STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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ARCH A. MOORE, JR
Governor

February 9, 1987

Jewell McClanahan
P.O. Box 13323
Sissonville, WV 25360

Dave Sugar Construction, Inc.
P.O. Box AH
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600 Atlas Bldg.
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Charleston, WV 25301

David Cecil, Esq.
202 Berkeley St.
Charleston, WV 25301

RE: McClanahan v. Dave Sugar Construction Co., Inc.
ES-17-86

Dear Parties:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the county wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within thirty (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney
Executive Director

HDK/mst
Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JEWELL MCCLANAHAN,

Complainant,

v. DOCKET NO. ES-17-86

DAVE SUGAR CONSTRUCTION CO.,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I.

Proceedings

This case came on for public hearing on the 27th and 28th day of January, 1986, and March 7, 1986, in Kanawha County, Charleston, West Virginia. The complainant, Jewell McClanahan, appeared in person and by counsel, Carter Zerbe, Esq. and the respondent appeared by its representative, Dave Sugar and by counsel, David Cecil, Esq. The hearing was presided over by the Honorable John M. Richardson, Hearing Examiner for the WV Human Rights Commission and the Honorable E. Sid Allen, Hearing Commissioner for the WV Human Rights Commission.

On July 9, 1985, the complainant, Jewell McClanahan, filed a verfied complaint with the WV Human Rights Comission wherein she alleged that her former employer, Dave Sugar Construction Co., violated WV Code 5-11-9(a) by subjecting her to sexual harassment and by otherwise discriminating against her on the basis of her sex.

After full consideration of the entire testimony, evidence, motions, briefs, Hearing Examiner's Recommended Decision and Exceptions thereto, (Exhibits A & B respectively) complainant's affidavit on attorneys fees and costs, respondent's objections thereto, (Exhibits C & D respectively) and the Hearing Commissioner's observances, the Commission concludes and decides as follows.

To the extent that the proposed Findings of Fact, Conclusions of Law and argument submitted by the Hearing Examiner are in accordance with the Findings, Conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent, they have been rejected. To the extent that the Exceptions advanced by the parties are in accordance with the Findings, Conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent, they have been rejected.

II.

Issues

1. Whether the complainant was subjected to harassment by the respondent based on her gender in violation of WV Human Rights Act.

2. Whether the complainant was treated disparately in terms and conditions of employment based on her gender in violation of the WV Human Rights Act.

3. Whether the complainant was laid-off because of her gender by the respondent in violation of the WV Human Rights Act.

4. If a violation is found, to what damages or other relief is complainant entitled?

III.

Findings of Fact

1. The complainant, Jewell McClanahan, is a female resident of Kanawha County with an employment history relating to restaurant and construction work. The complainant has been employed in the construction industry off and on since 1980.

2. The respondent, Dave Sugar Construction Co., is an Ohio corporation engaged primarily in pipeline, sewer and water construction and repair. At the time of the incidents complained of, the respondent was engaged, pursuant to bid awarded in early 1985, in the sewer construction project along Rt. 21 in the Sissonville area of West Virginia. Said project was essentially completed in September of 1985.

3. On March 20, 1985, the complainant was hired, consistent with the respondent's practice of hiring local persons on projects, as a flag person on the Sissonville project.

4. Another female, Madelaine B. White, was hired as a flag person by the respondent on or about April 3, 1985.

5. The complainant and Ms. White were the only females in respondent's workforce and the only employees whose primary responsibility was to perform duties related to flagging; however, from time to time the complainant and Ms. White both performed general laborer work, such as cleaning up, sowing grass, picking up and shovelling.

6. Coarse and vulgar language was commonplace among the respondent's employees and was freely and frequently engaged in by most employees including the complainant.

7. The complainant credibly testified that her co-worker, Joe Constantino, made sexually suggestive statements to her to "make love," that he called her a lesbian, and that, on one occasion, he retorted that he wanted "pussy" when complainant was taking meal orders. The complainant further testified that Mr. Constantino touched her improperly and that at least once he exposed himself to her and relieved himself in her presence. The complainant recalled that at least two of the incidents occurred in early June, 1985.

8. Respondent denied that complainant ever made complaints to respondent's management regarding Mr. Constantino's conduct.

9. Respondent testified that the complainant intentionally observed Mr. Constantino as he relieved himself on one occasion. The complainant denied this accusation.

10. It is undisputed that complainant brought to respondent's worksite sexually suggestive male and female dolls for her supervisor, Tom Berton and his wife; and that other employees were aware of complainant's action. The record does not reflect when this occurred.

11. The actions of respondent's employees, Mr. Constantino and the complainant, rather than characterized as "practical jokes," "teasing" or as "commonplace in construction jobs," evidence an atmosphere at respondent's Sissonville project permeated by sexual innuendoes, conversation and conduct.

12. Respondent's management was, or should have been aware of such conduct as fostering a potentially hostile and offensive work environment.

13. The complainant was subjected to, initiated and participated in conduct of a sexual nature at respondent's worksite.

14. The evidence of record does not sufficiently establish that the actions of the complainant did not actively contribute to the environment she complains of.

15. The record is devoid of sufficient facts in light of complainant's action to determine whether the conduct she complained of as sexually suggestive or explicit was unwelcome, or that the complainant did not welcome a continuation of conduct that at one time she participated in.

16. The bathroom accommodations at the Sissonville project consisted of a port-a-john and an office trailer. In addition, job circumstances often required the use of residential facilities along the route, pipeline and wooded areas as alternative restroom facilities for respondent's employees. Males employed by respondent could take momentary breaks to relieve their basic biological need to void, behind trees, in ditches and by other emergency measures; females, for obvious physical differences and social considerations, could not be so cavalier about meeting their needs.

17. A flag person employed by respondent at the Sissonville project, was required, as a matter of policy for safety considerations, to solicit another employee to replace her or to tell her supervisors that she needed to be replaced in order to use the restroom facilities. In circumstances where no one was available within proximity, a flag person would detain persons going up and down the road to request relief in order to use the restroom facilities.

18. On April 22, 1985, while flagging, the complainant was not provided with the opportunity to use the restroom facilities for more than seven hours. Respondent was aware of complainant's need to use the restroom on that day based upon complainant's direct request of her supervisor, Tom Berton, absent the availability of co-workers, that she be

relieved. There was unrebutted credible testimony that Tom Berton advised the complainant to "drop your goddam shit and do your fucking thing" because he didn't have anyone to relieve her.

