functions.

13. In spite of his hypertension, the complainant has been able to work continuously since leaving the Army. However, on occasion he has had to miss work because of his hypertension. This was true at jobs he held prior to February 1995 and while he worked for

respondent at Mount Olive.

14. During the time the complainant worked for respondent at Mount Olive, and perhaps as a result of the stress of his job there, his hypertension got worse. Complainant's doctor recommended, in writing, that complainant either work fewer hours at this job or find another position, and the complainant provided this letter to the respondent.

15. Following this, the complainant made efforts to exercise both of these options. Beginning about one to one-and-a-half years after he had started work for the respondent, complainant began putting in shift transfer requests in an effort to find a position with less stress. But he never heard anything back on his requests. Transfers between positions and shifts were commonly granted. Transfers between changes in job assignments are a little more involved because they require that the applicant be able to perform the new job; however, they are normally granted within reason.

16. The complainant also sought job transfers and promotions. He had good reason to believe this would reduce his job stress and therefore his blood pressure and because he knew he had more qualifications than some of the people hired. Accordingly, the complainant filed grievances against the respondent raising these issues.

17. The complainant gave the respondent repeated opportunities to obviate the need for a special accommodation by applying for transfers and promotions. But in each instance, the respondent denied the complainant's request.

18. On several occasions, the complainant requested to be transferred from a CERT team to day shift and to the SPD unit, which would be less stressful. Deputy Warden

Lemasters acknowledged that the stress on the CERT unit would be high. He had no specific knowledge or recollection as to why complainant's requests were denied, but testified that whenever the management determines that the best interests of the facility are served by keeping a correctional officer where he is, then a transfer request will be denied.

19. During the summer of 1997, the complainant missed some work because of his hypertension, including August 30th and 31st. On September 1, 1997, complainant returned to work with a note from his health care provided, Physician's Assistant Lynne Shaver. The note provided that complainant had been under her care for his unstable hypertension and that his condition had caused him to miss work on September 1st, as long as he worked eight-hour shifts and five days per week only.

20. The complainant handed in his doctor's slip when he returned on September 1st and worked his shift. However, when he came to work the next day, he was told he needed to see the shift manager. Captain Nottingham then told complainant that the respondent would not accept the doctor's return to work slip and the he could not return to work.

21. When Captain Nottingham sent the complainant home on September 2, 1997, he told complainant that he would be receiving further instructions. The next day, then-Deputy Warden Howard Painter sent a letter to the complainant seeking more specific information regarding his condition and limitations. The letter indicates that a physical had been scheduled for September 9th at the Huttonsville Correctional Center. This letter was addressed to complainant at a Whitesville, West Virginia address at which the complainant had not resided for over a year. The complainant had provided the respondent with a change of address form

for his Ivydale address on August 16, 1996. The complainant never received this letter.

22. On September 9, 1997, the complainant applied for Unemployment Compensation Insurance benefits. In the statement given to the Department of Employment Security he explained in precise and accurate details what had transpired. Complainant explained that he was awaiting further instructions from the respondent. The complainant's application for Unemployment benefits on this occasion was denied because the respondent asserted that he was still employed.

23. On September 25, 1997, the respondent, through its Payroll Supervisor Linda Coleman, sent the complainant a letter at his correct address, indicating that he had exhausted his accrued sick and annual leave and proposing that he apply for a leave of absence without pay. The letter also directed complainant to contact the payroll supervisor as soon as possible with his intentions. In reiterating the request for a response, the letter gave the complainant "fifteen (15) calendar days of receipt of this letter."

24. On October 3, 1997, less than eight days after receiving the letter from Ms. Coleman, the complainant responded to her in writing. He made it clear that he had been released to return to work. Complainant did not seek a leave of absence without pay because he considered himself able to work and because he needed the income.

25. On October 24, 1997, then-Deputy Warden Howard Painter wrote to complainant, this time at his correct address. This letter was sent certified mail. The letter makes references to "light duty," although nothing in the complainant's return to work form had made any reference to "light duty" and there was in fact no restriction on his activities or

abilities other than the working of long hours. The letter also made reference to a "Physician's /Practitioner's Statement," which purportedly was attached to the letter. However, there was credible evidence that there was no such form attached or enclosed with the letter sent to complainant.

26. The complainant received and signed for the certified letter from then-Deputy Warden Painter, and when he realized that the letter referred to a form which was not enclosed, complainant called the prison on or about November 5, 1997 and asked to speak directly to Warden George Trent. The complainant told Warden Trent that the Physician's/Practitioner's Statement form was missing from the letter he had received, and the Warden indicated that "he would get that out to me."

27. The complainant never received from the respondent the physician's/practitioner's statement form which he was promised; however, on his own initiative, in an effort to document his condition in anticipation of receiving such a form, complainant sought and obtained documentation from the Department of Veterans Affairs regarding his partial disability.

28. The respondent terminated the complainant's employment on November 13, 1997. The letter informing the complainant of respondent's decision to terminated him was sent to his correct address.

29. The explanation offered to the complainant by the respondent for his termination was "abandonment of your post, as set forth in Policy Directive 400.00, Section C24." This policy directive does not specifically contain an offense referred to as "abandonment of post."

Instead, it is the "catch-all" portion of the Class C offenses, which are the most severe of offenses. Class C offenses include falsifying records, theft, physical violence, abusing inmates, drinking on the job, trafficking in contraband or being convicted of a crime. Section C24 makes it a Class C offense to commit "other actions of similar nature and gravity." The prescribed discipline for Class C offenses is a suspension for the first two offenses and dismissal for the third offense.

30. The respondent had a progressive discipline policy which provides that discipline will normally begin with a lower level of consequence and proceed toward more serious consequences if the employee's behavior does not improve. There are some exceptions, such as "allowing an escape to occur, allowing an inmate to kill another inmate, [or] something of that nature," which would warrant immediate dismissal.

31. Deputy Warden Lemasters acknowledged at the hearing that returning to work with a restrictions on overtime does not warrant immediate dismissal. Even if an employee was given a request for more information regarding their condition and the employee blatantly refused to do so, this would ordinarily only start the progressive disciplinary process which might eventually lead to dismissal.

