STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
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Cecil H. Underwood
Governor

December 15, 1998

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Antonio Matthews
P.O. Box 61
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Appalachian Power Company
P.O. Box 480
Logan, WV 25601

John McFerrin
Asst. Attorney General
Civil Rights Division
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Re: Antonio Matthews v. Appalachian Power Company
Docket No. ER-243-96A

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

NORMAN LINDELL
ACTING EXECUTIVE DIRECTOR

NL/jk
Enclosure
cc: The Honorable Ken Hechler
Secretary of State

Mary C. Buchmelter
Deputy Attorney General
Civil Rights Division

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ANTONIO MATTHEWS,

Complainant,

v. DOCKET NO. ER-243-96A

APPALACHIAN POWER COMPANY,

Respondent.

FINAL ORDER

On November 19, 1998, the West Virginia Human Rights Commission reviewed the Final Decision of the Administrative Law Judge filed in the above-styled action by Administrative Law Judge Robert B. Wilson. After due consideration of the aforementioned, and a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's decision, the Commission decided to, and does hereby find that the record supports the opinion of the Administrative Law Judge that there was racial animosity in the Respondent's workplace, as demonstrated by the actions and language of several supervisory personnel. The Commission further finds that this racial animosity as well as retaliatory motive played a part in the Respondent's discriminatory action.

The Commission, therefore, affirms the Final Decision of the Administrative Law Judge with the following modifications:

1. Finding of Fact No. 9, p. 4: Insert "stated that it" between the words "respondent" and "refuses" in the second sentence, lines three and four.

2. Finding of Fact No. 15, p. 7: Place a period at the end of "leave" in the third line of the first sentence. Delete the remainder of the first sentence and substitute the following language: "As a result of this discipline, complainant commented that he intended to call in sick for that date. Complainant made this statement in the presence of foreman Charlie Adams. Complainant did call in sick for that date."

3. Finding of Fact No. 16, p. 7: Substitute "Charlie Adams" for "Mike Adams."

4. Finding of Fact No. 22, pp. 8-9: Delete the entire paragraph and substitute the following language:

> There was ample testimony about a series of incidents involving the complainant's co-worker, Ira Gore, as to the behavior of Marion Davis, a male supervisor who allegedly sexually harassed Mr. Gore. Mr. Gore testified that he had problems with Mr. Davis's behavior which resulted in Mr. Gore taking a leave of absence.

5. Finding of Fact No. 26, p. 10: In the third sentence, delete all text after the word "supervisor;" and place a period after "supervisor."

6. Finding of Fact No. 35, p. 12: On the ninth line in this finding, beginning with the sentence "Complainant complained of what he felt . . ." place a period at the end of line ten following the word "suspended." Delete the remainder of the sentence.

On the twelfth line, beginning with the sentence "Complainant mentioned the difficulties . . ." place a period after "public" and delete the remainder of the sentence. Substitute the following language: "Complainant specifically mentioned that Mr. Evans had a gun pointed at him and that respondent refused to file charges against those involved."

7. "Discussion" section, p. 25: In the first full paragraph, delete the second sentence, "Respondent contends that because complainant . . . . indefinite suspension was imposed for inadequate call out response." Substitute the following language:

> Respondent contends that complainant was consistently among the worst in call out response and that this was the reason for his termination. This case hinges upon the credibility of the testimony of Mr. Webb in comparison to the contradictory testimony of Mr. McDonald and Mr. Gore vis-a-vis Mr. Webb. Webb testified that he was not informed of the July 25, 1995, meeting until August 3, 1995, after complainant had been placed on indefinite suspension allegedly for inadequate call out response.

> The undersigned does not believe Mr. Webb and instead concludes that by a preponderance of the evidence the complainant has shown that retaliation played a significant role in the decision to impose discipline against the complainant.
>
> The evidence shows that Mr. Webb was aware generally that complainant supported Mr. Gore's allegations against Mr. Davis.

In the next sentence beginning "Mr. Webb had already had" substitute a comma for the semicolon following May 1995, delete the word "their" and substitute "respondent's."

8. "Discussion" section, p. 26: On line five, delete the second sentence "He acknowledges that he confronted . . . in his hand" and substitute the following language:

> Mr. Webb further acknowledged that he confronted Marion Davis about Mr. Gore's allegations of sexual harassment. Mr. Webb stated that he issued a strong statement of admonition to Mr. Davis. He further stated that he could find no one to confirm the incident of which Mr. Gore had complained.

Delete the next sentence beginning "The undersigned concludes . . ." and substitute the following language: "The undersigned concludes as a matter of fact that Mr. Webb was well aware that complainant could and would confirm other less severe incidents of Marion Davis's sexual harassment of Mr. Gore."

Start a new paragraph with the next sentence, substituting the following language:

> Perhaps as telling as the proximity in time between the meeting on July 25, 1995, and complainant's indefinite suspension on August 3, 1995, and his termination on August 10, 1995, is the timing of the working suspension which complainant was given on May 11, 1995, after Mr. Gore's return to work on May 8, 1995.

No changes until the seventh line from the bottom. The sentence beginning "Next, the claim of Mr. Webb . . ." starts a new paragraph.

9. "Discussion" section, p. 27: On line nine, in the sentence which begins "It is clear that Mr. Webb . . ." place a period after "Marion Davis" and delete the remainder of the sentence.

In the first sentence of the next paragraph, place a period after the word "complainant" and delete the remainder of the sentence. Delete the next sentence. Delete the third and fourth sentences and substitute the following language:

> The respondent's refusal to articulate an objective standard for call out response rate is relevant in deciding Mr. Webb's motivation for terminating the complainant. Without an objective standard against which to measure the complainant's call out response rate, the respondent's position that it implemented an unbiased progressive discipline plan based upon the complainant's inadequate call out response rate is not believable.

No other changes until the following page.

10. "Discussion" section, p. 28: On line ten, insert "the" between "that" and "complainant."

Delete the last sentence which begins, "Thus, when the initial working suspension . . ." and substitute the following language:

> Because the complainant's initial working suspension followed Mr. Gore's reinstatement; and, because the complainant's indefinite suspension and termination followed his attendance at the July 25, 1995, meeting, the undersigned finds that there is a connection between the protected activity and the complainant's termination.

The next sentence begins a new paragraph.

11. "Discussion" section, p. 29: On lines eleven through seventeen, delete the sentence beginning, "Thus the undersigned does not consider . . . causing a symptom which is the cause of the action." On line seventeen, delete the phrase "This issue is not reached because" and begin the sentence, "The preponderance of the evidence convinces the undersigned . . . ."