19. Two inspectors for the Sissonville project's independent engineering firm, each of whom drove past complainant at her flagging station, on April 22, 1985, at complainant's urging, intervened on her behalf by informing management of complainant's need to be relieved so that she could use the restroom facilities. Arden Stall, the first inspector, approached Tom Berton, complainant's supervisor, with complainant's request that she be relieved, to no avail. Roy Graley, the second inspector, observed complainant in a state of anguish early in the afternoon of April 22, 1985. Graley communicated complainant's plea to a management official, Sherman Batemen. One half hour later when Graley passed complainant on his return trip, complainant was still in her flagging position and had not yet been relieved.

20. Complainant could not leave her job post because of her position as flagger. As a result of respondent's conduct and the extended period of time she had to wait before she was relieved, the complainant suffered mental anguish and embarrassment and experienced pain and discomfort of such a degree that she sought out a physician later that afternoon. Complainant was diagnosed as having a urinary tract infection and placed on medication for that condition.

21. Later that evening, complainant communicated her dissatisfaction with what had transpired earlier that day to respondent's management and informed her supervisor of the urinary tract infection she had developed.

22. On April 23, 1985, the very next day, complainant's supervisor, Tom Berton, brought a child's potty chair and set it along the berm of the road opposite where the complainant was flagging.

23. The Commission rejects as incredulous in light of testimonial evidence of the record as a whole, the respondent's contention that the potty chair was placed on the berm of the road as a spot for sighting a laser beam.

24. The Commission finds credible the testimony of the complainant that Tom Berton informed her that the potty chair would be complainant's bathroom of the day.

25. The complainant was further embarrassed and humiliated by the potty chair incident which exacerbated the anguish and anxiety she suffered the previous day at not having been relieved.

26. The complainant's urinary tract difficulties prevented her from lifting heavy objects without the need to void, and consequently, the complainant eventually made known to the respondent and her co-worker her preference to do flagging as opposed to intermittent general clean up work which required the lifting of heavy objects.

27. Madelaine B. White preferred to do general labor work as opposed to flagging work, and made her preference known to respondent.

28. Complainant was laid-off on June 17, 1985, when the respondent was concluding its work on the Sissonville project, and the need for a flag person ceased to exist.

29. Madelaine Belle White, the other female flagger, was retained by the respondent as a clean up laborer because she was willing and able to perform the work of a general laborer. She was laid off in September, 1985.

IV.

Conclusions of Law

1. Dave Sugar Construction Co., respondent, is an employer within the meaning of WV Code 5-11-3.

2. Complainant, Jewell McClanahan, was an employee within the meaning of WV Code 5-11-3(e).

3. On July 8, 1985, complainant filed a verified complaint alleging that respondent had engaged in unlawful discriminatory practices prohibited under WV Code 5-11-9(a).

4. Complainant specifically alleged that she had been laid-off on the basis of her sex gender in violation of the Human Rights Act; that she was treated disparately in terms and conditions of employment on the basis of her gender; and that she was subjected to sexual harassment by respondent's employee.

5. The complaint of July 8, 1985, was timely filed within 90 days of the alleged acts of discrimination.

6. The WV Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to WV Code 5-11-8, 5-11-9 and 5-11-10.

7. The complainant has failed to establish a prima facie case of sexual harassment by the respondent as it relates to conduct toward her by her co-worker inasmuch as complainant has failed to show that the conduct she was subjected to was unwelcome.

8. The complainant has established, by direct evidence, that she was intentionally singled out for adverse treatment by her supervisor on the basis of her gender as it relates to denial of adequate opportunity to use the restroom.

9. The respondent is liable for the sexual discrimination committed by its supervisory employees or agents.

10. Respondent discriminated against complainant on the basis of her sex in violation of WV Code 5-11-9(a) by denying her adequate opportunity to use the restroom.

11. The complainant has failed to establish a prima facie case of unlawful discriminatory lay-off based on sex.

12. The complainant is entitled to compensatory damages for humiliation, loss of personhood and mental anguish she suffered as a result of respondent's discriminatory conduct toward her.

13. Complainant is entitled to an award of reasonable attorney fees and costs as set forth in Exhibit A notwithstanding respondent's objection to such an award.

V.

Discussion of Conclusions

Clearly, sexual harassment violates the WV Human Rights Act which proscribes discrimination on the basis of sex. WV Code 5-11-1 et seq. The Federal guidelines adopted by the Equal Employment Opportunity Commission (EEOC) relating to sexual harassment and employer liability, as well as court decisions interpreting said guidelines, provide a lodestar for the Human Rights Commission in determining claims of this nature under the Human Rights Act.

In pertinent part, the guidelines define sexual harassment as "[u]nwelcome, request for sexual favors and other verbal or physical conduct of a sexual nature." However, in order to constitute unlawful

activity under the guidelines, in the context of the employment relationship, the guidelines provide that sexual harassment must meet one of three criteria:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individuals employment;

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individuals work performance or creating an intimidating, hostile or offensive work environment. 29 CFR 1604.11 (a) (1981)

Applying the above standards to the case at bar, complainant's allegations of sexual harassment falls squarely within the third criteria or condition of work category. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). On this theory, in order to establish a prima facie case of sexual harassment involving a discriminatory work environment, the elements of proof the complainant must show are as follows: (1) that she belongs to a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) respondeat superior.

As recently reinforced by the United States Supreme Court, the gravamen of any type of sexual harassment claim, is that the advances or harassment complained of was unwelcome. The correct inquiry therefore, becomes whether the complainant, by her conduct, indicated that the conduct she complains of was unwelcome. Meritor Savings Bank v. Vinson, 106 S.Ct. 2339 (June 1986). The unescapable conclusion of the Commission in the instant case, is that the complainant has not met her

prima facie burden ~~on that element~~. Although the complainant is clearly a member of a protected class; and the complainant has established that she was subjected to sexually suggestive verbal and physical conduct by her co-worker, delineated in Finding of Fact 7, the complainant has not demonstrated that the alleged harassment was unwelcome. As pointed out in Henson, supra, in order to constitute harassment the conduct must be unwelcome in the sense that the employee did not solicit or incite it, or in the sense that the employee regarded the conduct as undesirable or offensive. Accord, Gans v. Kelpro Circuit Systems, 28 FEP 639, (1982). The actions of the complainant in bringing to the worksite sexually suggestive dolls, an undisputed fact which became apparent to her co-workers, and an incident which significantly is not identified chronologically in relationship to the conduct of her co-worker, compels a determination under either the Meritor or Henson standards that the complainant has not proved she was a victim of sexual harassment. Simply stated, there is insufficient evidence to conclude that the complainant did not actively contribute to a distasteful work environment or that she did not welcome a continuation of an atmosphere that at one time she participated in. By this ruling, there should be no suggestion that the Human Rights Commission condones the distasteful environment which permeated respondent's workforce, and which under different circumstances might be conducive to a sexual harassment charge.