32. At hearing Deputy Warden Lemasters sought to claim that complainant's dismissal was not pursuant to the progressive discipline policy. However, the dismissal letter had specifically invoked it. When confronted with this, Deputy Warden Lemasters acknowledged that he actually had no direct knowledge of the facts of this case.

33. In fact, the complainant had not "abandoned his post." He was ready, willing and

able to return to work and was not at his post on a regular basis only because he had been specifically prevented from returning to work by the respondent. He had not committed any offense at all, and certainly not a Class C offense.

34. Furthermore, even if the complainant had actually abandoned his post, or had committed some type of Class C offense, pursuant to the respondent' own policy, it did not warrant summary dismissal.

35. Respondent contested complainant's application for unemployment compensation benefits by reasserting its claim that he had been terminated for abandoning his post; however, no misconduct on the part of complainant was found by the Department of Employment Security, and complainant was granted unemployment benefits on this occasion.

36. At the time he was formally discharged on November 23, 1997, respondent's records reflect that complainant actually had 5.19 accrued annual leave days.

37. At the time of the hearing, the complainant reported that his hypertension was well controlled, with episodes of headaches and dizziness only occurring twice in the past six months.

38. At least by mid-September 1996, the respondent had been placed on notice of complainant's condition and of his need for accommodation. Yet, the respondent repeatedly failed and refused to work with the complainant to try to find a way of accommodation, even when he took all the initiative by requesting the transfer.

39. Transfers were approved on a case-by-case basis. If the transfer was inter-shift, it would depend upon the skill and ability of the individual involved, but requests were granted

where the needs of the facility would not be compromised. There is no evidence of record to indicate why the complainant's transfer requests were never honored, even though he had a legally compelling basis for requesting the transfer.

40. The respondent was adamant in its refusal to provide accommodations to employees with disabilities. Deputy Warden Lemasters testified that the respondent was unprepared to accommodate any type of limitations at all. "So if they have any type of restriction whatsoever, they're not at 100 percent. So, therefore, they're not allowed to work until they are."

41. Deputy Warden Lemasters testified that where an employee presented respondent with a doctor's slip indicating that the employee could only work eight hours, respondent" tried to allow them to do that until they could be evaluated by our physician." But this is not what respondent did in the case of complainant.

42. Deputy Warden Lemasters testified that employees were commonly excused from double shifts for medical reasons when they brought in a doctor's slip, but he could not recall a single instance.

43. Deputy Warden Lemasters also testified that respondent permitted accommodation for family illness, babysitting and child care, even to the extent of moving people among shifts and posts.

44. Deputy Warden Lemasters suggested that if the complainant had provided a doctor's statement, he might have been able to come back to work; however, the respondent made it clear that it would not have accepted any restriction on the number of hours

complainant could work.

45. The ability to work overtime was not an essential function of the job of correctional officer. Deputy Warden Lemasters claimed that the ability to work overtime was an essential function of the job; however, the evidence does not bear out this claim. There is nothing in the job description of a correctional officer which reflects this "essential function." In addition, the respondent made regular exceptions to the overtime requirement for those conditions it deemed worthy, such a family needs.

46. Deputy Warden Lemasters testified that at the time the complainant was discharged the prison was working 12-hour shifts. However, during the fall of 1997, when complainant was terminated, the prison was actually working8-hour shifts through the remainder of 1997 and into 1998. Respondent had between 40-45 security staff for two out of three shifts and a skeleton crew on the night shift.

47. Deputy Warden Lemasters testified that at the time respondent was approximately 50 staff members short. While the staff shortage put respondent in a position where it had to work some employees double shifts in order to cover vacancies, there is no reason other than an irrational commitment to consistency why respondent needed to be able to work all its employees overtime.

48. Ironically, if the respondent had been willing to permit the complainant to work eight hour shifts, complainant's efforts would have reduced, not exacerbated the respondent's staff shortage.

49. It was acknowledged by respondent that there was no evidence at all that the

complainant had any functional limitations which affected his job; it was simply a limitation on the number of hours in a day and in a week which he could work.

50. Deputy Warden Lemasters testified that a correctional officer who refused to work overtime when it was necessary would be disciplined with anything from a reprimand to dismissal, although he could not recall a single instance other than complainant where a correctional officer had been dismissed for refusal to work overtime.

51. The respondent could have accommodated complainant's disability by allowing him to refrain from working overtime shifts, at least for the time necessary to recontrol his hypertension. Not only would it have created no undue hardship to permit such accommodations when medically prescribed, but it would have created less hardship than the alternative, which was to terminate complainant's employment. Respondent was one-third down when complainant was fired. The termination of the complainant further exacerbated the staff shortage and caused an even greater need to work existing correctional officers overtime.

52. Deputy Warden Lemasters was not involved in the decision to terminate the complainant as far as he can recall.

53. It is clear from the record as a whole that the complainant's need for accommodation was not given individualized consideration. Instead, his need for more limited work hours was viewed by respondent as an obstacle to its entire overtime policy and therefore its ability to manage with a short staff. Warden Howard Painter testified that the prison had to work some employees overtime in order to maintain security. He testified that there were several other individuals, in addition to the complainant who "attempt to submit this type of

documentation limiting the duty because we were going to the 12 hours, and I had several people not wanting to go to 12-hour shifts, but we had to go to 12-hour shifts because of the shortage of staff." He testified that this created a problem for the institution. "For quite a while we had to deal with this practically on a daily basis and some of it quite frankly was from disgruntled employees just looking for ways to cause problems..." Clearly the respondent failed to make the distinction between employees who would have preferred to work fewer hours and those whose disabilities required it. In response to a question about why the respondent could not accommodate complainant's limitation, Warden Painter testified, "Because that was light-duty. If I did it for one, I would have to do it for all."

54. At the time of his discharge, the complainant was being paid a salary of $1,510 per month, assuming no overtime. The complainant's lost pay between September 1997 and December 1998 (when the complainant finally found work which paid as well as the job he was denied) was $24,160.

55. In addition to his wages, the complainant received health benefits through the Public Employees Insurance Agency (PEIA), which were lost when he was terminated, and which would have cost him well in excess of $302.00 per month to have continued by electing his COBRA option. Although the complainant did not have the resources to make this election, this is a reasonable minimum monthly value for the health benefits he lost. Between September 1997 and December 1998, the value of complainant's lost benefits was $4,832.