It is, therefore, the order of the Commission that the Administrative Law Judge's Final Decision be attached hereto and made a part of this Final Order, except as amended by this Final Order hereinabove.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the

parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto as Exhibit A. The calculation of damages attached hereto as Exhibit B brings the amount of the back pay award forward up to and including the date of this Final Order and incorporates the Administrative Law Judge's award of postjudgment interest compounded monthly at the rate of ten percent per annum.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 15th day of December 1998, in Charleston, Kanawha County, West Virginia.

Norman Lindell

NORMAN LINDELL, ACTING EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this Order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding $5,000.00; (2) cases in which the Commission awards back pay exceeding $30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this Order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11 and the West Virginia Rules of Appellate Procedure.

EXHIBIT A

Antonio Matthews - Damage Calculation August 95 - December 16, 1998

DATE	LOST BACK PAY	LOST BENEFITS	OVERTIME	MITIGATION	NET BACK PAY	INTEREST EARNINGS	ENDING BALANCE
AUG95	2,003.40	764.40	588.80	.00	3,356.60	.00	3,356.60
SEPT95	2,003.40	764.40	588.80	.00	3,356.60	27.97	6,741.17
OCT95	2,003.40	764.40	588.80	.00	3,356.60	56.18	10,153.95
NOV95	2,003.40	764.40	588.80	.00	3,356.60	84.62	13,595.17
DEC95	2,003.40	764.40	588.80	.00	3,356.60	113.29	17,065.06
JAN96	2,504.33	955.34	735.34	.00	4,195.01	142.21	21,402.28
FEB96	2,504.33	955.34	735.34	.00	4,195.01	178.35	25,775.64
MR96	2,504.33	955.34	735.34	.00	4,195.01	214.80	30,185.45
APR96	2,599.17	991.58	757.25	.00	4,348.00	251.55	34,785.00
MAY96	2,599.17	991.58	757.25	.00	4,348.00	289.88	39,422.88
JUN96	2,599.17	991.58	757.25	.00	4,348.00	328.52	44,099.40
JULY96	2,599.17	991.58	757.25	.00	4,348.00	367.50	48,814.90
AUG96	2,599.17	991.58	757.25	.00	4,348.00	406.79	53,569.69
SEPT96	2,599.17	991.58	757.25	.00	4,348.00	446.41	58,364.10
OCT96	2,599.17	991.58	757.25	.00	4,348.00	486.37	63,198.47
NOV96	2,599.17	991.58	757.25	.00	4,348.00	526.65	68,073.12
DEC96	2,599.17	991.58	757.25	.00	4,348.00	567.28	72,988.40
JAN97	2,599.17	991.58	757.25	.00	4,348.00	608.24	77,944.64
FEB97	2,599.17	991.58	757.25	.00	4,348.00	649.54	82,942.18
MAR97	2,599.17	991.58	757.25	.00	4,348.00	691.18	87,981.36
APR97	2,678.00	1,021.67	780.17	.00	4,479.84	733.18	93,194.38
MAY97	2,678.00	1,021.67	780.17	.00	4,479.84	776.62	98,450.84
JUN97	2,678.00	1,021.67	780.17	.00	4,479.84	820.42	103,751.10
JULY97	2,678.00	1,021.67	780.17	.00	4,479.84	864.59	109,095.53
AUG97	2,678.00	1,021.67	780.17	.00	4,479.84	909.13	114,484.50
SEPT97	2,678.00	1,021.67	780.17	.00	4,479.84	954.04	119,918.38
OCT97	2,678.00	1,021.67	780.17	.00	4,479.84	999.32	125,397.54
NOV97	2,678.00	1,021.67	780.17	.00	4,479.84	1,044.98	130,922.36
DEC97	2,678.00	1,021.67	780.17	.00	4,479.84	1,091.02	136,493.22
JAN98	2,678.00	1,021.67	780.17	.00	4,479.84	1,137.44	142,110.50
FEB98	2,678.00	1,021.67	780.17	.00	4,479.84	1,184.25	147,774.59
MAR98	2,678.00	1,021.67	780.17	.00	4,479.84	1,231.45	153,485.88
APR98	2,678.00	1,021.67	780.17	.00	4,479.84	1,279.05	159,244.77
MAY98	2,678.00	1,021.67	780.17	.00	4,479.84	1,327.04	165,051.65
JUN98	2,678.00	1,021.67	780.17	.00	4,479.84	1,375.43	170,906.92
JULY98	2,678.00	1,021.67	780.17	.00	4,479.84	1,424.22	176,810.98
AUG98	2,678.00	1,021.67	780.17	.00	4,479.84	1,473.42	182,764.24
SEPT98	2,678.00	1,021.67	780.17	.00	4,479.84	1,523.04	188,767.12
OCT98	2,678.00	1,021.67	780.17	.00	4,479.84	1,573.06	194,820.02
NOV98	2,678.00	1,021.67	780.17	.00	4,479.84	1,623.50	200,923.36
DEC98	1,339.00	510.84	390.09	.00	2,239.93	1,674.36	204,837.65
	103,619.03	39,531.22	30,230.51	.00	173,380.76	31,456.89	204,837.65

DAMAGE SUMMARY

NET BACK PAY	173,380.76
INTEREST ON BACKPAY	31,456.89
PAY WITH INTEREST	204,837.65
INCIDENTALS	3,277.45
TOTAL DAMAGES	208,115.10

EXHIBIT B

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ANTONIO MATHEWS,

Complainant,

v. DOCKET NUMBER: ER-243-96

APPALACHIAN POWER COMPANY,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on September 9, 1997, in Logan County, at the Offices of respondent Appalachian Power Company's successor American Electric Power Company, Inc., 420 Main Street, Logan, West Virginia, by agreement of parties, due to lack of room at the site originally noticed in the Logan County Courthouse, before Robert B. Wilson, Administrative Law Judge.

The complainant, Antonio Mathews, appeared in person and by counsel for the West Virginia Human Rights Commission, John T. McFerrin, Assistant Attorney General, Civil Rights Division of the Office of the Attorney General of West Virginia. The respondent, Appalachian Power Company, appeared by its representative, Isaac Webb and by counsel, Bryan R. Cokely, with Steptoe and Johnson, and in

house counsel for American Electric Power Company, Inc., Fred Sagan. Transcripts for this hearing appear in three separate volumes, one for each day of hearing, which are not numbered sequentially, therefore, citations to the record are by Volume and page number.

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. Complainant, Antonio Mathews, is a resident of Logan County, West Virginia. He is a black man.

2. Respondent, Appalachian Power Company, was a "person" and "employer", as those terms are defined in West Virginia Code §§

5-11-3(a) and 5-11-3(d), respectively. At the time of the alleged discriminatory actions of respondent, respondent maintained administrative offices and working facilities for the basing of the men and equipment in Logan, West Virginia.

