STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.
Governor

June 27, 1986

Rebecca J. Kimble
P. O. Box 219
Ft. Ashby, WV 26719

Phil Jordan
P. O. Box 477
155 Armstrong Street
Keyser, WV 26726

Daniel Staggers
P. O. Box 876
Keyser, WV 26726

RE: Rebecca J. Kimble V Dawn View Manor Nursing Home
ES-633-85

Dear Ms. Kimble, Mr. Jordan and Mr. Staggers:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Rebecca J. Kimble V Dawn View Manor Nursing Home.ES-633-85.

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 (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney
Executive Director

HDK/kpv
Enclosure
CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

REBECCA J. KIMBLE,

Complainant,

vs. Docket No. ES-633-85

DAWN VIEW MANOR NURSING HOME,

Respondent.

O R D E R

On the 11th day of June, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner James Gerl. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions and amendments set forth below.

The Commission hereby deletes paragraph 2, page 12, from the section of the Hearing Examiner's decision entitled "Proposed Order" and substitutes therefor the following paragraph:

"2. Respondent shall, when the first such vacancy occurs, offer to rehire complainant as a nurse at her previous salary plus any regular increases that would have accrued to her in the interim. In addition the respondent shall pay the complainant said salary until such time as the offer to retire is made."

The Commission further amends said decision by deleting paragraph 3, page 12, and substituting therefor the following paragraph:

"3. The respondent shall pay to the complainant the sum of

$9,446.54 plus prejudgment interest at 10% per annum from April 21, 1985, until February 28, 1986, the date of the hearing in this matter, as compensatory damages for lost wages resulting from respondent's discrimination."

The Commission further amends said decision in paragraph 5, page 12, by deleting the phrase "45 days" and substituting therefor the phrase "35 days."

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order, except as amended by this Order.

The respondent is hereby ORDERED to provide to the Commission proof of compliance with the Commission's Order within thirty-five (35) days of service of said Order by copies of cancelled checks, affidavit or other means calculated to provide such proof.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 27 day of June, 1986.

Respectfully Submitted,

Betty R. Hamilton

CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

STATE OF WEST VIRGINIA

HUMAN RIGHTS COMMISSION

REBECCA J. KIMBLE,

Complainant,

V.

DOCKET NO. ES-633-85

DAWN VIEW MANOR NURSING HOME,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on February 28, 1986 in Keyser, West Virginia. The complaint was filed on July 1, 1985. The notice of hearing was issued on December 18, 1985. Respondent answered the complaint December 30, 1985. A telephone Status Conference was convened on January 7, 1986. The parties failed to file a pre-hearing memorandum as ordered by the Hearing Examiner. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. Although respondent's post hearing documents were four days late, complainant's request to strike respondent's brief and proposed findings is hereby denied.

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 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 findings as stated herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against her on the basis of her sex/pregnancy by terminating her. Respondent maintains that complainant was fired because complainant never requested maternity leave and because she didn't follow respondent's personnel rules.

FINDINGS OF FACT

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

1. Complainant is a registered nurse who was employed as a nurse by respondent from June 25, 1984 through April 21, 1985. Her regular shift was 7 a.m. to 3 p.m. o'clock. She was responsible for the care of 30 elderly patients.

2. Respondent is a licensed nursing home in Fort Ashby, West Virginia. Respondent employs approximately 50 persons, 47 of whom are female. The two key personnel are Mary Billmyre, administrator, and Dawn Billmyre, office manager.

3. In October, 1984, complainant discovered that she had become pregnant.

4. On Monday, November 26, 1984, complainant advised Dawn Billmyre and Mary Billmyre that she was pregnant. Said conversation occurred in the Billmyres' office. Rebecca Kimble advised the Billmyres that the baby was not due until the end of June, 1985. Rebecca Kimble further advised the Billmyres that she would only need a few weeks off before the baby was born and a few weeks off after the baby was born.

5. During complainant's first office visit with Dr. Kho, a gynecologist, on February 11, 1985, Dr. Kho suggested that she obtain a sonogram, because he felt that she was larger than usual for the time period of the pregnancy.

6. On Friday, February 15, 1985, complainant developed some vaginal bleeding. Dr. Livengood advised her to get complete bed rest until she obtained her sonogram on Monday, February 18, 1985. Complainant's mother, Meadows, telephoned Mary Billmyre on February 15, 1985 to tell her of complainant's medical complications and to advise her that she would not be able to work at the nursing home on February 16 and February 17, 1985, due to her medical complications.