56. The complainant had mitigation earnings totaling $11,623.52 between September 1997 and December 1998.

57. The complainant's net lost pay and benefits was $17,488.53 as of December 1998.

58. The interest on lost pay and benefits as of July 31, 2000, is $4,955.08.

59. The complainant also suffered humiliation, embarrassment and emotional distress, to a value well in excess of $3,277.45, as a result of the respondent's unlawful termination.

B.

Discussion

The prohibitions against unlawful discrimination by an employer are set forth in the Human Rights Act, WV Code §§ 5-11-1 to -19. Section 5-11-9(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...." The term "discriminate" or "discrimination" as defined by WV Code § 5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of...disability...."

The term "disability" is defined by the Act to apply to a person with an existing "mental or physical impairment which substantially limits one or more of such person's major life activities;" and also to a person who "has a record of such impairment," and a person who "is regarded as having such an impairment. WV Code § 5-11-3(m).

Included within the concept of equal opportunity for employees with a disability is an

obligation on the part of an employer to reasonably accommodate a person with a disability, and not to exclude a person from an equal opportunity where such equal opportunity can be extended with reasonable accommodation. **West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities**, 6 WV C.S.R. § 77-1-4 et seq. (1994); **Skaggs v. Elk Run Coal Co.**, 198 WV 51, 479 S.E.2d 561 (1996). The obligation of an employer to reasonably accommodate creates an affirmative obligation on the part of the employer, and the failure to reasonably accommodate is unlawful discrimination, notwithstanding motive.

While a disability discrimination case may be analyzed under the traditional disparate impact and disparate treatment formulas, **Skaggs**, 479 S.E.2d at 573, it may also involve considerations and issues unique to disability discrimination. Many disability cases turn upon whether the employee or candidate can perform the essential functions of the job, with or without reasonable accommodation, or whether he or she can safely perform these functions. 6 WV C.S.R. §§77-1-4.7. and 77-1-4.8; **Skaggs**, 479 S.E.2d at 577. Where these issues arise, the analysis of a disability discrimination case deviates from the more conventional discrimination formula.

This is a reasonable accommodation case. The commission's legislative disability regulations provide that "an employer shall make reasonable accommodation to the known physical or mental impairments of qualified individuals with disabilities where necessary to enable a qualified individual with a disability to perform the essential functions of the job." 6 WV C.S.R. § 77-1-4.5. See also **Skaggs**, 479 S.E.2d at 575; **Morris Memorial**

Convalescent Nursing Home, Inc., 189 WV 314, 318 431 S.E.2d, 353, 357 (1993), citing **Southeastern Community College v. Davis**, 442 U.S. 397, 412-13, 99 S.Ct. 2361, 2370, 60 L.Ed.2d 980, 992 (1979) modification recognized by **Tuck v. HCA Health Services of Tenn.**, 842 F.Supp. 988 (M.D. Tenn 1992), aff'd 7 F.3d 465 (7th Cir. 1993). If an accommodation is possible and it would allow the employee to perform the essential functions of the job, then the employer must provide the accommodation, unless the accommodation would impose an undue hardship upon the respondent's business. 6 WV C.S.R. §77-1-4.6.

In this case, the respondent refused the complainant an equal opportunity by refusing to reasonably accommodate the limitations imposed by his hypertension. The complainant has identified several possible accommodations, any one of which would have allowed complainant to return to work. These include accommodating the complainant by allowing him to work eight-hour shifts without requiring him to work overtime, or by assigning him to anyone of several positions for which he was qualified which came open over the year prior to his termination.

The respondent, on the other hand, has failed to show that any of these possible accommodations would impose an undue hardship. Since the respondent can avoid the requirement of accommodation only if it can carry the burden of proving that the identified possible accommodations pose an undue hardship, the respondent is liable for its failure to accommodate.

In **Skaggs**, the Court lays out the test for proving a case of disability discrimination by failing to reasonably accommodate. The six elements in such a case are:

> (1) The plaintiff is a qualified person with a disability; (2) the employer was aware if the plaintiff's disability; (3) the plaintiff required an accommodation in order to perform the essential functions of the job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the employer knew or should have known of the plaintiff's need and of the accommodation; and (6) the employer failed to provide the accommodation.

Skaggs, at Syl. Pt. 2.

Each of these elements will be addressed in turn. Once the commission has established its prima facie case of failure to reasonably accommodate, the respondent can escape liability only by carrying the burden of proving undue hardship.[1]

The term "Qualified Individual with a Disability" is defined in Rule 4.2. of the Commission's legislative regulations as "an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job[.]..." "Able and Compete," as defined by Rule 4.3. "means that, with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a direct threat (as defined in Section 4.8) of injury to the health and safety of other employees or the public."

The record establishes that the complainant is a qualified individual with a disability. Indeed, it was stipulated to by the parties that "the Complainant was well qualified for a position as correctional officer."

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[1]The use of the word **shall** in §77-1-4.5. of the Human Rights Commission's legislative rules, referring to reasonable accommodation, is qualified only by Rule 4.6., which gives the respondent an opportunity to prove undue hardship as an affirmative defense.

Despite his hypertension, the complainant has been able to work continuously since leaving the Army, with only brief absences. Despite the seriousness of his condition, the complainant had no functional limitations and was able to carry out all of the tasks associated with being a correctional officer.

The second part of this question is the issue of whether the complainant is a person with a disability. The Human Rights Commission's regulations define disability as:

> 2.1. "Disability" means, with respect to an individual–:
>
> 2.1.1. A mental or physical impairment which substantially limits one or more of a person's major life activities; or
>
> 2.1.2. A record of such impairment; or
>
> 2.1.3. Perception of such an impairment.
>
> 2.1.4. This term does not include persons whose current use of or addiction to alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat (as defined in Rule 4.8) to property or the safety of others.

Clearly, the complainant has a record of disability. But more than that, the complainant's hypertension is a physical impairment that substantially limits several of his major life activities. During the periodic occasions when his medication requires adjustment, the complainant suffers from headaches and dizziness, sometimes causing him to vomit and forcing him to take to bed. In addition, he endures a continuous heightened risk to his eyes and

to his kidneys and an increased risk for stroke.