3. Complainant was first hired by respondent in October 1990 as a Line Mechanic D in the Logan-Williamson Division of respondent. Commission's Exhibit No. 4.

4. Due to the nature of respondent's business, that of a public utility providing electric power, employees are required to make themselves reasonably available to work overtime as required by the respondent. Tr. Vol. III pp. 24 and 25; Respondent's Exhibit No. 23.

5. Charles Frederick Coleman, II, is the business manager for Local Union Number 978 of the International Brotherhood of Electrical Workers. He testified credibly that although different locations comprised different bargaining units, all line mechanics contracts with the respondent were negotiated at the same time and are subject to these same contract provisions. Tr. Vol 1 pp. 136-138.

6. At the times relevant to this complaint, James M. Perry was the Labor Relations Manager for respondent which was Appalachian Power at that time. Appalachian Power at that time operated in Western Virginia and Southern West Virginia. Appalachian Power was organized into nine divisions, with the Logan Division having a main office in Logan, with outlying offices in Williamson and Madison. The Logan and Madison areas were union shops, represented by IBEW Local 978; while the Williamson area was a non union shop. Tr. Vol. III pp. 20-23.

7. Each division and location would have its own procedure for handling call-outs and the actual implementation of the contract provisions. Tr. Vol. III pp. 26 and 27.

8. The Logan Office operated on a rotation basis, wherein the number one name on the call out list would remain number one for an entire week. It is found that complainant was subject to call out by class of line mechanics B, C, and D in Logan, and that this rotation included five men until Mr. Gore returned to work at which time it became a six man rotation. This was the procedure in Huntington as well. Other offices operated on a low overtime hour basis, like Beckley; or fewest number of overtime opportunities, as in Charleston. Some offices included overtime holdovers in call out response while others, like Logan did not. Tr. Vol. I pp. 22 and 23; Tr. Vol. III pp. 26-28, 47 and 127.

9. Respondent and the union cannot agree on what is an acceptable call out response percentage, the union says zero is acceptable, the respondent says only 100% will do. The respondent refuses to set an acceptable target for call out response because to set such a limit would mean that some employees would refuse to come out once they met that percentage; while the respondent needs them to come in whenever they are called until power can be restored during an emergency. Therefore, respondent's policy is to engage in corrective, progressive discipline whenever respondent feels the employee is failing to meet their call out responsibilities. This consists of verbal counseling in which respondent tells them their percentages up to that time and what to expect if they don't improve. Then if they don't improve they would follow up with written

warnings, suspensions and discharge. Discipline was initiated at the local level by the office supervisor or the division manager. Mr. Perry was generally consulted on written warnings; which were handled at the local level. All suspensions and discharges were run through Mr. Perry's or Ed Bradley's office in Roanoke; then discussed with the appropriate vice-president. Tr. Vol. III pp. 28-29, and 32.

10. Isaac Webb was the manager for the Logan/Williamson Division for three years starting January 1, 1993 and ending around Thanksgiving 1995 when he began working for respondent in Kingsport, Tennessee. Call out response was extremely important to Mr. Webb who stated his conviction at hearing, "When peoples' lights go out, and I mean I feel this way even though I've worked for the company for 17 years, I want them back on, and I want them back on now." Staffing is set based upon normal work load, which is lower in an office like Logan/Williamson compared to a more urban area; while the number of line miles is essentially equivalent. Since the amount of trouble is more proportional to number of line miles; the burden of response is much greater in a Division such as Logan. Tr. Vol. III pp. 127-129.

11. The complainant timely filed a complaint with the West Virginia Human Rights Commission on January 16, 1996 alleging race discrimination in his suspension and termination for low call out response; and, subsequently filed an amended complaint alleging that he was terminated from his employment on August 10, 1995 by the respondent for opposing discriminatory practices against himself and a co-worker, that race discrimination played a role in the severity of reprimands, as well as that he was subjected to a racially hostile work environment. See Complaint and Notice of Public Hearing and

Amended Complaint.

12. Complainant worked as a line mechanic D from October 29, 1990 until April 25, 1992, at which time he was promoted to line mechanic C, after working through the progression books, performing demos for the foreman and taking a test. Tr. Vol. I pp. 18-20; Complainant's Exhibit No. 4.

13. Complainant received a written warning on August 8, 1991 for failure to carry out a reasonable order. On January 23, 1992 complainant received a suspension for deception in reporting off work. On March 19, 1992 complainant received verbal counseling regarding poor call out response. On September 17, 1992 Complainant received a written warning about not being reasonably available for overtime work. On September 21, 1993 complainant again received a written warning concerning not being reasonably available for overtime work. On January 27, 1994 complainant received verbal counseling concerning calling company after rest period. On July 18, 1994 complainant received a written warning for improper lifting. On May 11, 1995 complainant received a working suspension for unacceptable call out response. Complainant received an indefinite suspension for unacceptable call out response on August 3, 1995. Respondent's Exhibit No. 22.

14. Complainant was off sick and later on LTD from August 24, 1992 until May 23, 1993, as a result of a motorcycle accident. Complainant sustained a back injury at work on June 1, 1994 and was later off sick from June 3 until August 26, 1994, then on Workers Compensation for this back injury from August 27, 1994 until September 14, 1994. Respondent's Exhibit No. 22.

15. The complainant's discipline for deception in reporting off work involved the failure of management to act on complainant's request for administrative leave, as a result of this he commented in the presence of foreman Charlie Adams (mistakenly referred to as Mike Adams at p. 64) that he intended to call in sick for that date, which he did. The incident in 1991 involved his forgetting to see foreman Denny Carter before leaving work on the day he arrived back from school in Roanoke. The incident for improper lifting results from a dispute as to whether complainant hurt his back when he slipped and fell on a rock or when he reached to get the hand line out of the back of the truck. Tr. Vol. I pp.63-67 and 93-95.

16. The complainant has personally heard two comments of a racially derogatory nature; one by Charlie Isaacs, who told a racial joke in his presence during 1991, while Issacs was still a line mechanic (but has since become a supervisor); and the other a comment by supervisor Hassel Price, involving the use of the "N" word in describing something Mr. Gore, another line mechanic, was doing, which occurred sometime prior to 1993. At the time Mr. Issacs told the racial joke, Supervisor Mike Adams was present and took no action. Tr. Vol. I pp. 32-33, 108, 110 and 191.

17. There is substantial evidence regarding numerous remarks of racially disparaging nature, which the undersigned finds, as a matter of fact, were made by exempt line foreman Marion Davis. These remarks include a remark that there are two things wrong with this country, women and "N" word. Another time Marion Davis remarked in the presence of David Whitman, that he would just as soon they stay with their color and we stay with ours, when seeing a bi-racial

couple. At the time that comment was made, complainant was dating a white woman. Tr. Vol. I pp. 163-166.