7. On February 19, 1985, complainant visited Dr. Kho's and Dr. Mould's office. She obtained the physician's certification of her physical ability to perform her usual assigned duties. The doctor did not assign a specific date for her to return to work but instead states "Mrs. Kimble is physically able to work

at this time and may do so as long as she has no complaints at all regarding her pregnancy." After receiving the physician's certification, complainant took the certification to the nursing home and left it with the Billmyres, in the administration office. At that time, either complainant or Mary Billmyre placed a question mark in the date space indicating the last day Rebecca Kimble could work.

8. Complainant again visited Mary Billmyre and Dawn Billmyre, in the administrator's office, on approximately February 22, 1985, and advised them that she would be taking her maternity leave, effective with the March schedule, the first day of the schedule being March 7, 1985. Complainant, however, offered to work two to three days a week after March 7 to help respondent with the shortage of help. All parties agreed to Rebecca Kimble's abbreviated work schedule. Dawn Billmyre confirmed the aforesaid meeting by preparing a memorandum indicating the Rebecca Kimble would work two days per week "due to the pregnancy."

9. On approximately April 8, 1985, complainant again visited the Billmyres' office at the nursing home. She advised the Billmyres that, due to the pregnancy, she was getting too big and too much pressure was placed on her feet. Rebecca Kimble further advised the Billmyres that she could only finish the April work shecule, the last day of the schedule being April 25, 1985.

10. On April 21, 1985, complainant delivered a letter dated April 15, 1985, to the Billmyres' office. She left the

letter on Dawn Billmyre's desk, as neither Mary Billmyre nor Dawn Billmyre were present. In the letter, complainant advised respondent that April 25, 1985 would be the last work schedule she could work and that she would return to full capacity with respondent approximately six weeks after delivery of the baby, if physical health allowed.

11. In response to complainant's letter, Mary Billmore wrote to complainant on April 23, 1985 stating that she no longer had a job at respondent, and that "(t)here can be no guarantee of you returning to your position or any position unless at some future date we have an opening." Said letter also states "I had supposed that with three children, now you had no plans of returning..."

12. Complainant's lawyer wrote to Mary Billmyre on April 30, 1985 advising that complainant had not terminated her employment with respondent.

13. On May 14, 1985, Mary Billmyre responded by letter repeating that complainant no longer had a job at respondent.

14. Respondent's personnel handbook describes its maternity leave policy as follows:

> A Maternity Leave without pay with the privilege to return to the first vacant position for which she is qualified may be granted to full-time permanent employees at the discretion of the Administrator. There is no guarantee that the employee will return to her same position. Ordinarily the Maternity Leave will start with the sixth (6th) month of pregnancy and terminate six (6) weeks after delivery; however, under extraordinary circumstances the Administrator at discretion may modify the leave time. In order for a pregnant employee to continue work, she must

of discrimination. Shepherdstown Volunteer Fire v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W.Va. 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 nondiscriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunter Fire Department., 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. Complainant became pregnant. At first, complainant wanted to take off only a few weeks from work because of the delivery of her baby. After some medical complications, however, complainant decided to request a maternity leave from her employer at or near the beginning of sixth month of pregnancy. Complainant notified respondent of her last day that she would be able to work on April 21, 1985. Two days later, respondent's administrator sent a letter to complainant stating that "I had supposed that with three children now you had no plans of returning." Such facts are sufficient to make out a prima facie case of discrimination because, if otherwise unexplained, they raise an inference of discrimination. Furnco Construction v. Waters 438 U.S. 567 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

Respondent has articulated a legitimate nondiscriminatory reason for its termination of complainant. Respondent presented

evidence that complainant never requested maternity leave, and that complainant did not follow respondent's personnel rules.

Complainant has demonstrated that the reason articulated by respondent for her termination is pretextual. The testimony of complainant and her witnesses was more credible than the testimony of respondent's witnesses because of the demeanor of the witnesses. In addition, the testimony of respondent's main witness, Mary Billmyre, was impaired by several problems as well as an evasive demeanor. For example, her testimony at the hearing herein was impeached by a prior inconsistent statement at the unemployment hearing relative to a conversation she had had with complainant's mother regarding complainant's difficulties caused by the pregnancy. Similarly, her testimony was inconsistent with regard to whether she knew that complainant would deliver her baby in May.

Moreover, complainant did make it known to respondent that she wanted a maternity leave by expressing such desire in writing on the last day thatshe worked at respondent. Such written request negates any argument that complainant never requested a maternity leave.