The United States Supreme Court in the recent cases of **Sutton v. United Air Lines,** ___U.S.___ 119 S. Ct. 2139, 144 L.Ed.2d 450, 9 A.D. Cas. 673 (1999), and **Murphy v. United Parcel Service**, ___U.S.___, 119 S. Ct. 2133, 144 L.Ed.2d 484, 9 A.D. Cas. 691 (1999), has held that the question of whether a person has a disability turns upon the nature of such person's limitations in light of any mitigating measures that person is able to make use of. In other words, notwithstanding his diagnosis of hypertension (which is a serious and life threatening condition) under the Americans With Disabilities Act, complainant is a person with a disability only if he continues to be substantially limited even with the medications he is able to take to control his hypertension.

While the West Virginia Supreme Court has not addressed the question of whether mitigation plays the same role in the determination of substantial limitations under the Human Rights Act as it does under the Americans With Disability Act [hereinafter ADA], there are some compelling reasons to think that our Court might interpret the Human Rights Act differently from the ADA. For one thing, the U.S. Supreme Court in **Sutton** placed significant emphasis upon the language of the Preamble of the ADA. This argument was not persuasive with two members of the Supreme Court, see **Sutton**, 9 A.D. Cas at 686-687. And, more importantly, there is no Preamble to the West Virginia Human Rights Act. Left to interpret the text alone, and the other policy arguments related to this issue, it is likely that our Court would take a more limited view of the appropriate role fo the threshold issue of whether a person has a disability.

However, even if the complainant's limitations are considered post-mitigation, it is clear that he is substantially limited. While his hypertension is well controlled for periods of time, there are times when it is not. Furthermore, the medication he takes to control his hypertension caused him significant side effects which themselves substantially limit major life functions. Most notably, both the complainant and his doctor testified that the medication used to control his hypertension causes him sexual dysfunction.[2] Certainly this is a significant limitation on a major life activity.

The complainant is a capable worker who was kept out of the workforce by the inflexibility of his employer. Whether the employer's inflexibility can be legally justified is a question which must be addressed in a later stage of the analysis. However, it should be clear that the complainant meets the threshold requirements for asserting a disability discrimination claim.

The respondent was well aware of the complainant's disability. The complainant was given a physical examination by the respondent before he started his employment, at which he fully disclosed his hypertension and the medications he had been prescribed. Complainant disclosed that he had a Service-related disability on his application for employment. In addition, in September 19996, the complainant made the respondent aware that his doctor was recommending an accommodation because of difficulty in controlling his hypertension.

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[2]Although it is somewhat bizarre to consider, the type of limitation in an employment discrimination case, the analysis in **Sutton** and **Murphy** clearly include this type of side effect as a basis for meeting the threshold test.

Finally, a year later, complainant's September 1, 1997, return to work slip from his physician's assistant again notified the respondent of complainant's uncontrolled hypertension and his need for accommodation.[3]

In **Hendricks-Robinson v. Excel Corp.**, 154 F.3d 685, 8 A.D. Cas 875 (7th Cir. 1998), the court said:

> Under the ADA, an employee begins the accommodation "process" by informing his employer of his disability; at that point, an employer's "liability is triggered for failure to provide accommodations." Beck v. University of Wis. Bd. Of Regents, 75 F.3d 1130, 1134 [5 A.D. Cas 304] (7th Cir. 1996).

Hendricks-Robinson, 8 A.D. Cas. At 881.

Certainly the complainant has met this part of the prima facie test.

Although complainant had been able to consistently and competently perform his job in spite of his disability, it was clear that his health was being compromised in the process. His doctor, in September 1996 and his physician's assistant both expressed the view the complainant's long-term health required him to work more normal hours if he was going to continue in such a high stress position. Failure to provide him the accommodation of another position or of more normal and regular work hours put him at risk for serious health problems.

In evaluating the evidence with regard to this element, it is very important to distinguish between proving that a reasonable accommodation existed and the question of whether such accommodation involved undue hardship.

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[3]It was this assertion of his need for accommodation which triggered complainant's termination.

> "Reasonable" and "undue" are both relative terms, and their application will often depend upon overlapping facts. Both imply some assessment of costs and effectiveness and of the relationship between costs and effectiveness. Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538 (7th Cir. 1995). The designation of whether an issue be considered as relating to undue hardship rather than reasonable accommodation (or vice versa) has significance because it determines who bears the risk of nonpersuasion.
>
> We need not, at this time set down any elaborate analysis for resolving this potentially troublesome issue. It is sufficient for present purposes to note that the reasonableness of a proposed accommodation normally will depend upon a **general analysis** of costs and effectiveness. Whether a resulting hardship is undue typically will focus the fact finder on the impact of the accommodation on the particular employer.

Skaggs, 479 S.E.2d at 576 (footnote omitted) (emphasis supplied); see especially Id. at n.13.

Consideration of whether a reasonable accommodation exists must be done on a case-by-case basis.

> Determinations about the reasonableness of an accommodation or the impact of its hardship must be done on a case-by-case basis, with careful attention to the particular circumstances and guided by the Human Rights Act's policy of enhancing employment opportunities for those with disabilities through workplace adjustments. Essentially, the law mandates common sense courtesy and cooperation. "Accommodation" implies flexibility, and workplace rules, classifications, schedules, etc., must be made supple enough to meet that policy. "Undue hardship" implies a balancing, and the employer's interest in avoiding costs and disruption can furnish a defense only when they outweigh the policy gains.

Skaggs, 479 S.E.2d at 577 (footnote omitted).

The concept of reasonable accommodation is a flexible one which is to be implemented

in a manner consistent with the purposes of the Human Rights Act to prevent "unnecessary denials of job opportunities to people with disabilities." **Skaggs**, 479 S.E.2d at 573. The concept of "reasonable accommodation," like other provisions of the Human Rights Act, is designed to be "strong medicine." "In applying our [Human Rights] statutes, [judges should] remain mindful that, as a remedial law, it should be liberally construed to advance those beneficent purposes." **Skaggs**, 479 S.E.2d at 574, citing **State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.**, 194 WV 770, 461 S.E.2d 516 (1995).

The commission's legislative regulations (§ 77-1-4.5.) set forth various types of actions which may constitute reasonable accommodation in a particular case. These include "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent...to perform,...and similar actions." 6 WV C.S.R. § 77-1-4.5.2. However, the regulation explicitly provides that the types of actions listed are not intended to be exhaustive.