18. The undersigned concludes that there is substantial evidence of inappropriate comments and attitudes toward black people on the part of several of its immediate supervisory personnel, including specifically, Marion Davis, Russell Isaacs and Ronnie Dalton.

19. Mr. McDonald testified credibly that he heard Charlie Adams state "We can't fire him because he's a Vietnam Vet. He's over fifty and he's a "N" word." This was in reference to Clarence Evans. He confirmed numerous derogatory statements (50 to 100) referring to blacks as "F"ing "N" word. Ronnie Dalton referred to complainant as a lazy "N" word and on another occasion asked a fellow supervisor when he was going to get one of those "N" word, because I keep getting them. He also stated it was going to take two weeks to get the "N" word smell out of his truck. Tr. Vol. I, pp.194-195, 198-199, 204 and 225.

20. Clarence Evans, a black man, testified credibly that he felt he was being singled out for counseling for stopping at a store or to pick up his mail. White employees were not disciplined when they stopped. He also felt the incident related to the chalks involved being singled out because of race. Tr. Vol II p.23.

21. Marion Davis supervised a crew with Ira Gore, a friend of complainant's. Tr. Vol. I p. 100 and Vol II p. 91.

22. Mr. Davis is alleged to have chased Mr. Gore around a field on one occasion, with his penis in his hand. Mr. Davis would frequently interrupt conversations with comments about a man being

able to perform oral sex on a man much better than a woman--telling Mr. Gore not to knock it until he had tried it. Whenever Mr. Davis would go to the bathroom, he would make a habit of telling Mr. Gore. Mr. Davis's comments were directed specifically toward Mr. Gore. Although Mr. Davis never asked Mr. Gore to have sex with him or touch him sexually; Mr. Gore was made very uncomfortable by Marion Davis's constant comments of that nature, especially when made while they were alone in the truck at night. Eventually Mr. Gore had problems as a result of this treatment and had to take a leave of absence from the respondent. Tr. Vol. I pp. 42-44, Vol. II pp. 92-93, and 168-171.

23. Mr. Gore was off from respondent from May 1983 until he resumed work with the respondent on May 8, 1995. Tr. Vol. II pp. 99 and 277.

24. Isaac Webb, who was division Manager for respondent at Logan/Williamson, was aware of Mr. Gore's problems with Marion Davis as Mr. Gore had discussed the problems he was having with Mr. Webb at Mr. Webb's garage at home one day, while Gore was still off on leave. Tr. Vol. II p. 253; Respondent's Exhibit No. 11.

25. Mr. Webb was Division manager at Logan while Mr. Gore worked from January 1, 1993 until he left work in May 1993. Mr. Gore came to his house on January 1, 1995 and discussed his treatment by Marion Davis and the respondent's failure to allow him to return to work. Mr. Webb was aware of Mr. Gore's being out for disability LTD on a psychiatric basis. Mr. Webb told him that if he obtained a note from his doctor he could come back to work and that is what happened. Tr. Vol. III pp. 141-142 and 144-145.

26. This meeting between Mr. Gore and Mr. Webb was in 1994 and the incidents related by Mr. Gore occurred in 1992 if not 1991. Mr. Webb admits that it was not something he wanted to deal with. Mr. Webb noted that Marion Davis was in his 50's, was with respondent for 20 years and was a supervisor; he admitted that a lot of people had told him Marion Davis was "not your average bear". Mr. Webb asked Marion Davis about the penis chasing incident and Marion Davis denied it, and no-one else would verify it. Mr. Webb went on to deliver a "startling [sic] warning about his conduct around other employees." Tr. Vol. III pp. 145-147.

27. Mr. Webb acknowledges that the Human Rights Complaint by Mr. Gore was still relatively fresh, although it had been resolved between the time Mr. Gore returned to work on May 8, 1995 and the meeting on July 25, 1995. During this period, Mr. Webb stated that he was not concerned about Mr. Gore's allegations concerning Marion Davis being made public, because Mr. Gore had already by that time done a pretty good job of broadcasting it, writing letters to the local newspapers and that type of thing. Tr. Vol. III pp. 167-168.

28. On May 11, 1995 complainant received his working suspension for inadequate call out response. Respondent's Exhibit No. 24.

29. At the time of his suspension, complainant's call out response rate was around 20%. Tr. Vol. I p. 61, Vol. III p. 187; Commission's Exhibit No. 5.

30. During the first quarter of 1995, Kevin Bates, the union steward and a white employee in the respondent's Logan/Williamson Division, had a call out response rate of 25%, and was not disciplined in any way; while the complainant's call out response

rate for the same quarter was 27%. Tr. Vol. II p. 39; Commission's Exhibit No. 5.

31. In the Spring of 1995 respondent made a toll free number available to receive complaints or concerns from its employees. Mr. Gore was informed of the number when he was reinstated to work following his filing of a Human Rights Complaint alleging failure to reinstate due to his handicap of clinical depression. During early July 1995, Mr. Gore called the toll free number to voice his complaints about Marion Davis and the failure of company to acknowledge what had happened. Respondent's Exhibit No. 1, Respondent's Exhibit No. 12.

32. At the same time he called the toll free number, Mr. Gore wrote to other officials with the respondent concerning some of the issues raised in the toll free number call. Soon after making the call, Mr. Gore told several other employees of the respondent, including one member of management that he had called the toll free number. Respondent's Exhibit No. 6; Tr. Vol. II pp. 103-104.

33. As a result of the call to the toll free number, Al Moeller, Corporate Compliance Officer for the respondent, scheduled a meeting between Mr. Gore, himself, and John Schmansky to discuss the matters alleged in Mr. Gore's correspondence and call. Mr. Gore invited complainant to attend this meeting; which the two did attend in Charleston, on July 25, 1995. Tr. Vol. II p. 173.

34. Prior to the meeting of July 25, 1995, James Lackey, a management employee of respondent, knew of the meeting and advised Mr. Gore of possible adverse results of his attending such a meeting. Mr. Lackey knew that Mr. Gore intended to complain of his being

subjected to sexual harassment at the hands of Marion Davis, and the refusal to reinstate him following his clinical depression resulting from that harassment. Tr. Vol. III pp. 64 and 66.