Respondent's argument that multiple doctor slips are required is negated by respondent's own personnel manual. Clearly, one doctor slip is sufficient pursuant to respondent's rules.

Perhaps most importantly, Mary Billmyre told Mallow, an applicant for a nursing job, that she had a nurse who would be

present a physician's certification of her physical ability to perform her usual assigned duties to a specific date without risk to her pregnancy, and she must sign a waiver of liability of the nursing home for any untoward result of the employment on her pregnancy. The condition for Maternity Leave is the same as those for employee leaves of absence without pay.

15. Mary Billmyre told Mallow, an applicant for employment with respondent as a nurse, in early March, 1985 that she had a nurse going on maternity leave. Mallow inquired as to the identity of the nurse and Billmyre told her that the nurse going on maternity leave was complainant.

16. On June 26, 1985, Dr. Mould released complainant to return to her normal work duties.

17. Since being terminated by respondent, complainant has had part-time employment with Sacred Heart Hospital and has received $1,801.46 from said employer.

18. At the time of her termination, complainant earned $7.40 per hour from respondent and she normally worked 40 hours per week.

19. Complainant's attorney, Daniel C. Staggers, reasonably expended 80.4 hours of attorney time on this matter.

20. $60.00 per hour is a reasonable hourly rate for the legal services rendered by Daniel C. Staggers in this matter.

21. Complainant reasonably incurred costs in the amount of $15.65 in litigating this matter.

CONCLUSIONS OF LAW

1. Rebecca Kimble 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, §5-11-10.

2. Dawn View Manor Nursing Home is an employer as defined by West Virginia Code §5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case of age discrimination.

4. Complainant has demonstrated that the reason articulated by respondent for its failure to hire complainant is pretextual.

5. Respondent discriminated against complainant on the basis of her sex/pregnancy by terminating her in violation of the Human Rights Act, West Virginia Code §5-11-9(a).

DISCUSSION OF CONCLUSIONS

I Complainant's Motion to Reopen

Complainant has filed a Motion to Reopen the hearing in this matter. As respondent's written response to the motion points out, however, complainant has not demonstrated that she has exercised due diligence in attempting to discover the evidence at issue prior to the hearing herein. Accordingly, the motion is denied.

II Merits

In fair employment, desparate treatment cases, the initial burden is upon the complainant to establish a prima facie case

of discrimination. Shepherdstown Volunteer Fire v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W.Va. 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 nondiscriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunter Fire Department., 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.

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Complainant has demonstrated that the reason articulated by respondent for her termination is pretextual. The testimony of complainant and her witnesses was more credible than the testimony of respondent's witnesses because of the demeanor of the witnesses. In addition, the testimony of respondent's main witness, Mary Billmyre, was impaired by several problems as well as an evasive demeanor. For example, her testimony at the hearing herein was impeached by a prior inconsistent statement at the unemployment hearing relative to a conversation she had had with complainant's mother regarding complainant's difficulties caused by the pregnancy. Similarly, her testimony was inconsistent with regard to whether she knew that complainant would deliver her baby in May.

Moreover, complainant did make it known to respondent that she wanted a maternity leave by expressing such desire in writing on the last day thatshe worked at respondent. Such written request negates any argument that complainant never requested a maternity leave.

Respondent's argument that multiple doctor slips are required is negated by respondent's own personnel manual. Clearly, one doctor slip is sufficient pursuant to respondent's rules.

Perhaps most importantly, Mary Billmyre told Mallow, an applicant for a nursing job, that she had a nurse who would be

going on maternity leave. Mallow asked who the nurse was, and Billmyre responded that the nurse who would be going on maternity leave was complainant. This conversation between Mallow and Billmyre occurred in early March, 1985. Thus, it is obvious that respondent was aware of complainant's valid request for a maternity leave.

Respondent has attempted to impeach complainant's testimony by offering into evidence a letter from Dr. Kho which pertains to who signed complainant's doctor's slip. Such evidence, however, is gross heresay. On the other hand, complainant's evidence is direct evidence, and such direct evidence is accorded more weight. In addition, the authenticity of the letter offered by respondent came into question at the hearing herein in view of strict rules of confidentiality which are applicable to doctors not disclosing information about their patients.

Respondent also attempted to impeach complainant's credibility by revealing a minor inconsistency with regard to the date on which complainant advised respondent that she wold be taking a maternity leave. Respondent's time records indicates that complainant did not work on the date that complainant believes that she notified respondent of her desire for maternity leave. Complainant's testimony on this point, however, was credible. Even if the exact date was not accurately recalled, complainant's testimony was highly credible.