> Reasonable accommodations include, but are not limited to:
>
> 4.5.1. Making facilities used by individuals with disabilities, including common areas used by all employees such as hallways, restrooms, cafeterias and lounges, readily accessible to and usable by individuals with disabilities;
>
> 4.5.2. Job restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent (as defined in Section 4.3.) To perform, acquisition or modification of equipment or devices, the provision of readers or interpreters, and similar actions;

4.5.3. Appropriate adjustments or modifications of examinations, training materials or policies; and

4.5.4. The preparation of fellow workers for the individual with a disability to obtain their understanding of the limitations of the disability and their cooperation in accepting other reasonable accommodations for the individual with a disability.

6 WV C.S.R. § 77-1-4.5. (Emphasis supplied).

Part-time or modified work schedules and reassignment to vacant positions are all explicitly mentioned. Working a full-time regular job, without mandatory overtime, is certainly implied among these possible accommodations.

It is not clear that all "reasonable" options for accommodation must be given consideration. "Indeed, categorically excluding any strategy from the list of accommodations that can be required of an employer must be highly disfavored. " **Skaggs**, 479 S.E.2d at 579 (emphasis supplied).

To permit the complainant to work his regular 40-hour per week job without mandatory overtime is an obvious and eminently reasonable accommodation. In contrast to job restructuring, leaves of absence and transfer to other positions, the option of merely allowing the complainant to do his job without mandatory overtime places minimal burden on the respondent.

Reassignment to a different position is also a possible accommodation. This option is one of the explicitly listed forms of reasonable accommodation which an employer is required to make "where necessary to enable a qualified individual with a disability to perform the

essential functions of the job. " 6 WV C.S.R. §§ 77-1-4.5. and 77-1-4.5.2.

Respondent may argue that the reassignment is not a required form of reasonable accommodation; that it is merely discretionary with the employer, even if reassignment is the only way to return complainant to work, and even if it imposes no undue hardship on the employer. This was the holding in **Coffman**. However, this holding was explicitly overturned on April 30, 1996, when the West Virginia Court decided **Skaggs**.

> We also believe that the current federal law and the commission's rules better serve the goals of the disability law and that Coffman was flat out wrong, both on its facts and in its dicta ruling out transfers as a reasonable accommodation. The latter is inconsistent with the common sense courtesy mandated by the Human Rights Act; there is simply no reason that transfer to a vacant position should not be within the range of considerations for accommodating a person with a disability.

Skaggs, 479 S.E.2d at 579.

The unambiguous holding in **Skaggs** is that "[i]f the employee cannot be accommodated in his or her current position, however it is restructured, then the employer must inform the employee of potential job opportunities within the company and, if requested, consider transferring the employer to fill the open position." Skaggs, at Syl. Pt. 4 (emphasis supplied).

In this case, the complainant tried repeatedly to transfer to less stressful positions. Beginning in September 1996, the respondent was on notice that the complainant was doing this at the direction of his doctor for the purpose of attempting to control his hypertension. Yet, for reasons undisclosed in the record, the respondent refused to permit the complainant to make such a transfer and has offered no explanation at all for these decisions.

As Justice Cleckley explicitly notes, much will depend on the employer and the work context and the degree of flexibility. "In any instance, an employer must have a reason for refusing a proposed accommodation that would permit the impaired worker's continued employment." **Skaggs**, 479 S.E.2d at 580. In a work context where there is work which needs to be done, and where an employer has the flexibility, an accommodation must be made. It will depend upon facts which must be examined with in limine restriction. Each case is a case-by-case analysis and no particular accommodation in one case binds the respondent to the same approach in any other.

Second, even if a particular option would be held to be inapplicable as a reasonable accommodation for the complainant in a particular case, this does not mean that evidence of how and when such accommodations were provided to others is irrelevant. A critical issue is the ability of the employer to accommodate the complainant without undue hardship.

> Determinations about the reasonableness of an accommodation or the impact of its hardship must be done on a case-by-case basis, with careful attention to the particular circumstances and guided by the Human Rights Act's policy of enhancing employment opportunities for those with disabilities through workplace adjustments.

Skaggs, 479 S.E.2d at 577.

Evidence regarding an employer's ability to accommodate other employees is extremely relevant to how flexible the employer can afford to be. Indeed, it is precisely because the questions of what is "reasonable" must be decided in light of the particular facts related to the particular workplace that facts related to a whole myriad of variables become

relevant to the analysis.

The evidence in this case demonstrates that respondent had accommodated employees with family needs by allowing them to vary their schedule.

Under the ADA, an employer is required to permit "an employee with a disability to work a modified or part-time schedule as a reasonable accommodation, absent undue hardship[.]" EEOC: Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, at 70:1411 (BNA) (effective 3/1/99). Where such accommodations have been refused, courts have ordered them provided. **Ralph v. Lucent Technologies**, 135 F.3d 166, 7 A.D. Cas. 1345, 1349 (1st Cir. 1998).

In West Virginia, our Court has clearly stated that when it comes to reasonably accommodating workers with disabilities, "categorically excluding any strategy from the list of accommodations that can be required of an employer must be highly disfavored." **Skaggs** 479 S.E.2d at 579 (emphasis supplied).

The record clearly establishes that the respondent knew of the complainant's need for an accommodation. In September 1996, complainant present respondent with a letter from his doctor which clearly provided that the complainant's hypertension was being adversely affected by his work stress and that an accommodation in his work situation was needed. Respondent was agin given notice of the complainant's need for an accommodation in September 1997.

It appears that respondent made some effort to obtain additional information regarding the complainant's need for a reasonable accommodation; however, the effort completely failed due to the fault of the respondent. Apparently, the respondent sent the complainant a letter on

September 3, 1997, scheduling a physical examination for the complainant; however, this letter was sent to an address at which the complainant had not resided for more than a year. The respondent had been timely notified of his change of address a year previously, and, consequently, if the letter was actually sent, it was never received by the complainant. Even at the hearing of this matter, respondent's representatives acted as if the complainant should be held responsible for not complying with this letter which he never received. However, whether the respondent's failure to communicate this message to the complainant was intentional or negligent, the effect is the same, and the responsibility for this failure must be borne by the respondent.