A contrary conclusion is reached by the Commission on complainant's claim of sexual discrimination based upon disparity in terms and conditions of employment. The complainant has established that there was an intentional act by respondent to deny her adequate opportunity to use the restroom because of her sex. On April 22, 1985, the complainant, while

flagging, was forced by the respondent's conduct to remain at her flagging position for more than seven hours without relief to use the restroom by benefit of either lunch break or rest break. As a flagger, complainant for public safety considerations could not leave her post unattended to relieve herself without insuring that a substitute was positioned. Although, concededly, respondent provided a port-a-john for the use of its employees, it is uncontroverted that males on the construction project could take momentary breaks to relieve their basic biological need by voiding behind trees, in ditches and by other emergency measures. It should be equally uncontroverted that the complainant, as a female for obvious physical differences and social considerations, could not be so cavalier about meeting her basic needs. However, the unrebutted testimony of the complainant reflects that her supervisor advised her to drop her pants and relieve herself on the spot manifesting an indifference to complainant's dilemma and an invidious type of sexual animus. As a result of this deprivation, the complainant was forced to perform her duties as a flagger in excruciating pain and under severe emotional distress. Respondent defends its conduct by asserting that it provided ample opportunity for all of its employees to use the restroom, and while admitting that the complainant was not relieved on April 22, 1985, attributes this denial to inadvertence rather than because of the complainant's sex. This defense is found by the Commission to be implausible in light of the unrebutted testimony of at least two witnesses that each reminded the complainant's supervisor of complainant's need to be relieved in order to use the restroom, all to no avail. Sexual animus is further manifest by the action of complainant's supervisor, who the next day, placed on the berm of the road, a childs potty chair and advised the

complainant that the chair would be her bathroom of the day. Whether viewed as sexual harassment or as direct evidence of discrimination, the complainant has sustained her burden of proving sexual discrimination, to wit: that she was intentionally singled individually for adverse differential treatment on the basis of her gender by respondent's supervisors. It should be noted that, under the Human Rights Act, a respondent is liable for the unlawful discrimination committed by its supervisory employees or agents. Henson, supra; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); U.S. v. International Brotherhood of Teamsters, 431 U.S. 324 (1977); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (1975)

The only remaining issue evolves around the complainant's claim that she was unlawfully laid-off by respondent because of her sex. The threshold question in a disparate treatment layoff claim is whether the lay-off of the complainant was based upon qualifications, comparative skills and/or economic conditions or upon discriminatory reasons. Lions v. Bechtel Power Corp., 625 F.2d 771 (8th Cir.); Peters v. Jefferson Chemical Co., 516 F.2d 452 (5th Cir. 1975); Heffernan v. Western Electric Co., 510 F. Supp. 712 (N.D. Ga. 1981).

The Commission finds that the complainant has failed to establish a prima facie case of discriminatory lay-off based on sex. Although complainant is a member of a protected class, she has failed to establish that she was qualified to assume the position as general clean up laborer at the time of her lay-off or that a similiary situated person not of the protected class was retained. The substantial weight of the evidence is that the complainant and Ms. White were the only similarly situated persons for purpose of the employment decision made. The record reflects that the complainant, a flagger, was not kept on the job because she had professed

the refusal of the Respondent to give Mrs. McClanahan adequate opportunies to use the restroom because of the complainant's alleged use of vulgar language. The Hearing Examiner further observes that the record reflects that such facilities were, in fact, available. The complainant readily agrees. However, that is not the issue. In order to make use of the facilities, Mrs. McClanahan's foreman was obligated to find someone to replace her at her flagging post. On numerous occasions he failed or refused to do so. That is the issue, not the availability of facilities.

The Hearing Examiner also calls the incident of April 22nd a situation of "miscommunications." There is no evidence anywhere in the record which indicates that respondent's failure, indeed refusal, to relieve Mrs. McClanahan for a bathroom break between 7:15 in the morning until late in the afternoon was the result of "miscommunications." The basically unrefutted evidence is that she told her foreman that she needed to go to the bathroom and he returned twenty (20) minutes later and told her he did not have anybody to relieve her. On two separate occasions, two engineers from the project's consulting engineering firm intervened with company officials on her behalf and still nothing happened. Management was repeatedly told of her situation and repeatedly failed to do anything about it. The result was excruciating pain and subsequent urinary problems.

The Hearing Examiner finally concludes that this incident of April 22nd was not a repetitious act. The complainant testified to specific incidents on April 5, 22, 23; May 22 and June 14, and at least one neutral witness verified that Jewell McClanahan came

to her house in June in pain and discomfort from a distended bladder. If the Hearing Examiner is going to disbelieve and dismiss the testimony of the complainant, the testimony of the two engineers, Graley and Stahl, and the testimony of Faye Jones, who lived along the project highway, there ought to be some indication as to why all these individuals are unworthy of belief. Indeed, of all the witnesses who testified, the two engineers and Ms. Jones were the most disinterested and neutral. Every witness who testified for the company, on the other hand, was still in its employment or had been promised a job in respondent's next project.

Whether viewed from the standpoint of sexual harassment or disparate treatment in the terms and conditions of employment, the refusal of respondent to allow Mrs. McClanahan the opportunity to use available restroom facilities constitutes sexual discrimination. Complainant respectfully asserts that she has sustained her burden of proof on that issue as well as the sexual harassment discussed previously, and that her claims should be upheld by the Commission and damages awarded.

One could perhaps agree with the Hearing Examiner's conclusions about the trivial nature of the potty chair incident if that incident had not grown out of the events of April 22nd. It is one thing to engage in coarse and vulgar language and to exchange sexual jokes and pornographic dolls and make fun of one another in the commonplace construction work atmosphere. It is another thing to require an employee to flag for hours beside the road in full public view without an opportunity to use the bath-

room causing not only extreme pain and discomfort, but producing long-term physical and medical difficulties; and then respond to this situation by placing a potty chair beside the woman's station the next day. In that context, the act is no longer trivial but cruel and inhuman.