35. The meeting took place in the Holiday Inn by the river in Charleston. The undersigned finds that complainant testified credibly concerning the issues that were raised at that meeting. Mr. Gore had brought up his treatment by Marion Davis and his difficulty in being able to return to work after being out on LTD for nearly two years. Complainant brought up some racial remarks that had been made; including four separate incidents, two of which he witnessed, and two other comments by Marion Davis, which he had been told about by Mr. Gore. Complainant complained of what he felt was unfair treatment of another black man, Clarence Evans who had been suspended for failure to put down scotch's, which Mr. Evan's reports had been in place. Complainant mentioned the difficulties in working certain locations for a black man based upon racial slurs being shouted from the general public and specifically mentioning Mr. Evan's having had a gun pointed at him, and respondent's refusal to file charges against those involved; instead requiring Mr. Evan's to file the complaint on his own behalf, should he so choose. Complainant specifically brought up homosexual remarks directed toward Mr. Gore by Marion Davis; and his habit of always telling Mr. Gore when he was going to relieve himself. Complainant confirmed those incidents which he had personally been there to observe. Tr. Vol. I pp. 31-38, and 40-45.

36. While complainant and Mr. Gore were in Charleston a storm rumbled through the area. Neither complainant nor Mr. Gore made any

effort to call in to Logan to ask if they were needed for call out as a result of that storm. Tr. Vol. II pp. 134-135.

37. Mr. Webb knew complainant missed a call out on July 25, 1995, the night of the meeting, because complainant and Mr. Gore were the only ones to report to work fresh the next day. Mr. Webb knew complainant missed a call out on the morning of July 28, 1995, because Mr. Gore came down off a pole, got sick and was hospitalized for the next three days on July 26th. Mr. Webb states that he was having operational problems as a result of poor call out response, and had this very problem on the night of July 25, 1995. Although call out response numbers are reported regularly at the end of each month; Mr. Webb asked for these numbers prior to the end of the month on July 28, 1995. Tr. Vol. III pp. 156-157, 188-189 and 194.

38. It was Mr. Webb who decided to issue a written warning to complainant on September 21, 1993, for inadequate call out response. At the time Mr. Webb came on board at Logan; he was aware that complainant was off because of a motorcycle accident and did not return to work until the middle of the year after being off work for nine months. Mr. Webb states that he had noticed a trend of poor call out response in comparison to others in the Division in complainant's records from before he arrived. Tr. Vol. II p. 138; Respondent's Exhibit No. 22.

39. Mr. Webb was aware that complainant did not want to attend training in Roanoke, and, that when he was ordered to attend as his work assignment, he injured his back days before he was scheduled to attend that training, missing several months of work. This injury resulted in complainant's receiving a written warning for improper

lifting on July 18, 1994. Mr. Webb states that complainant was not fired for not wanting to attend line mechanics school in Roanoke. Tr. Vol. III pp. 139-140 and 184; Respondent's Exhibit No. 22.

40. It was Mr. Webb's decision to issue the working suspension to complainant for inadequate call out response on May 11, 1995. The decision according to Mr. Webb, was based upon the call out response percentages for the period of February 1, 1995 through May 1, 1995. Mr. Webb was disappointed because complainant had missed two call outs while on the working suspension. Tr. Vol. II pp. 140-141.

41. Following his working suspension on May 11, 1995, complainant met with Cliff Nicholson, the general line crew supervisor, on two separate occasions on May 12th with Mr. MacDonald and on May 15th with Mr. Bates. At that time complainant expressed his concerns as to what call out percentage was acceptable. Mr. Nicholson would not tell him. Mr. Nicholson was asked if he wished complainant to stay by the phone when he was not number one on the list and was told this wasn't necessary. During this meeting complainant warned he would take them to court if they terminated him. On the 15th complainant explained that he was away from the house because it was the weekend and he missed two call outs, Mr. Nicholson didn't care and instructed him to improve or be terminated. Complainant improved his call out response between this working suspension and the indefinite suspension on August 3, 1995 for inadequate call out response. Tr. Vol. I. pp. 79-80, Vol. III pp. 102-108; Respondent's Exhibit No. 25 and Respondent's Exhibit No. 26.

42. Mr. Webb noted that complainant had missed all but one or two call outs since early June, 1995 and that he missed call outs on

July 25th and 28th. At that point he was contemplating some sort of disciplinary action against complainant. After consulting with John Skidmore, a Human Resources person then working out of Logan; Charlie Adams, who was Mr. Nicholson's supervisor; and, Harry Ruloff, who was Charlie Adam's supervisor; Mr. Webb instructed Mr. Skidmore to run the decision to indefinitely suspend complainant by Mr. Perry in the respondent's Roanoke office. To that end Mr. Skidmore prepared the summary contained in Respondent's Exhibit No. 22, and sent it to Mr. Perry. This report was faxed to Roanoke on August 1, 1995. At the same time Mr. Adams was instructed by Mr. Ruloff, to call in complainant to issue the indefinite suspension, and to call in Mr. Gore for a verbal warning and Mr. Bates for a written warning for inadequate call out response. Tr. Vol. III pp. 10-14, 55, 95-96, 100, 105, 149-151 and 156-157.

43. Complainant attended the August 3, 1995 meeting at which his indefinite suspension was imposed with Mr. Bates, the union steward, and Charlie Adams and Cliff Nicholson. The suspension was given for inadequate call out response without further elaboration. At the time of the August 3rd meeting, they told Mr. Bates that complainant's call out response rate was 20%. They would not say what was an acceptable percentage. Tr. Vol. II p. 31-33.

44. Mr. Bates requested call out records on August 7th and later calculated complainant's call out response rate at 43%; while the respondent's own calculations indicated a call out response rate of 31%. Tr. Vol. II p. 36.

45. Mr. Bates written warning on August 3, 1995 was the first he had ever received for inadequate call out response. Tr. Vol. II

p. 39.

46. Mr. Webb denies knowledge that complainant or Mr. Gore attended the meeting in Charleston on July 25, 1995 until the afternoon of August 3, 1995 after complainant had been given his indefinite suspension. Tr. Vol. III p. 162.

47. The undersigned finds as fact, based upon a preponderance of the evidence, that Mr. Webb was aware of Mr. Gore's having called the 800 number, and that prior to July 28, 1995, Mr. Webb knew that complainant had accompanied Mr. Gore to the meeting on July 25, 1995. This finding is based on the fact that one supervisor, Mr. Lackey, was aware of Gore's activities from the beginning, that Mr. Gore was going to complain about sexual harassment by Marion Davis, and his trouble being reinstated to work from LTD. It was open discussion among the crews. Although Mr. Lackey denies disclosing the meeting or the 800 call with Mr. Webb, he states somewhat contradictorily that he didn't keep it in confidence either. Mr. Gore worked on Ronnie Dalton's crew on the July 26, 1995 the day he came off the pole and was hospitalized for three days. Mr. Lackey testified that Mr. Gore talked openly of the meeting and call while on his crew, and it is most likely that he did so the day he worked on the 26th. Based upon the testimony and the observation of the demeanor of Mr. Gore, the undersigned is convinced that Mr. Gore made everyone aware of the meeting prior to his being ill and going to the hospital. The day following the meeting in Charleston, Mr. Webb noted that complainant and Mr. Gore were the only ones reporting to work fresh from the previous night. Tr. Vol. III. pp. 6-70 and 75.