Similarly, the October 24, 1997, letter from the respondent to the complainant, which made reference to a "Physician/Practitioner's Statement," failed to enclose the form. The complainant called after receiving a letter to inquire about the form and was told that a copy of the form would be sent. But it never was. The complainant was then terminated without respondent taking any further action to find out the nature of the complainant's disability.

Elements five and six of the prima facie case set forth in **Skaggs** are sometimes best addressed together because the are commonly interrelated. The provision of a reasonable accommodation usually involves identifying possible accommodations and then asking to make one or more of those accommodations a reality for the employee. Because it is typically the employer who has access to information regarding possible accommodations, the employer is an essential part of the process; and where an employer fails or refuses to engage in the process in a good faith manner, for all intents and purposes, the employee has been refused an

accommodation he never even knew about. "The process by which accommodations are adopted ordinarily should engage both management and the affected employee in a cooperative problem-solving exchange." **Skaggs**, 479 S.E.2d at 577.

Skaggs makes it very clear that an employer may not dodge its responsibility to reasonably accommodate by placing all of the assessment burden upon the employee. **Skaggs** cites approvingly to the Americans With Disabilities Act regulations which provide:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3)(1995).
>
> Similarly, the appendix to 29 C.F.R. § 1630.9 at 414 (1995), provides: "[T]he employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." Neither the West Virginia statutes nor the federal law assigns responsibility for when the interactive process is not meaningfully undertaken, but we infer that neither party should be able to cause a breakdown in the process. The trial court should look for signs of failure to participate in good faith or to make reasonable efforts to help the other party determine what specific accommodations are necessary and viable. A party that obstructs or delays the interactive process or fails to communicate, by way of initiation or response, is acting in bad faith. When information necessary for a meaningful determination of accommodation only can be provided by one party, the failure to provide that information is considered an obstruction. The determination must be made in light of the circumstances surrounding a given case.

Skaggs, 479 S.E.2d at 577-578 (footnote omitted); see also EEOC Enforcement Guidance, at

70:1404-70:1405; **Hendricks-Robinson v. Excel Corp.**, 154 F.3d 685, 8 A.D. Cas. 875 (7th Cir. 1998.).

Our Court has made clear that it is the employer's duty to identify possible accommodations; it is not sufficient for the employer to offer to be helpful and then leave it to the employee to propose a plan which the employer finds acceptable. "The employer must inform the employee of potential job opportunities within the company." **Skaggs**, at Syl. Pt. 4. Other courts are in accord.

> Under the ADA, an employee begins the accommodation "process" by informing his employer of his disability; at that point, an employer's "liability is triggered for failure to provide accommodations." Beck v. University of Wis. Bd. Of Regents, 75 F.3d 1130, 1134 [5 A.D. Cas. 304] (7th Cir. 1996). "Once an employer's responsibility to provide reasonable accommodation is triggered, the employer must engage with the employee in an 'interactive process' to determine the appropriate accommodation under the circumstances. Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 [5 A.D. Cas. 1283] (7th Cir. 1996).... An employer must make a reasonable effort to explore the accommodation possibilities with the employee. See Miller v. Illinois Dept. of Corrections, 107 F.3d 483, 486-87 [6 A.D. Cases 678](7th Cir. 1997).

Hendricks-Robinson, 8 A.D. Cas. At 881 (emphasis supplied)

In this case, the respondent's failure to reasonably accommodate could not be clearer. Respondent repeatedly refused to allow the complainant to transfer when he made requests to do so. For a time, the complainant responded to this refusal by continuing to work unaccommodated, although his health apparently suffered. In September 1997, when his medical provider imposed a restriction, rather than even explore the possibility of an

accommodation, the respondent simply terminated the complainant's employment.

Furthermore, the complainant cooperated with respondent fully regarding its requests for additional information and requests to respond, except when the respondent sent requests to complainant's former address or when it failed to provide the forms which it requested he fill out. Respondent never acknowledged or accepted responsibility for its failures in this regard; but, it must be held liable for the consequences of its negligence when the result was a failure to obtain the information. Ironically, the complainant was in the process of gathering information regarding his own disability, on his own initiative, when he was abruptly terminated by the respondent.

The commission having established a prima facie case of failure to reasonably accommodate, the respondent can avoid liability only by proving, by a preponderance fo the evidence in the record, that the available accommodations would have been unduly burdensome.

> An employer shall not be required to make such accommodation if she/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his/her business.

6 WV C.S.R. §77-1-4.6 (emphasis supplied)

The law is very clear that once reasonable accommodations have been identified, this is the only remaining issue, and the burden to prove that the accommodations are unduly burdensome is upon the respondent.

> An employer may defend against a claim of reasonable accommodation by disputing any of the above elements or by

> proving that making such accommodation would impose an undue hardship on the employer. The latter is an affirmative defense, upon which the employer bears the burden of persuasion.

Skaggs, 479 S.E.2d at 576 (citations omitted).

The issue of undue hardship is to focus on an analysis of various factors, including financial considerations and the structure of the employer's operations. Rule 4.6. of the commission's legislative regulations provides:

> The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in the following subparagraphs (4.6.1 - 4.6.5):
>
> 4.6.1. The overall financial resources of the employer; the overall size of the employer's operation with respect to the number of its employees; the number, type, and location of its facilities;
>
> 4.6.2. The nature of the employer's operation, including the composition, structure, and functions of the employer's workforce; the geographic separateness, administrative, or fiscal relationship of the employer's facility or facilities;
>
> 4.6.3. The nature and cost of the accommodations needed (taking into account alternate sources of funding, such as Division of Vocational Rehabilitation); the effect on expenses and resources, or the impact otherwise of such accommodation upon the employer's operation;
>
> 4.6.4. The possibility that the same accommodations may be able to be used by other prospective employees[.]

6 WV C.S.R. 77-1-4.6; see also Skaggs, 479 S.E.2d at 576.

However, an employer must do more than merely identify reasons why it would prefer not to make an accommodation. Not every hardship is an undue hardship. Undue hardship must

be assessed on a

> case-by-case basis, with careful attention to the particular circumstances and guided by the Human Rights Act's policy of enhancing employment opportunities for those with disabilities through workplace adjustments.... "Undue hardship" implies a balancing, and the employer's interest in avoiding costs and disruption can furnish a defense only when they outweigh the policy gains.