With respect to her lay-off, the Hearing Examiner found that since no men were hired to perform her duties, complainant failed to establish a prima facie case. Complainant asserts that in discharge or lay-off situations, it is not necessary to show a replacement by a male employee to establish a prima facie case of discrimination. If this were required, then no individual who was discharged or laid-off for economic reasons could ever establish a prima facie case of discrimination as they would not be replaced by anyone. In a lay-off or discharge situation, the crucial issue is not whether the terminated employee was replaced by a male employee, but why she was selected for lay-off or discharge from among other similarly situated employees. Thus, complainant respectfully asserts that by showing that she was female, that she was performing her job adequately, that despite that adequate performance, she was laid-off, is sufficient to establish a prima facie case of discrimination. The Hearing Examiner also determined that because Mrs. McClanahan had professed her preference for flagging work, the employer was entitled to retain Mrs. White, who was hired after Mrs. McClanahan, and lay-off the complainant because a full-time flagger was no longer needed. This determination ignores the unrebutted evidence that the reason Mrs. McClanahan preferred flagging duty was because of

her urinary tract difficulties which, in turn, were caused by respondent's prior discriminatory act and mistreatment. Thus, the Hearing Examiner is allowing the respondent to relieve itself from liability for one discriminatory act by relying on the consequences of a prior act. Moreover, Mrs. McClanahan, despite her preference, was willing and able to do the general laboring duties despite the difficulties this caused her.

Complainant finally objects and excepts to the rulings by the Hearing Examiner that documents complainant attempted to use for impeachment purposes and testimony related thereto were inadmissible. This ruling was based on the fact that the documents were not exchanged beforehand. The complainant also takes exception to the ruling that rebuttal witnesses not disclosed to respondent prior to hearing could not be used.

At the pre-trial conference, the Hearing Examiner ordered that the parties exchange witness lists and documents they intended to introduce into evidence. Prior to hearing testimony, the complainant could not anticipate what rebuttal witnesses might be used or what documents might be necessary for impeachment. The Hearing Examiner's ruling excluding that evidence was improper and prejudicial to the complainant.

For all the above reasons, complainant urges the Commission to sustain her charge.

a dislike of doing general labor work, notwithstanding the reasons for said disfavor. Consequently, when the need for a full-time flagger ceased to exist, the complainant was laid-off. The record reflects that Madelaine B. White, the other flagger, and another member of the protected class was retained by the respondent for purposes of clean up work because she was willing and able to perform the work of a general laborer. The preponderance of the evidence therefore supports the Commission's conclusion that the lay-off of the complainant was not based upon her sex.

VI.

ORDER

In view of the foregoing, the Commission hereby ORDERS the following:

It is hereby ORDERED that the respondent cease and desist from sexual discrimination against individuals on the basis of sex in terms and conditions of employment.

It is hereby ORDERED that the respondent pay to complainant the sum of $10,000.00 as compensatory damages for humiliation, embarrassment, emotional and mental distress, and the loss of personhood and dignity suffered by the complainant as a result of the discriminatory treatment she received.

It is further ORDERED that the respondent pay complainant's reasonable attorney's fees in the amount of $8,381.00.

It is hereby ORDERED that the respondent pay complainant the sum of $53.09 for cost reasonably necessary to the litigation of this matter.

It is further ORDERED that the respondent report to the Commission within thirty-five (35) days of the entry of this Order, the steps taken to comply with this Order.

Entered this 4th day of February, 1987.

RESPECTFULLY SUBMITTED,

BY Betty A Hamilton
BETTY HAMILTON
VICE-CHAIR
WV HUMAN RIGHTS COMMISSION

EXHIBIT A

THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

OFFICE OF THE HEARING EXAMINER

JEWELL MCCLANAHAN,

Complainant,

v. DOCKET NO. ES-17-86

DAVE SUGAR CONSTRUCTION CO.

Respondent.

RECOMMENDED DECISION

I.

Preliminary Matters

On July 9, 1985, the Complainant, Jewell M. McClanahan, filed a verified complaint wherein she alleged that the Respondent, Dave Sugar Construction Co., violated WV Code 5-11-9(a) in that she was discriminated against because of her sex and was sexually harassed by the Respondent's employees.

On September 17, 1985, notice of public hearing was issued. The public hearing was held on January 27 & 28, 1986 and on March 7, 1986. The Hearing Panel was comprised of John M. Richardson, Hearing Examiner and E. Sid Allen, Hearing Commissioner. The Complainant appeared in person

and by her private counsel, Carter Zerbe, and the Respondent appeared by its representative, Dave Sugar, and by counsel, David Cecil. Thereafter, testimony of witnesses was taken and recorded to which the parties, by counsel, have filed proposed findings of fact and conclusions of law.

To the extent that the proposed findings, conclusions and arguments advanced by the parties, are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the various witnesses testimony is not in accord with the findings herein, it is not credited.

II.

Issues

The issues presented at the public hearing and contained in the complaint were:

1. Was the Complainant subjected to unlawful sexual harassment.

2. Was the Complainant subjected to unlawful layoff or discharge because of her sex.

III.

Findings of Fact

1. The Complainant, Jewell McClanahan, is a female with an 11th grade education, with an employment history relating to restaurant work and construction. The Complainant has been employeed in the construction industry off and on since 1980.

2. The Respondent, Dave Sugar Construction Co., is a general contracting company involved primarily in sewer and water line construction and repair. At the times relevant in this complaint, the Respondent was engaged in a sewer construction project along Rt. 21 in the Sissonville area and had an additional project in progress near Buchannon, West Virginia.

3. The Complainant was hired, pursuant to the policy of the Respondent of hiring local people, as a flagger for the Sissonville project which was essentially completed in September 1985.

4. Another female employee was hired by the Respondent, Madeline Bell White, on or about April 3, 1985.

5. The primary responsibility of the Complainant and Ms. White was to perform duties relating to "flagging."

6. The Complainant and Ms. White both performed general labor work, such as, cleaning up, sewing grass, shoveling, etc.

7. Coarse and vulgar language was commonplace among the Respondent's employees and was freely and frequently engaged in by all employees, including the Complainant.

8. During the month of April 1985, the Complainant began experiencing urinary tract difficulties which led to the necessity to frequently urinate.

9. On April 22, 1985, the Complainant was not able to use the restroom for considerable length of time and as a result suffered severe abdominal pains and went to see a doctor. She was placed on medication for urinary tract infection, and while she informed her supervisors of her discomfort, she never provided them with any medical information which would indicate that a need to use the restroom was significantly important.

10. The Respondent had no policy limiting the use of restroom facilities, the job circumstances often required the use of residential facilities along the route pipeline, wooded areas or the "port-a-john" which was often located as much as a half mile away.