48. Following the concurrence of the Roanoke office with the

recommendation to discharge, and Mr. Skidmore's preparation of the necessary paper work for a person leaving employment, Mr. Bates was asked to help locate complainant to come in on August 8, 1995. The meeting was held with Mr. Bates, complainant and Mr. Skidmore on August 10, 1995 and the complainant was given his discharge notice for continued inadequate call out response. Tr. Vol. II. pp. 34, and 76-77.

49. Prior to complainant's discharge for inadequate call out response, the respondent had never fired someone for that offense in Logan. Tr. Vol. II. p. 57.

50. In evaluating the respondent's motivation in imposition of discipline for inadequate call out response rate; the undersigned concludes that the appropriate comparison group would be that of other line mechanics in the Logan office. Further, the reasonableness of the call out response discipline is not the issue, but rather, whether the decision maker, Mr. Webb, imposed this discipline for the alleged failure of complainant to make himself available for emergency call outs. In making this evaluation, the undersigned notes that Mr. Webb issued complainant a written warning for inadequate call out response in September 1993, when he initially came on board at the Logan/Williamson Division. It is noted that for the period of January 1, 1993 through December 31, 1993, the period most corresponding to the time frame of Mr. Webb's initial write up of complainant, Mr. Evans's call out response rate was 35% compared to complainant's 33%. This is a difference that Mr. Webb has testified in another context was not significant, yet Clarence Evans testified that he had only been talked to once or twice in the course

of his 30 years with respondent, and Mr. Evan's was never issued a written warning for inadequate call out response. Mr. Evans is also a black man, as is the complainant. The period of October 1, 1993 through October 31, 1994 saw complainant's call out response percentage at 44%, the same as Mr. Bates and better than Mr. Evans at 35%. The numbers for January 1, 1994 through December 31, 1993, indicate complainant 44%, Mr. Bates at 47%, and Mr. Evans at 35%. Just prior to complainant's working suspension for inadequate call out response, for the period of February 1, 1995 through May 1, 1995, complainant's call out response was 20%, Mr. Bates's 37% and Howard McDonald's 33%; Mr. Webb did not impose any warnings on Mr. Bates or Mr. McDonald, although he did discuss the call outs with Mr. Gore and Mr. Bates on that day, and admitted to having previously discussed the call outs with Mr. Bates as his numbers had been declining. Mr. McDonald was not disciplined for low call out response in any fashion. For the period between May 1, 1995 and July 28, 1995 the complainant had a call out response of 31%, Mr. Bates 29% and Mr. Gore 6%, while Mr. McDonald's was at 44%. Tr. Vol. I. pp. 238-240, Vol. II. p.10, and, Vol. III. p. 198; Complainant's Exhibit No. 5, and Respondent's Exhibit No. 28.

51. Based upon the foregoing facts the undersigned concludes as a matter of fact, that respondent's agent, Division Manager Mr. Webb, was motivated in substantial part by an illegal retaliatory motivation directed toward complainant for his opposition to Marion Davis's sexual harassment of Ira Gore and his subsequent attempts to get rehired with the respondent following his clinical depression sustained as a result of that sexual harassment, stemming from his

reluctance to deal with Mr. Davis's inappropriate behavior.

52. Based upon the preponderance of the evidence the undersigned finds that the respondent would not have disciplined the complainant for inadequate call out response were it not for his known support for Mr. Gore in his dispute with respondent and his attendance at a meeting where he in fact substantiated most of Mr. Gore's assertions as to Marion Davis's outrageous conduct toward Mr. Gore.

53. The complainant has sustained incidental damages as a result of the unlawful retaliation of the respondent. Tr. Vol. I. pp. 67-68.

54. The complainant has suffered loss of back wages, benefits and overtime in the amount of $16,783 for August 1995 through December 1995; $12,585 for January 1996 through March 1996; $52,176 for April 1996 through March 1997; and, $26,879 for April 1997 through September 1997. Total back wages from August 1995 through September 1997 are $108,423.00. Joint Exhibit No. 1.

B.

DISCUSSION

The Human Rights Act, W. Va. Code § 5-11-9(a)(7)(C), provides that it is unlawful for any person or employer to engage in any form of reprisal or otherwise discriminate against any person because he has opposed any practices or acts forbidden under the Act. In order to prove a prima facie case of retaliation, the West Virginia Supreme Court has held that a complainant must prove by a preponderance of the evidence that (1) the complainant engaged in a protected

activity; (2) that the complainant's employer was aware of the protected activity; (3) that the complainant was subsequently discharged and (absent other evidence tending to establish retaliatory motivation); (4) that complainant's discharge followed his protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251, at 259 (1986).

In order to make out a prima facie case of employment discrimination the complainant must offer proof of the following:

1. That the complainant is a member of a protected class;

2. That the employer made an adverse decision concerning the complainant;

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

Conaway v. Eastern Associated Coal Corporation, 178 W. Va. 164, 358 S.E.2d 423, at 429 (1986); see also Kanawha Valley Regional Transportation Authority v. West Virginia Human Rights Commission, 181 W. Va. 675, 383 S.E.2d 857, at 860 (1989). Criterion number three (3) of this formulation, inappropriately labeled the "but for" test, is only a threshold inquiry, requiring only that a complainant show an inference of discrimination. Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152, at 161 (1995).

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by the three step inferential proof formula

first articulated by the United Sates Supreme Court in McDonald Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a prima facie case of discrimination; the respondent then has the opportunity to articulate a legitimate non discriminatory reason for its action; and, finally, the complainant must show that the reason proffered by the respondent was not the true reason for the adverse employment decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real motive; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway, supra. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Where pretext is shown discrimination may be inferred, Barefoot, supra, though discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. _____ , 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the "mixed motive" analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology,

spra. "Mixed motive" analysis applies where the respondent articulates a legitimate non discriminatory reason for its decision which is not pretextual, but where discriminatory motive plays a part in the adverse decision. Under the "mixed motive" analysis, the complainant needs to show that an unlawful discriminatory motive played some role in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant's protected status. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n.18.

Once the complainant establishes a prima facie case of discrimination the burden shifts to the respondent to offer evidence that the adverse decision was for a non discriminatory reason, which must be clear and reasonably specific. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Should the respondent offer a legitimate non discriminatory reason for its decision, "then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely pretext for unlawful discrimination." Shepardstown, 309 S.E.2d at 352. The complainant "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated that employer, or indirectly, by showing that the employers proffered reason is unworthy of credence." Burdine, 450 U.S. at 256. See also O. J. White Transfer Storage Company v. West Virginia Human Rights Commission, 181 W. Va. 519, 383 S.E.2d 323, at 327 (1989).