Skaggs, 479 S.E.2d at 577 (footnote omitted).

> In order to withstand judicial scrutiny, the employer's undue hardship defense will have to have a strong factual basis and be free of speculation or generalization about the nature of the individual's disability or the demands of a particular job.

United States v. City and County of Denver, 943 F. Supp. 1304, 6 A.D. Cas. 245, 252 (D. Colo. 1996) (citations and quotations omitted).

In this case, the respondent has completely failed to establish a defense of undue hardship. While the respondent has asserted that its unwillingness to accommodate complainant is necessitated by its staff shortage and its need to staff its security positions around the clock, the evidence fails to connect this real security need to its total inflexibility regarding overtime. This record contains virtually no evidence that allowing the complainant to work his regular shifts without doing overtime or second shifts would have imposed an undue hardship on the respondent.

The complainant is entitled to back pay and benefits. Frank's Shoe Store v. WV Human Rights Commission, 179 WV 53, 365 S.E.2d 251 (1986). The evidence reveals that complainant suffered lost wages and benefits from September 1997, when he was refused the

opportunity to return to work, through December 1998, when he finally found work which payed as much as his correctional officer job. If he had been permitted to continue working his eight-hour shift, complainant would have continued making $1,510 per month, even without any pay increases. In addition, he lost the value of medical benefits, worth at least $302.00 per months, for total lost pay and benefits of $1,812 per month. During the 16-month period between September 1997 and December 1998, this totals to lost pay of $24,160 and lost benefits of $4,832. (See Exhibit A)

The complainant's mitigation earnings during this period were $11,623.52, leaving net lost pay and benefits of $17,488.53 as of December 1998. (See Exhibit A)

The complainant is entitled to interest on back pay and benefits. Interest is payable on back pay awards at a rate of ten percent per annum. Hensley v. WV Dept. of Health and Human Resources, 203 WV 456, 508 S.E.2d 616 (1988); Frank's Shoe Store v. WV Human Rights Commission, 179 WV 53, 365 S.E.2d 251 (1986); Bell v. Inland Mutual Ins. Co., 175 WV 165, 332 S.E.2d 127 (1985); Douglass v. McCoy, 24 WV 722 (1884); Tiernan v. Minghini, 28 WV 314 (1886); WV Code §56-6-31. Interest is calculated back to the date on which the cause of action accrued. WV Code § 56-6-31. Because it increases in time, interest calculations have been made for the end of each month through the end of 2000. (See Exhibit A)

The complainant is entitled to incidental damages in the amount of $3,277.45. Pearlman Realty Agency v. WV Human Rights Commission, 161 WV 1, 239 S.E.2d 145 (1977); Bishop Coal Co. v. Salyers, 181 WV 71, 380 S.E.2d 238 (1989). Bishop Coal

provides that the $2,500 cap on incidental damages may be adjusted from time to time to conform to the Consumer Price Index. Bishop Coal, 380 S.E.2d at 247. In keeping with this language, the commission has since raised the cap on incidental damages to $3,277.45.

The commission and its counsel will be awarded their costs incurred in prosecuting this claim, including the cost of depositions, the cost of recording and transcribing the record, witness fees and travel expenses. The Human Rights Commission has expended $835.59, and the Office of the Attorney General, Civil Rights Division , $43.44 in prosecuting this claim.

The complainant has established by a preponderance of the evidence that the respondent terminated him because of his disability in violation of the West Virginia Human Rights Act.

C.

Conclusions of Law

1. Complainant, James H. Gee, is an individual claiming to be aggrieved by an unlawful discriminatory practice and is a proper complainant for the purposes of the West Virginia Human Rights act, WV Code § 5-11-10. At all times relevant hereto, the complainant is a person within the meaning of WV Code § 5-11-3(a), and was an employee (or former employee) of the respondent, as defined by the West Virginia Human Rights Act, WV Code §5-11-3(e).

2. Respondent, West Virginia Department of Corrections, is and was at all times relevant hereto, an employer and a person as defined by the West Virginia Human Rights Act, WV Code §§ 5-11-3(d) and 5-11-3(a), respectively.

3. The complaint in this matter was timely filed pursuant to WV Code § 5-11-10.

4. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter of the complaint.

5. The complainant proved by a preponderance of the evidence that at the time of his termination from employment, he was a person with a disability as defined by WV Code § 5-11-3(m) (1994), in that he had a physical impairment, hypertension, which substantially limited one or more of his major life activities.

6. The complainant has established that he is a qualified person with a disability and possess the skills and ability to do the desired job, with reasonable accommodation.

7. The complainant has established that he needed an accommodation and that the respondent failed to provide him with available reasonable accommodations, i.e, the opportunity to work an eight-hour shift, five days per week, or the opportunity to transfer to a less stressful position.

8. The respondent failed to meet its burden to prove that the reasonable accommodation requested by the complainant created an undue hardship upon the respondent

9. The complainant has proved that the respondent terminated him because of his disability, in violation of the West Virginia Human Rights Act.

10. As a result of the alleged discriminatory actions of the respondent, complainant is entitled to remedial action from respondent as follows:

a. Modification of the complainant's employment and/or personnel file to reflect that complainant had a good work record and that his departure

was not in any way his fault;

b. Back pay and benefits in the amount of $17,488.53, plus prejudgment interest thereon at the rate of ten percent (10%) per annum, in the amount of $4,935.08 as of July 31, 2000, all as more fully set forth in the commission's memorandum of law.

c. Incidental damages in the amount of $4,277.45 for the humiliation, embarrassment and emotional distress suffered by the complainant as a result of the discriminatory actions of the respondent;

d. Reimbursement of expert witness fees, deposition and hearing transcript costs, and travel expenses associated with prosecuting this claim, all as more fully set forth in the commission memorandum of law;

e. A cease and desist order aimed at preventing the respondent from continuing the illegal discriminatory practices evidenced in its actions, including its failure to modify its overtime policy; and

f. An order directing that the respondent provide its supervisory staff with training on compliance with disability law.

D.