11. Ms. White, a female co-worker, having the same duties and responsiblities as the Complainant did not have any problem getting relieved in order to use the restroom facilities.

12. The Complainant was the object of and took part in practical jokes including the giving of anatomically exaggerated dolls to a supervisor who had teased her with a child's potty chair. Both of these incidences took place at the work site and with the knowledge of co-workers.

13. The Complainant preferred to do flagging work as opposed to general labor and made her preferences known to her supervisors.

14. Ms. White preferred doing labor work to flagging work and made her preferences known to her supervisors.

15. The Complainant was laid off when the need for a full time flag person ceased to exist.

16. Ms. White was retained longer than the Complainant because she willing and able to perform the work of a general laborer.

17. No males were hired to replace the Complainant.

IV.

Discussion

The legal principles to be applied to the issues in this case are not uncommon and have been widely used by the United States Supreme Court and approved by the West Virginia Supreme Court of Appeals. In the cases of Shepherdstown Volunteer Fire Department v. WV Human Rights Commission ___WV___ 309 SE2d 352 (1983) and State ex rel. Logan-Mingo Area Mental Health Agency, Inc., ___WV___ 329 SE2d 77 (1985) the West Virginia Supreme Court of Appeals approved the guidelines laid down in the United States Supreme Court cases of McDonnell Douglas Corp. v. Green 411, U.S. 792, 93 S.Ct. 1817 36 L.Ed. 2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 101

S.Ct. 1089, 67 L.Ed. 2d 207 (1981) wherein it was established that the Complainant carrys the burden of proof in proving a prima facie case which thereafter requires the Respondent to articulate a legitimate, non-discriminatory reason for its action which then the Complainant is required to prove is pretextual.

In the present case, the Complainant has the burden of proving that she is a member of a protected class and that she was subjected to disparate treatement or sexual harassment to which the Respondent must then articulate a legitimate, non-discriminatory reason, and thereafter, the Complainant must prove that the reason offered was pretextual. There can be no doubt that the Complainant proved that she was a female, and a member of the protected class, however, the allegations that she was disparately treated or the subject of unlawful harassment were not proven. As the evidence readily reveals the Complainant was hired in March 1985, followed by the hiring of another female in early April 1985. The Complainant contends that she was laid off/discharged and the Respondent continued to employ the female co-worker and hire males to perform the duties she had previously performed. Such is simply not the case. What in fact happened was that the Complainant was not kept on the job as long as was her female co-worker because she had professed a dislike of doing general labor work and when the need for a full time flagger ceased to exist, she was laid off.

The facts pertaining to the Complainant's discharge were clear in that the Complainant had professed her preference in the flagging portion of her duties and had often complained about performing the duties of a general laborer. Meanwhile, her co-female employee, Ms. White, professed a desire to perform the services of a general laborer rather than that of a flagger and when the time came that a full time flagger was not needed the Respondent's obvious choice was to select the female employee who desired to perform the general laborer work which remained. The allegation that male employees were hired to carry out duties performed by the Complainant is simply not true. Those male employees which came on to the job were members of the pipeline crew and performed duties that neither the Complainant nor Ms. White were hired to perform for the Respondent. Futhermore, it was the credible testimony that these male employees were skilled in the pipelaying duties for which they were hired to perform and there was no evidence to indicate that either the Complainant or Ms. White was so qualified.

With regard to the sexual harassment, it also clearly appears from the record that the coarse and vulgar language complained of was commonplace and was participated in by the Complainant as well as her female co-worker and other employees. While it is clear that the Complainant was teased on several occassions and once with regard to a potty chair, it is also true, that the Complainant initiated and

participated in practical jokes of a similar and possibly even of a more coarse sexual nature. Examples of the Respondent's employees involving sexual harassment certainly could not be considered unexpected on a construction job to which the Complainant was familiar with and testified she had participated in. The coarse and vulgar language used by construction employees was commonplace and was by the Complainant's own admission something which she also participated in along with her female co-worker Ms. White.

Inasmuch as the Complainant has failed to prove that she was subjected to disparate treatment or unlawful sexual harassment her quest for establishing a prima facie case failed. Therefore, the only conclusion that can be reached by this Hearing Examiner, is that the complaint should be dismissed with prejudice. It would indeed be a strange state of affairs that a Complainant who has participated in practical jokes of a sexual nature and used the same coarse and vulgar language to which she complains of, could thereafter avail herself of similar behavior by others in order to obtain monetary relief. To the extent that the Complainant complains that she was sexually harassed by not being permitted to use restroom facilities, the record clearly reflects that such facilities were in fact available and that the Complainant's one proven instance of having to wait for a protracted length of time to avail herself of them was a situation where there was missed communications and certainly not an intentional or repetitious act on the

part of the Respondent or its employees. The credible testimony of Ms. White, was that during her period of employment, and while performing the same or similar duties, had no difficulty in availing herself of the use of restrooms as needed.

V.

Conclusions of Law

1. The Commission has jurisdiction of the parties and subject matter of this complaint.

2. The Complainant failed to proved a prima facie case of unlawful sex discrimination based upon disparate treatment or sexual harassment.

3. The Complainant's complaint should be dismissed with prejudice.

4. That no costs be awarded to or assessed against either party.

VI.

Recommended Order

The Hearing Examiner recommends that the Commission adopts as its final order the following:

1. That the Commission adopt and approve for all pertinent purposes the Hearing Examiner's recommended decision together with its contents.

2. That the Complainant's complaint be dismissed with prejudice.

3. That the Respondent is not guilty of any unlawful discrimination.

4. That neither party be awarded or assessed costs in this action.

Entered this 3rd day of June, 1986.

RESPECTFULLY SUBMITTED,

BY _____
JOHN M. RICHARDSON
HEARING EXAMINER

EXHIBIT B
RECEIVED
JUN 26 1986
W.V. HUMAN RIGHTS COMM.
Answered

BEFORE THE

WEST VIRGINIA HUMAN RIGHTS COMMISSION

JEWELL M. McCLANAHAN,

Complainant,

vs. Docket No. ES-17-86

DAVE SUGAR CONSTRUCTION COMPANY,

Respondent.

EXCEPTIONS TO THE HEARING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. EXCEPTIONS TO FINDINGS OF FACT

The complainant takes exception to the Hearing Examiner's Findings of Fact both as to the content of his Findings of Fact 8, 9, 10, 16, the scope of his findings, and to his failure to consider uncontradicted testimony in record. The Complainant's exceptions are as follows.