RELIEF

In complainant's brief, she requests $10,000.00 for embarrassment, humiliation, and loss of respect in the nursing community.

The record evidence reveals no basis for any such claim. It is recommended that complainant not receive an award for such damages.

The backpay calculation for this matter should take into account complainant's wages of $7.40 per hour X 40 hours per week X the number of weeks from the date of complainant's termination to the date a final resolution of this matter. Complainant's mitigating wages, which total $1801.46 as of the date of complainant's brief herein, should be deducted from the sum of money that results from the calculation described above.

Respondent advances the argument that complainant should not be awarded attorney's fees because she had the option of being represented by the Attorney General's office. The Hearing Examiner strongly urges the Commission to reject this argument. Private attorneys who represent complainants in Human Rights cases should not be penalized for performing an invaluable public service in helping to enforce the provisions of the Human Rights Act. The services of the private bar in representing complainants are necessary to prevent the creation of a backlog of cases which may delay the public interest in expeditious resolution of human rights cases.

PROPOSED ORDER

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

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:

Daniel Staggers, Esq.
P. O. Box 876
Keyser, WV 26726

Phil Jordan, Esq.
P. O. Box 477
155 Armstrong St.
Keyser, WV 26726

on this 15th day of May, 1986.

James Gerl

1. That the complaint of Rebecca J. Kimble, Docket No. ES-633-85, be sustained.

2. That respondent rehire complainant as a nurse.

3. That respondent pay complainant a sum of money equal to the wages she would have earned but for her wrongful termination by respondent minus any minigating income that she has received since the date of her termination, other than unemployment benefits.

4. That respondent be ordered to cease and desist from discriminating against individuals on the basis of the sex/pregnancy in making employment decisions.

5. That respondent report to the Commission within 45 days of the entry of the Commission's Order, the steps taken to comply with the Order.

6. That respondent pay complainant $4824.00 as attorney's fees and $15.65 as expenses.

James Gerl
Hearing Examiner

ENTERED: May 15, 1986

COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE: 304-348-2616

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$9,446.54 plus prejudgment interest at 10% per annum from April 21, 1985, until February 28, 1986, the date of the hearing in this matter, as compensatory damages for lost wages resulting from respondent's discrimination."

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By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 27 day of June, 1986.

Respectfully Submitted,

Betty D. Hamilton

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CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against her on the basis of her sex/pregnancy by terminating her. Respondent maintains that complainant was fired because complainant never requested maternity leave and because she didn't follow respondent's personnel rules.

FINDINGS OF FACT

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

1. Complainant is a registered nurse who was employed as a nurse by respondent from June 25, 1984 through April 21, 1985. Her regular shift was 7 a.m. to 3 p.m. o'clock. She was responsible for the care of 30 elderly patients.

2. Respondent is a licensed nursing home in Fort Ashby, West Virginia. Respondent employs approximately 50 persons, 47 of whom are female. The two key personnel are Mary Billmyre, administrator, and Dawn Billmyre, office manager.

3. In October, 1984, complainant discovered that she had become pregnant.

4. On Monday, November 26, 1984, complainant advised Dawn Billmyre and Mary Billmyre that she was pregnant. Said conversation occurred in the Billmyres' office. Rebecca Kimble advised the Billmyres that the baby was not due until the end of June, 1985. Rebecca Kimble further advised the Billmyres that she would only need a few weeks off before the baby was born and a few weeks off after the baby was born.

5. During complainant's first office visit with Dr. Kho, a gynecologist, on February 11, 1985, Dr. Kho suggested that she obtain a sonogram, because he felt that she was larger than usual for the time period of the pregnancy.

6. On Friday, February 15, 1985, complainant developed some vaginal bleeding. Dr. Livengood advised her to get complete bed rest until she obtained her sonogram on Monday, February 18, 1985. Complainant's mother, Meadows, telephoned Mary Billmyre on February 15, 1985 to tell her of complainant's medical complications and to advise her that she would not be able to work at the nursing home on February 16 and February 17, 1985, due to her medical complications.

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letter on Dawn Billmyre's desk, as neither Mary Billmyre nor Dawn Billmyre were present. In the letter, complainant advised respondent that April 25, 1985 would be the last work schedule she could work and that she would return to full capacity with respondent approximately six weeks after delivery of the baby, if physical health allowed.