The undersigned finds that the complainant has proven a prima facie case of retaliatory discharge, by a preponderance of the

evidence, under the standard set in Frank's Shoe Store, supra. On July 25, 1995, complainant attended a meeting with agents of the respondent in Charleston, to express concerns raised by Mr. Gore. At that meeting, complainant supported Mr. Gore's allegations concerning sexual harassment by Marion Davis. Notwithstanding the fact that Mr. Gore's sexual harassment claim was stale by the time of the meeting because they had occurred in 1991 and 1992; or the fact that there was one individual targeted by the unlawful conduct against a member of the same sex [the U.S. Supreme Court has recognized the validity of a same sex sexual harassment claim in Oncale v. Sundowner Offshore Services, Inc., No. 96-568 (March 4, 1998)]; complainant was engaged in a protected activity in supporting Mr. Gore's complaints about the treatment by Marion Davis and the respondent's subsequent failure to reinstate him to duty following his LTD for clinical depression resulting from that treatment. Complainant further discussed incidents of racial remarks and other instances of racially motivated actions, both by respondent's own employees and by the people in the general public, directed against both himself and other black employees of respondent. Certainly the employer knew of the protected activity because the complaints were voiced to its own agents. Mindful of the admonition in Barefoot, supra, that the prima facie showing requires only the inference of discrimination, the undersigned defers discussion of the weight of evidence regarding whether the respondent's decision maker was in fact aware of the protected activity in this case. Complainant was subsequently discharged on August 10, 1995. The timing follows in such proximity that the undersigned may infer retaliatory motive. There is no

evidence that the complaints voiced at the meeting of July 25, 1995, or any earlier protected activities, were engaged in for any other purpose than that of attempting to have those concerns addressed by respondent. The undersigned is not aware of any case law holding that a retaliatory discharge claim is predicated upon the ultimate merits of the discrimination being opposed by the person discharged; thus the complainant has proven a prima facie case of retaliatory discharge.

Proceeding under the three step inferential proof formula, the respondent has articulated a clear and specific reason for its discharge of the complainant, that respondent was acting in the course of its progressive discipline policy against complainant for his inadequate call out response rate. Respondent further demonstrated that the decision to fire complainant was made by Division Manager, Isaac Webb; and, that Mr. Webb was unaware of any protected activity engaged in by the complainant until after such time as the progressive discipline for inadequate call out response was initiated against complainant who admittedly was leading the league in last place finishes for call outs. Thus it is incumbent upon the claimant to prove by a preponderance of the evidence that this reason was not the true reason, but rather pretextual for a discriminatory motive. Where pretext is shown through direct or circumstantial evidence, discrimination may be inferred unless some non discriminatory alternate reason is determined to be the actual motivation. Under the mixed motive analysis, should the complainant show that an unlawful discriminatory motive played a substantial role in the decision to fire the complainant, then the respondent

employer can avoid liability only by proving that it would have made the same decision even if it had not considered complainant's protected status.

The crux of the respondent's position is that Mr. Webb made the decision to terminate complainant before he became aware of the complainant's attendance at the meeting in Charleston on July 25, 1995 with Mr. Al Moeller, Corporate Compliance Officer, and John Schmansky. Respondent contends that because complainant was consistently among the worst in call out response and because Mr. Webb testified that this is the reason for complainant's termination, that the complainant is unable to demonstrate by a preponderance of the evidence that a discriminatory motivation was the actual animus to the termination; and that the case therefore hinges upon the relative credibility of the testimony of Mr. Webb viz a vis Mr. McDonald and Mr. Gore on whether Mr. Webb was aware of the meeting before the date he testified being informed of that meeting on August 3, 1995, after the indefinite suspension was imposed for inadequate call out response. The undersigned disagrees and instead concludes that the preponderance of the evidence suggests that a retaliatory motive played a significant role in the decision to impose discipline for call out response against complainant. The evidence tends to show that Mr. Webb was aware generally that complainant supported Mr. Gore's allegations against Marion Davis. Mr. Webb had already had a confrontation in his own home with Mr. Gore in January 1995, before Mr. Gore returned to work in May 1995; regarding the whole issue of his sexual harassment by Marion Davis and about their refusal to reinstate Mr. Gore to his position. This was the subject of a

workers compensation claim which was not covered under the terms of newly enacted legislation; and of a West Virginia Human Rights complaint, which resulted in the situation being "resolved" according to Mr. Webb. Mr. Webb acknowledges that the incidents had been well publicized by Mr. Gore in advance of his return to work. He acknowledges that he confronted Marion Davis about the allegations, administering a strong admonition; but that he could find no-one to confirm the incident of Mr. Davis chasing Mr. Gore with his penis in his hand. The undersigned concludes as a matter of fact that Mr. Webb was most likely well aware that complainant could and would confirm other less severe incidents of Marion Davis's sexual harassment of Mr. Gore. Perhaps as telling as the proximity in time between the meeting on July 25, 1995 and complainant's indefinite suspension on August 3, 1995 and termination on August 10, 1995; is the timing of the working suspension complainant was given on May 11, 1995, right after Mr. Gore's return to work on May 8, 1995. For the quarter immediately preceding this working suspension; the complainant's call out response rate was 27%; while Mr. Bates's call out response rate was only 25%. Mr. Bates was not even given a written warning at that time, although he had already been talked to about the lowering response rate by Mr. Webb. Next, the claim of Mr. Webb is that he had not been informed of the meeting in Charleston until August 3, 1998. Although the undersigned is prepared to accept that Mr. Webb was not aware of the specifics concerning who complainant and Mr. Gore met with or what was discussed in particular with those individuals, the undersigned finds that the preponderance of the evidence indicates that Mr. Webb was aware of Mr. Gore's

having called the concern line regarding his sexual harassment by Marion Davis and his concerns about his difficulties in getting the company to reinstate him following his psychiatric problems. It is most likely that Mr. Webb was aware generally of the fact that Mr. Gore had met with someone in Charleston about these matters and that complainant had accompanied him to confirm Mr. Gore's allegations concerning these matters, by the very next day July 26, 1995, prior to the indefinite suspension and termination being initiated by Mr. Webb. It is clear that Mr. Webb was not anxious to take disciplinary actions against Marion Davis even though he acknowledges Marion Davis's reputation as not being your average bear. All of these factors convince the undersigned that he was motivated in substantial part by the protected activities of complainant in support of Mr. Gore.