Finding of Fact No. 8

"During the month of April, 1985, the complainant began experiencing urinary tract difficulties which led to the necessity to frequently urinate."

Complainant has no objection to this finding as far as it goes. However, the finding ignores uncontested testimony that complainant's urinary tract difficulties which produced her

frequent need to urinate was caused by the respondent's refusal to give the complainant a restroom break on April 22, 1985. Thus, the Hearing Examiner's findings of fact No. 8 fails to bring out the extremely important fact that Mrs. McClanahan's urinary tract difficulties were caused by the respondent's own conduct.

Finding of Fact No. 9

"On April 22, 1985, the complainant was not able to use the restroom for [sic] considerable length of time and as a result suffered severe abdominal pains and went to see a doctor. She was placed on medication for a urinary tract infection, and while she informed her supervisors of her discomfort, she never provided them with any medical information which would indicate that a need to use the restroom was significantly important." (Emphasis supplied.)

Mrs. McClanahan told her supervisors of the urinary tract infection and the consequences of frequent urination. She made them aware of her situation and that is all she was obligated to do. Respondent never asked or required her to bring medical documentation and the Hearing Examiner's suggestion that further documentation was needed has no basis in law nor fact. Mrs. McClanahan met her burden by telling the company of her problem. She made them aware of the situation. That is all that is necessary.

Finding of Fact No. 10

"The respondent had no policy limiting the use of restroom facilities, the job circumstances often required the use of residential facilities along the route pipeline, wooded areas or the "port-a-john" which was often located as much as a half mile away."

While this finding of fact may be accurate as far as it goes, it is irrelevant to the issues raised by complainant's charge, and it ignores the complainant's basic problem. Mrs. McClanahan's complaint was not about the unavailability of restroom facilities, nor even that restroom facilities were too far away. Her predicament was that as a flag person, in order to use these facilities she had to get someone to relieve her. She could not just walk off the road and leave her post unattended. The policy of the company, as well as practical safety considerations, required her to find somebody to replace her before she could leave. If she could not find anybody, it was her foreman's responsibility to find someone to replace her. It is virtually uncontroverted in the record that on numerous occasions she was unable to get relief to go to the restroom. This was true despite the company's knowledge of her urinary tract difficulties.

Finding of Fact No. 16

"Ms. White was retained longer than the complainant because she [sic] willing and able to perform the work of a general laborer."

There is no dispute that the complainant preferred flagging to general laborer. She preferred it because after the incident on April 22, 1985, every time she would lift a heavy object, which, as a general laborer, she would have to do periodically, she would void. However, she was willing and able to perform the work and did. Moreover, the Hearing Examiner ignores the fact

that the urinary difficulties she experienced with general laboring work were caused by the respondent's prior discriminatory act.

The complainant takes further exception to the Hearing Examiner's findings in that his findings ignore voluminous amounts of uncontroverted testimony, as well as testimony from unbiased, neutral witnesses. The Hearing Examiner gives no reason for disbelieving and discarding virtually all the evidence of complainant and her witnesses. Mrs. McClanahan asserts that her proposed findings, or variations thereof, are supported by substantial evidence. Mrs. McClanahan specifically asks the Commission to include Complainant's Findings of Fact Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 35, 36, 37 and 38.

II. OBJECTIONS AND EXCEPTIONS TO THE HEARING EXAMINER'S DISCUSSION AND CONCLUSIONS OF LAW

The Hearing Examiner erred in his conclusions of law that complainant failed in her prima facie burden of showing that she was "desperately treated" or the subject of unlawful harassment." In regard to the issue of sexual harassment, the Hearing Examiner concludes that since it appears from the record that the complainant participated in "coarse vulgar language" and that this type of language was commonplace in the work place, there was no discrimination. He further observes that "it would indeed be a strange state of affairs that a complainant who has participated in practical jokes of a sexual nature and used the same coarse

and vulgar language to which she complains of could avail herself of similar behavior by others in order to obtain monetary relief." (Emphasis supplied.)

If the graveman of Mrs. McClanahan's charge was limited to coarse and vulgar language, the the Hearing Examiner's point might have some validity. Even then, in terms of language, not one witness gave an example or was able to come up with one specific incident of complainant's use of such language. Mrs. McClanahan demonstrated that she was called "a lazy ass bitch", "lesbian", and that the word "pussy" was used in her presence. However, even if there was substantial evidence to support the Hearing Examiner's conclusion, the primary focus of her sexual harassment and disparate treatment charges had nothing to do with coarse and vulgar language. Did Mrs. McClanahan's use of vulgar language mean she acquiesced to the treatment by a male worker who repeatedly exposed himself to her, chased her around with "his wang in his hand," touched her improperly, dropped his pants in front of her, and relieved himself in her presence. Neither alleged vulgar language nor Ms. McClanahan's gifts of pornographic dolls to another individual and his wife condone, excuse, or show that she acquiesced in the outrageous behavior of her fellow employee referred to above. This conduct is rendered even more outrageous in the light of the fact it occurred in the presence of Mrs. McClanahan's foreman. The alleged acquiescence is belied moreover by her complaints to her supervisors about this behavior and their failure to do anything about it.

It is even less tenable for the Hearing Examiner to condone

filed 4/23/86

BEFORE THE

WEST VIRGINIA HUMAN RIGHTS COMMISSION

JEWELL M. McCLANAHAN,

Complainant,

vs. Docket No. ES-17-86

DAVE SUGAR CONSTRUCTION COMPANY,

Respondent.

MOTION FOR AWARD OF ATTORNEY FEES

DETERMINATION OF REASONABLE ATTORNEY'S FEES

The Fourth Circuit Court of Appeals has adopted the Fifth Circuit's delineation of the factors to consider in determining reasonable attorney fees. Barber v. Kimbrells, Inc., 577 F.2d 216 (4th Cir. 1978). The factors are:

1. The time and labor required;

2. The novelty and difficulty of the questions presented in the case;

3. The skill required to perform the legal services properly;

4. The preclusion of other employment by the attorneys due to the acceptance of the case;

5. The customary fee;

6. The type of fee charged: contingent or fixed;

7. The time limitations imposed by the client or circumstances;

8. The amount involved and the results obtained;

9. The experience, reputation, and ability of the attorneys;

10. The undesirability of the case;

11. The nature and length of the professional relationship with the client;

12. The awards in similar cases.

1. The Time and Labor Required

Plaintiff's attorney spent approximately 98.6 hours representing his client, as is documented in the attached affidavit specifying hours and dates of work on individual aspects of the case.