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In the instant case, complainant has established a prima facie case of discrimination. Complainant became pregnant. At first, complainant wanted to take off only a few weeks from work because of the delivery of her baby. After some medical complications, however, complainant decided to request a maternity leave from her employer at or near the beginning of sixth month of pregnancy. Complainant notified respondent of her last day that she would be able to work on April 21, 1985. Two days later, respondent's administrator sent a letter to complainant stating that "I had supposed that with three children now you had no plans of returning." Such facts are sufficient to make out a prima facie case of discrimination because, if otherwise unexplained, they raise an inference of discrimination. Furnco Construction v. Waters 438 U.S. 567 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

Respondent has articulated a legitimate nondiscriminatory reason for its termination of complainant. Respondent presented

evidence that complainant never requested maternity leave, and that complainant did not follow respondent's personnel rules.

Complainant has demonstrated that the reason articulated by respondent for her termination is pretextual. The testimony of complainant and her witnesses was more credible than the testimony of respondent's witnesses because of the demeanor of the witnesses. In addition, the testimony of respondent's main witness, Mary Billmyre, was impaired by several problems as well as an evasive demeanor. For example, her testimony at the hearing herein was impeached by a prior inconsistent statement at the unemployment hearing relative to a conversation she had had with complainant's mother regarding complainant's difficulties caused by the pregnancy. Similarly, her testimony was inconsistent with regard to whether she knew that complainant would deliver her baby in May.

Moreover, complainant did make it known to respondent that she wanted a maternity leave by expressing such desire in writing on the last day thatshe worked at respondent. Such written request negates any argument that complainant never requested a maternity leave.

Respondent's argument that multiple doctor slips are required is negated by respondent's own personnel manual. Clearly, one doctor slip is sufficient pursuant to respondent's rules.

Perhaps most importantly, Mary Billmyre told Mallow, an applicant for a nursing job, that she had a nurse who would be

present a physician's certification of her physical ability to perform her usual assigned duties to a specific date without risk to her pregnancy, and she must sign a waiver of liability of the nursing home for any untoward result of the employment on her pregnancy. The condition for Maternity Leave is the same as those for employee leaves of absence without pay.

15. Mary Billmyre told Mallow, an applicant for employment with respondent as a nurse, in early March, 1985 that she had a nurse going on maternity leave. Mallow inquired as to the identity of the nurse and Billmyre told her that the nurse going on maternity leave was complainant.

16. On June 26, 1985, Dr. Mould released complainant to return to her normal work duties.

17. Since being terminated by respondent, complainant has had part-time employment with Sacred Heart Hospital and has received $1,801.46 from said employer.

18. At the time of her termination, complainant earned $7.40 per hour from respondent and she normally worked 40 hours per week.

19. Complainant's attorney, Daniel C. Staggers, reasonably expended 80.4 hours of attorney time on this matter.

20. $60.00 per hour is a reasonable hourly rate for the legal services rendered by Daniel C. Staggers in this matter.

21. Complainant reasonably incurred costs in the amount of $15.65 in litigating this matter.

CONCLUSIONS OF LAW

1. Rebecca Kimble 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, §5-11-10.

2. Dawn View Manor Nursing Home is an employer as defined by West Virginia Code §5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case of age discrimination.

4. Complainant has demonstrated that the reason articulated by respondent for its failure to hire complainant is pretextual.

5. Respondent discriminated against complainant on the basis of her sex/pregnancy by terminating her in violation of the Human Rights Act, West Virginia Code §5-11-9(a).

DISCUSSION OF CONCLUSIONS

I Complainant's Motion to Reopen

Complainant has filed a Motion to Reopen the hearing in this matter. As respondent's written response to the motion points out, however, complainant has not demonstrated that she has exercised due diligence in attempting to discover the evidence at issue prior to the hearing herein. Accordingly, the motion is denied.

II Merits

In fair employment, desparate treatment cases, the initial burden is upon the complainant to establish a prima facie case

of discrimination. Shepherdstown Volunteer Fire v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W.Va. 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 nondiscriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunter Fire Department., 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. Complainant became pregnant. At first, complainant wanted to take off only a few weeks from work because of the delivery of her baby. After some medical complications, however, complainant decided to request a maternity leave from her employer at or near the beginning of sixth month of pregnancy. Complainant notified respondent of her last day that she would be able to work on April 21, 1985. Two days later, respondent's administrator sent a letter to complainant stating that "I had supposed that with three children now you had no plans of returning." Such facts are sufficient to make out a prima facie case of discrimination because, if otherwise unexplained, they raise an inference of discrimination. Furnco Construction v. Waters 438 U.S. 567 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

Respondent has articulated a legitimate nondiscriminatory reason for its termination of complainant. Respondent presented

evidence that complainant never requested maternity leave, and that complainant did not follow respondent's personnel rules.