Relief and Order

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

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

2. The respondent is ordered to provide its supervisory staff with training on compliance with disability law.

3. Respondent is ordered to modify the complainant's employment or personnel file to reflect that complainant had a good work record and that his departure was not in any way his fault.

4. Within 31 days of receipt of the undersigned's order, the respondent shall pay back pay in the amount of $17,488.53, plus statutory interest.

5. Within 31 days of receipt of the undersigned's order, the respondent shall pay the commission's costs in the amount of $835.59 and the Office of the Attorney General, Civil Rights Division's costs in the amount of $43.44 in the prosecution of this claim.

6. Within 31 days of the receipt of this decision, the respondent shall pay the complainant incidental damages in the amount of $3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination, plus statutory interest of ten percent.

7. In the event of failure of the respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Ivin B. Lee, Executive Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **Ordered**.

Entered this 9 day of January 2001.

WV HUMAN RIGHTS COMMISSION

BY _____

GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE

DAMAGE CALCULATIONS AT 10% SIMPLE INTEREST

JAMES H. GEE v. WEST VIRGINIA DEPARTMENT OF CORRECTIONS
DOCKET NO. EH-195-98

DATE	LOST BACK PAY	VALUE OF LOST BENEFITS	MITI-GATION	NET MONTHLY LOST W & B	TOTAL NET LOST W & B	INTEREST EARNINGS	ENDING BALANCE
SEPT 97	1,510.00	302.00	.00	1,812.00	1,812.00	.00	1,812.00
OCT 97	1,510.00	302.00	47.64	1,764.36	3,576.36	29.80	3,606.16
NOV 97	1,510.00	302.00	583.19	1,228.81	4,805.17	80.09	4,885.26
DEC 97	1,510.00	302.00	583.19	1,228.81	6,033.98	150.85	6,184.83
JAN 98	1,510.00	302.00	276.01	1,535.99	7,569.97	252.33	7,822.30
FEB 98	1,510.00	302.00	276.00	1,536.00	9,105.97	379.42	9,485.39
MAR 98	1,510.00	302.00	276.00	1,536.00	10,641.97	532.10	11,174.07
APR 98	1,510.00	302.00	.00	1,812.00	12,453.97	726.48	13,180.45
MAY 98	1,510.00	302.00	.00	1,812.00	14,265.97	951.06	15,217.03
JUNE 98	1,510.00	302.00	711.52	1,100.48	15,366.45	1,152.48	16,518.93
JULY 98	1,510.00	302.00	1,932.05	.00	15,366.45	1,280.54	16,646.99
AUG 98	1,510.00	302.00	164.45	1,647.55	17,014.00	1,559.62	18,573.62
SEPT 98	1,510.00	302.00	1,693.36	118.64	17,132.64	1,713.26	18,845.90
OCT 98	1,510.00	302.00	1,693.37	118.63	17,251.27	1,868.89	19,120.16
NOV 98	1,510.00	302.00	1,693.37	118.63	17,369.90	2,026.49	19,396.39
DEC 98	1,510.00	302.00	1,693.37	118.63	17,488.53	2,186.07	19,674.60
JAN 99	.00	.00	.00	.00	17,488.53	2,331.80	19,820.33
FEB 99	.00	.00	.00	.00	17,488.53	2,477.54	19,966.07
MAR 99	.00	.00	.00	.00	17,488.53	2,623.28	20,111.81
APR 99	.00	.00	.00	.00	17,488.53	2,769.02	20,257.55
MAY 99	.00	.00	.00	.00	17,488.53	2,914.76	20,403.29
JUNE 99	.00	.00	.00	.00	17,488.53	3,060.49	20,549.02
JULY 99	.00	.00	.00	.00	17,488.53	3,206.23	20,694.76
AUG 99	.00	.00	.00	.00	17,488.53	3,351.97	20,840.50
SEPT 99	.00	.00	.00	.00	17,488.53	3,497.71	20,986.24
OCT 99	.00	.00	.00	.00	17,488.53	3,643.44	21,131.97
NOV 99	.00	.00	.00	.00	17,488.53	3,789.18	21,277.71
DEC 99	.00	.00	.00	.00	17,488.53	3,934.92	21,423.45
JAN 00	.00	.00	.00	.00	17,488.53	4,080.66	21,569.19
FEB 00	.00	.00	.00	.00	17,488.53	4,226.39	21,714.92
MAR 00	.00	.00	.00	.00	17,488.53	4,372.13	21,860.66
APR 00	.00	.00	.00	.00	17,488.53	4,517.87	22,006.40
MAY 00	.00	.00	.00	.00	17,488.53	4,663.61	22,152.14
JUNE 00	.00	.00	.00	.00	17,488.53	4,809.35	22,297.88
JULY 00	.00	.00	.00	.00	17,488.53	4,955.08	22,443.61
AUG 00	.00	.00	.00	.00	17,488.53	5,100.82	22,589.35
SEPT 00	.00	.00	.00	.00	17,488.53	5,246.56	22,735.09
OCT 00	.00	.00	.00	.00	17,488.53	5,392.30	22,880.83
NOV 00	.00	.00	.00	.00	17,488.53	5,538.03	23,026.56
DEC 00	.00	.00	.00	.00	17,488.53	5,683.77	23,172.30
TOTALS:	24,160.00	4,832.00	11,623.52	17,488.53	17,488.53	5,683.77	23,172.30

DAMAGE SUMMARY (AS OF DECEMBER 31, 2000):

NET BACK PAY:	17,488.53
INTEREST:	5,683.77
PAY WITH INTEREST:	23,172.30
INCIDENTALS:	3,277.45
TOTAL:	26,449.75

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May 18, 2000

Gee Exhibit A

EXHIBIT
A

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES H. GEE,

Complainant,

v. DOCKET NO. EH-195-98

WEST VIRGINIA DEPARTMENT
OF CORRECTIONS,

Respondent.

ITEMIZATION OF LITIGATION EXPENSES

Costs Incurred by the West Virginia Human Rights Commission

Medical Records	$20.14
Hearing Transcripts (Rebecca Baker)	$682.45
Evidentiary Deposition Transcript (Rebecca Baker)	$133.00
Total	$835.59

Costs Incurred by the Office of the Attorney General
Civil Rights Division

Travel for evidentiary deposition	$43.44
Grand Total	$879.03