2. The Novelty and Difficulty of the Case

Plaintiff asserts that this suit, while not complex, involved some novel issues and was significantly difficult in that it involved an aspect of sex discrimination that has been little litigated in this state and has not been authoritatively addressed by the courts of record in this jurisdiction.

3. The Skill Required to Perform the Legal Services Properly

Plaintiff's attorney exhibited the skills necessary to plead and try the case successfully, as well as furnishing the court with memoranda of law on the complex and continually changing law of the case. The area of law requires an expertise that few attorneys possess because of the demanding, complex nature of civil rights litigation and because of the uncertainity of being compensated for the work expanded. Many attorneys who were once active in this area have curtailed or completely abandoned Title VII and Human Rights litigation because of the above reasons and

because of the conservative trend in civil rights law.

4. The Preclusion of Other Employment

The undersigned attorney had to decline other potentially lucrative cases because of this case. Since this case was fully litigated, counsel was precluded from representation of many other clients.

5. The Customary Fee

The customary fee for an attorney with the experience and qualifications of the undersigned is at least $85.00 per hour. The undersigned attorney was awarded a fee of $85.00 per hour by the Commission in Paxton v. Crabtree, Docket No. ES-287-82A.

6. Whether the Fee is Fixed or Contingent

Plaintiff's counsel accepted this case knowing of the plaintiff's indigency and anticipating fees only by award of the Commission.

7. Time Limitations Imposed by the Client or the Circumstances

This case was advanced to a full hearing on the merits requiring pre-trial discovery and hearing and a full two days of trial.

8. The Amount Involved and the Results Obtained

While a decision has not been rendered potentially this case involved anywhere from $5,000 to $75,000 depending on the nature of the relief ordered; i.e., backpay, front pay, damages for emotional distress, reimbursement for lost benefits and the like.

9. Experience, Reputation and Ability of the Attorneys

The undersigned attorney has been in the practice of law for eight (8) years and at the institution and trial of this case was a partner in the firm of HICKOK, WITHERS & ZERBE. The undersigned attorney is extremely experienced in civil rights litigation having devoted his entire law career to this field. He served two and one-half years as staff attorney and then as managing attorney for the West Virginia Human Rights Commission. He specialized in civil rights as a litigation coordinator for the W. Va. Legal Services Plan. As a full partner in the firm of HICKOK, WITHERS & ZERBE, he retained that speciality. He has successfully pursued sex, race, age and other discrimination cases in federal and state courts and before the West Virginia Human Rights Commission. He was the lead attorney in Burdette v. FMC Corporation, 566 F.Supp. 808 (N.D. W.Va. 1983), which established seminal law on sex discrimination in this federal jurisdiction. He was the attorney at the hearing level in Bradshaw v. Logan-Mingo Area Health Agency, Inc., #16015 (W.Va., 1985) which produced a definitive and precedent setting for W. Va. Supreme Court of Appeals decision on discharge cases. He

handled Swain, et al. v. Berkeley Springs Fire Department, a companion case to Waldeck, et al. v. Shepardstown Volunteer Fire Department, another definitive W. Va. Supreme Court decision. He has litigated numerous other civil rights cases in Federal and Circuit Courts and before the West Virginia Human Rights Commission.

10. Undesirability of the Case

The relative undesirability of this case is shown by the fact that with a case worth the amount indicated above the complainant had difficulty obtaining representation. The relative novelty and the complexity of the legal analysis in civil rights cases, as well as the typical indingency of clients combined with the conservative state of the law, made this case undesirable to the typical attorney.

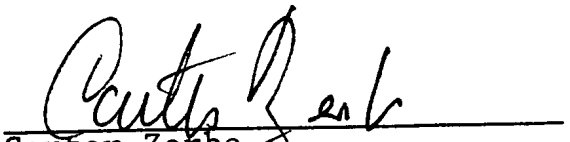
11. Nature and Length of the Professional Relationship with the Client

The attorney-client relationship between the plaintiff and the undersigned attorney has been limited to the representation of the claim brought before the Commission in this litigation. Over a year has elapsed from the first interview with plaintiff and the date of this fee application.

12. Awards in Similar Cases

There have been comparable awards in similar cases. See, for instance, the award in Curry v. Dupont, ES-59-73, amended.

JEWELL M. McCLANAHAN
By Counsel



Carter Zerbe
600 Atlas Building
1031 Quarrier Street
Charleston, WV 25301

Counsel for Complainant

5/5/86

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JEWELL M. McCLANAHAN,

Complainant,

v. Case No. ES-17-86

DAVE SUGAR CONSTRUCTION, INC.,

Respondent.

EXCEPTIONS TO COMPLAINANT'S MOTION FOR ATTORNEY'S FEES

Respondent by way of exception to Complainant's motion for attorney's fees would suggest the following:

1. All consultations with Bruce Green, who is an attorney with the West Virginia Worker's Compensation Legal Staff, would appear to have no relationship to Complainant's case and are, therefore, objected to; specifically:

November 12, 1985;
November 13, 1985;
November 14, 1985.

2. That all hours submitted be considered reduced by each claim, or all claims, upon which the Complainant is not a prevailing party.

Wherefore, Respondent moves that the exceptions as noted be found proper and consideration for the same not be permitted if Complainant should prevail on any of her claims.

DAVE SUGAR CONSTRUCTION, INC.
BY COUNSEL

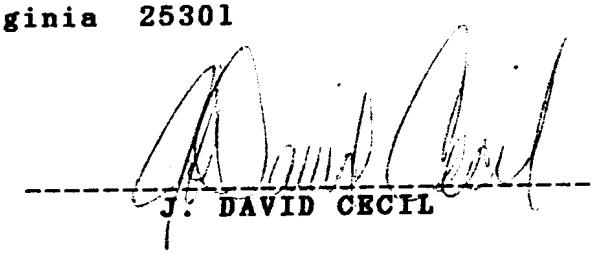
J. David Cecil
CECIL, BARTH & THOMPSON
Post Office Box 129
Charleston, W. Va. 25321
Counsel for Respondent

CECIL, BARTH & THOMPSON
ATTORNEYS AT LAW
P. O. BOX 129
KANAWHA BOULEVARD
ST AT BERKELEY
CHARLESTON
WEST VIRGINIA
25321

CERTIFICATE OF SERVICE

I, J. David Cecil, counsel for Respondent, do hereby certify that the foregoing EXCEPTIONS TO COMPLAINANT'S MOTION FOR ATTORNEY'S FEES was served upon the Complainant by mailing this 5th day of May, 1986, a copy of the same to her counsel of record, as follows:

Carter Zerbe, Esquire
600 Atlas Building
1031 Quarrier Street
Charleston, West Virginia 25301



J. DAVID CECIL

CECIL, BARTH & THOMPSON
ATTORNEYS AT LAW
P. O. BOX 129
KANAWHA BOULEVARD
'ST AT BERKELEY
CHARLESTON
WEST VIRGINIA
25321

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-Wit:

A F F I D A V I T

This day comes CARTER ZERBE, Attorney for Jewell McClanahan, and after being duly sworn, upon his oath, deposes and says:

1. That the time and effort involved in work on Ms. McClanahan's case is reflected in the attached itemized fee statement. The hearing in this matter lasted two full days while the pre-trial investigation and preparation required a number of trips to and from Clay County.