Complainant has demonstrated that the reason articulated by respondent for her termination is pretextual. The testimony of complainant and her witnesses was more credible than the testimony of respondent's witnesses because of the demeanor of the witnesses. In addition, the testimony of respondent's main witness, Mary Billmyre, was impaired by several problems as well as an evasive demeanor. For example, her testimony at the hearing herein was impeached by a prior inconsistent statement at the unemployment hearing relative to a conversation she had had with complainant's mother regarding complainant's difficulties caused by the pregnancy. Similarly, her testimony was inconsistent with regard to whether she knew that complainant would deliver her baby in May.

Moreover, complainant did make it known to respondent that she wanted a maternity leave by expressing such desire in writing on the last day thatshe worked at respondent. Such written request negates any argument that complainant never requested a maternity leave.

Respondent's argument that multiple doctor slips are required is negated by respondent's own personnel manual. Clearly, one doctor slip is sufficient pursuant to respondent's rules.

Perhaps most importantly, Mary Billmyre told Mallow, an applicant for a nursing job, that she had a nurse who would be

going on maternity leave. Mallow asked who the nurse was, and Billmyre responded that the nurse who would be going on maternity leave was complainant. This conversation between Mallow and Billmyre occurred in early March, 1985. Thus, it is obvious that respondent was aware of complainant's valid request for a maternity leave.

Respondent has attempted to impeach complainant's testimony by offering into evidence a letter from Dr. Kho which pertains to who signed complainant's doctor's slip. Such evidence, however, is gross heresay. On the other hand, complainant's evidence is direct evidence, and such direct evidence is accorded more weight. In addition, the authenticity of the letter offered by respondent came into question at the hearing herein in view of strict rules of confidentiality which are applicable to doctors not disclosing information about their patients.

Respondent also attempted to impeach complainant's credibility by revealing a minor inconsistency with regard to the date on which complainant advised respondent that she wold be taking a maternity leave. Respondent's time records indicates that complainant did not work on the date that complainant believes that she notified respondent of her desire for maternity leave. Complainant's testimony on this point, however, was credible. Even if the exact date was not accurately recalled, complainant's testimony was highly credible.

RELIEF

In complainant's brief, she requests $10,000.00 for embarrassment, humiliation, and loss of respect in the nursing community.

The record evidence reveals no basis for any such claim. It is recommended that complainant not receive an award for such damages.

The backpay calculation for this matter should take into account complainant's wages of $7.40 per hour X 40 hours per week X the number of weeks from the date of complainant's termination to the date a final resolution of this matter. Complainant's mitigating wages, which total $1801.46 as of the date of complainant's brief herein, should be deducted from the sum of money that results from the calculation described above.

Respondent advances the argument that complainant should not be awarded attorney's fees because she had the option of being represented by the Attorney General's office. The Hearing Examiner strongly urges the Commission to reject this argument. Private attorneys who represent complainants in Human Rights cases should not be penalized for performing an invaluable public service in helping to enforce the provisions of the Human Rights Act. The services of the private bar in representing complainants are necessary to prevent the creation of a backlog of cases which may delay the public interest in expeditious resolution of human rights cases.

PROPOSED ORDER

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

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:

Daniel Staggers, Esq.
P. O. Box 876
Keyser, WV 26726

Phil Jordan, Esq.
P. O. Box 477
155 Armstrong St.
Keyser, WV 26726

on this 15th day of May, 1986.

James Gerl

1. That the complaint of Rebecca J. Kimble, Docket No. ES-633-85, be sustained.

2. That respondent rehire complainant as a nurse.

3. That respondent pay complainant a sum of money equal to the wages she would have earned but for her wrongful termination by respondent minus any minigating income that she has received since the date of her termination, other than unemployment benefits.

4. That respondent be ordered to cease and desist from discriminating against individuals on the basis of the sex/pregnancy in making employment decisions.

5. That respondent report to the Commission within 45 days of the entry of the Commission's Order, the steps taken to comply with the Order.

6. That respondent pay complainant $4824.00 as attorney's fees and $15.65 as expenses.

James Gerl
Hearing Examiner

ENTERED: May 15, 1986