The critical factor to be considered in this instance is the motivation for the decision to terminate the complainant for his inadequate call out response. This being the case, it would not matter that the refusal to state what respondent's call out response expectations were to its union employees is unreasonable, should the decision maker be motivated by the inadequate call out response rate of the complainant. Unfortunately for respondent, the refusal to articulate an objective standard to be applied is relevant in deciding what was motivating Mr. Webb. Without objective standards to point to in imposing its progressive discipline, its imposition against complainant for inadequate response because he historically had the lowest is much less probative. The lack of objective criteria makes it much more likely that discipline in such cases is

in fact being meted out due to other concerns. Examining the figures at issue with regard to Mr. Webb's use of inadequate call out response as applied to complainant, the undersigned finds as a matter of fact that Mr. Evans's call out response rate was consistently as bad or worse than complainant's during the period of late 1993 through 1994. Despite this fact, Mr. Evans was never issued any written warning for inadequate call out response by Mr. Webb. As the race of both complainant and Mr. Evans is the same, it is unlikely that race is the motivating factor for Mr. Webb. In that instance it would appear that complainant was given his second written warning for inadequate call out response in September 1993 shortly after returning to work after being off sick for 9 months following a motorcycle accident. Complainant received his first written warning for inadequate call out response in the month following his motorcycle accident from Mr. Webb's predecessor. On July 18, 1994 complainant was given a written warning for improper lifting; while he was off work with a work related back injury. From these incidents, the undersigned discerns a pattern on the part of respondent in general, and Mr. Webb in particular, to utilize discipline to get even with the complainant for being off duty because of injury; and, that the discipline is being imposed in response to other concerns than that the individual involved committed an offense for which discipline is appropriate. The timing of these written warnings to complainant always seems to follow some event that Mr. Webb does not appreciate. Thus, when the initial working suspension follows Mr. Gore's reinstatement, and his indefinite suspension and termination follows his attendance of the

July 25, 1995 meeting; the undersigned finds the coincidence too great to dismiss some connection between complainant's support of his friend, Mr. Gore, in his opposition to unlawful sexual harassment of Mr. Gore. The undersigned is persuaded by this circumstantial evidence that Mr. Webb would not have disciplined complainant for inadequate call out response, were it not for complainant's engaging in protected activity, by backing up his friend's allegations of sexual harassment by Marion Davis; and is not convinced by Mr. Webb's assertions at hearing that even had complainant not missed the call out on July 26, 1995 he would still have been terminated for his perpetually low call out response rate. Thus the undersigned does not consider the fact that complainant's failure to respond to call out on July 25, 1995; a protected activity, which led to Mr. Webb's specially requesting the numbers on July 28, 1995 for the purpose of terminating complainant; and the respondent's position that there is a distinction between the protected activity causing the action versus merely causing a symptom which is the cause of the action. This issue is not reached because the preponderance of the evidence convinces the undersigned that although Mr. Webb is genuinely concerned with call out response, his imposition of discipline for this offense in the case of complainant seems to be related to other events than simply the raw response numbers on which the discipline was based during each of the phases in which that progressive discipline was imposed by Mr. Webb.

The West Virginia Human Rights Act is a make whole statute. Since complainant was subjected to progressive discipline as a result of his engaging in protected activities and would not have been

terminated but for those activities; he is entitled to back pay for the period, an order requiring reinstatement to the next available position for which he is qualified and front pay until so reinstated. Complainant further suffered incidental damages as a result of the unlawful retaliatory conduct of respondent, he is entitled to award of incidental damages for humiliation, emotional distress and loss of personal dignity.

In discovery there was a dispute as to whether other divisions call out response information would be discoverable. The undersigned permitted some discovery with respect to certain divisions where the complainant had knowledge of others subjected to or not subjected to discipline for poor call out response. Over respondent's objection, this data was ruled discoverable for certain other divisions but not all. The information at hearing indicates that the decision to impose discipline in these cases was left entirely to the discretion of the local supervisor or manager. That being the case the probative value of decisions in other divisions is minimal in trying to ascertain whether the decision maker was motivated by unlawful retaliation against complainant because of his opposition to sexual harassment of his friend Mr. Gore, in the workplace. This information concerning call out response was admitted into the record. As part of that evidence the respondent also introduced evidence relative to the firing of another long term employee of respondent's in another division. Comparison of that discipline, indicated that individual received the termination only after much more extensive history of warnings; and where the individual had continued to decline in performance after receiving his final

warning. The complainant had in fact improved his call out response rate from 20% to 31% when he was terminated following his final warning. Thus it would appear that imposition of the discipline as between these two examples would indicate disparate treatment. Nevertheless, the undersigned does not find such evidence relevant to the issue in this case, as Mr. Webb was responsible for imposition of discipline in Logan/Williamson and did not operate under any standard for acceptability of response rates for respondent as a whole.

There is also evidence suggesting racial animosity on the part of several of respondent's immediate supervisory personnel in Logan/Williamson. Whether or not Mr. Webb in fact made racially derogatory remarks himself, his unswerving support of these line supervisors viz a vis union employees in any dispute of what happened, creates a situation where incidents related by these to upper echelon of management, who in turn decide discipline to be imposed, is compromised by demonstrable negative attitudes of these persons toward black employees. As such the undersigned is of the opinion that respondent's personnel at all levels would benefit from a program to increase awareness of diversity in the workplace and tolerance for other races and cultures. The respondent is also directed to undertake education of this nature for its employees subject to monitoring by the West Virginia Human Rights Commission. The respondent is to cease and desist from disparate imposition of discipline because of race, and shall stop its employees from making racially derogatory comments, whether directed to members of another race or not.

C.

CONCLUSIONS OF LAW

1. The complainant, Antonio Mathews, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, W. Va. Code § 5-11-10.

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

3. The respondent, Appalachian Power Company, at the time of the events giving rise to the complaint herein, and now doing business as American Electric power Company, Inc.; is an employer as defined by W. Va. Code § 5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

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

5. Complainant has established a prima facie case of retaliation and race discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful retaliation and race discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to back pay in the amount of $108,423.00, as calculated through September of 1997, plus statutory interest; rehiring to the next available position for which he is

qualified and front pay until so reinstated.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of $3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. As a result of the unlawful discriminatory action of the respondent, Commission is entitled to an award of reasonable costs in the aggregate amount of $3,035.72.

D.

RELIEF AND ORDER

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

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices; and shall implement diversity training for its employees in Logan/Williamson.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant $108,423.00 in back wages for the period through September 1997.

3. Within 31 days of receipt of this decision, the respondent shall pay to the Commission costs in the amount of $3,035.72.

4. Within 31 days of receipt of this decision, the respondent shall pay to 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.

5. The respondent shall reinstate complainant to the next available position for which he is qualified and shall pay front pay until such time as complainant is reinstated.

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

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

It is so **ORDERED**.

Entered this 31st day of March, 1998.

WV HUMAN RIGHTS COMMISSION

BY: _____

ROBERT B. WILSON

ADMINISTRATIVE LAW JUDGE