2. From the vast amount of time spent on this case, the attorney performing this list of services could not be handling other fee generating matters during those time periods.

3. The fees charged by attorney are commensurate with those for attorneys of similar experience.

4. The amounts involved in this case are still undetermined, but the complainant expects to prevail on the major issues involved.

5. There were no strict time limitations in this matter imposed by the client or by the circumstances.

6. The attorney handling this matter has practiced before Circuit Courts throughout the State and has appeared on a number of occasions before the Supreme Court of Appeals of West Virginia. He has appeared before many administrative agencies and has handled cases before the United States Federal District

Court. As disclosed in Plaintiff's Motion for Attorney Fees, said attorney has vast experience in the field of civil rights and discrimination.

7. The relationship between the undersigned attorney and Ms. McClanahan began in 1985 and has been on-going until the present time.

8. Because of the indingency of the client and undersigned attorney accepted this case with the hope and anticipation that respondent could be made responsible for the fees and costs.

And further Affiant saith not.

Carter Zerbe

CARTER ZERBE
Attorney for Jewell McClanahan

Taken, subscribed and sworn to before me this 23rd day of April, 1986.

My commission expires July 1992.

Anne B. Phillips

Notary Public

Carter Zerbe

Attorney at Law

600 Atlas Building
1031 Quarrier Street
Charleston, WV 25301
(304) 345-2728

RE: Jewell McClanahan v. Dave Sugar Construction Co.
Docket No. ES-17-86

Attorney: Carter Zerbe
Time Rate: $85.00/hour

FEE: For Services Rendered as Follows:

Date	Services	Time
9/16/85	Conversation with client	.2
9/26/85	Interview with client; call from hearing examiner	1.0
9/28/85	Calls from client; calls to and from Emily Spieler	.5
10/2/85	Calls to and from client	.3
10/3/85	Review file	1.0
11/1/85	Interview with client; visit to HRC; preparation of Interrogatories	2.5
11/4/85	Meeting with Katina	1.0
11/5/85	Meeting with client	.2
11/7/85	Preparation of Answers to Interrogatories	1.5
11/8/85	Calls to Lou, Pat Williams, David Cecil and John Richardson	1.0
11/10/85	Preparation of Answers to Interrogatories and Motion to Continue	1.5
11/10/85	Interview with client; work on interrogatories; reserach	3.0

Date	Services	Time
11/11/85	Preparation of interrogatories; motion for continuance; consultation with opposing counsel, investigators and client	3.0
11/12/85	Consultation with Bruce Green	.5
11/12/85	Call from client	.3
11/12/85	Telephone call to Bruce Green and Katina	.5
11/12/85	Interview with client; calls to doctors; talk with investigators	1.5
11/13/85	Trial preparation with client; consultation with Bruce Green	1.5
11/14/86	Preparing for case with client; viewing sight with client; consultation with Pat Mooney, Lou Newberger	2.5
11/14/85	Discussion with Bruce Green	.5
11/15/85	Preparation for preliminary hearing	4.0
11/15/85	Meeting with Katina RE: Jewell	3.8
12/14/85	Call to Katina	.2
12/18/85	Consultation with Katina	.5
12/30/85	Meeting with client	.7
1/6/86	Working on file and subpoenaes	.3
1/10/86	Meeting with client; pre-trial hearing	1.5
1/12/86	Call to client	.2
1/13/86	Supplemental Answers to Second Set of Interrogatories; witness list; review of file	2.0
1/13/86	Meeting with consulting counsel	.4
1/14/86	Call from Harry Graham	.4
1/16/86	Interview with Dr. Lewis	1.8
1/16/86	Interview with Dr. Schles	1.0

Date	Services	Time
1/17/86	Call to Katina	.2
1/20/86	Preparation of witnesses	3.0
1/21/86	Preparation for direct and cross examination	2.5
1/21/86	Interview with witnesses and client	3.5
1/22/86	Call to witness Joe McClung	.2
1/22/86	Call to Katina; interview with witness; call to client	1.5
1/25/86	Preparation of witnesses for hearing	3.0
1/27/86	Discrimination hearing and pre-hearing preparation	4.0
1/28/86	Pre-hearing preparation; hearing	7.0
1/28/86	Preparation and trial	4.0
1/28/86	Preparation for hearing	1.5
1/29/86	Preparation of rebuttal; review of testimony and dictate subpoenas	1.0
1/30/86	Preparation for rebuttal	1.0
3/7/86	Hearing and preparation	3.0
3/31/86	Reading transcript and dictating proposed findings	2.0
4/1/86	Working on proposed findings and conclusions	2.0
4/2/86	Preparation of Findings of Fact and Conclusions of Law	.3
4/11/86	Final draft and revision of brief	4.0
4/12/86	Revision and proposed findings	1.9
4/13/86	Working on proposed findings of fact and conclusions of law	6.0
4/14/86	Working on proposed findings of fact and conclusions of law	.2

Date	Services	Time
4/16/86	Writing and research on proposed findings of fact and conclusions of law	6.0
	TOTAL	98.6

98.6 hours at $85/hour = $ 8,381.00

Expenses:

Long Distance Calls		$ 24.20
Photocopies		26.94
Postage		1.95
	TOTAL	$ 53.09

CERTIFICATE OF SERVICE

I, CARTER ZERBE, counsel for Complainant, do hereby certify that I have this 23rd day of April, 1986, served a true and exact copy of the foregoing "Motion for Award of Attorney Fees", upon counsel for respondent, J. David Cecil, Kanawha Blvd. West and Berkeley Street, Charleston, West Virginia, 25302, by depositing copy of same in the U.S. Mail postage paid and sealed in an envelope.

Carter Zerbe