STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
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Quewanncoii C. Stephens
Executive Director

23 August 1990

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AUG 29 90

Re: Osborne v. Advance/Gregg Security
Docket No. ES-110-88

Dear Parties and Counsel:

Herewith please find the Final Order of the West Virginia Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 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 a review of this Final Order.

Sincerely,

Quewanncoii C. Stephens
Executive Director

Enclosures

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

cc: Secretary of State

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 Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., 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, landlord, etc., 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.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RETHA A. OSBORNE,

Complainant,

v. DOCKET NO. ES-110-88

ADVANCE/GREGG SECURITY,

Respondent.

FINAL ORDER

On 14 March 1990 and 15 August 1990 the West Virginia Human Rights Commission reviewed the Recommended Findings of Fact and Conclusions of Law filed in the above-styled matter by hearing examiner Donald Pitts.

After consideration of the aforementioned, and all exceptions filed in response thereto, the Commission has decided to, and does hereby, adopt said Recommended Findings of Fact and Conclusions of Law as its own, with no modifications.

Accordingly, it is the ORDER of the Commission that the hearing examiner's Recommended Findings of Fact and Conclusions of Law be attached hereto and made a part of this Final Order.

In keeping with the recommendation of the hearing examiner, counsel for the complainant shall have twenty (20) days from the date of this Order to submit a detailed

affidavit regarding attorney's fees. Counsel for respondent shall have ten (10) days from receipt of said affidavit to file a reply thereto.

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.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 24th day of August, 1990, in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RETHA A. OSBORNE, COMPLAINANT,

VS: DOCKET NO. (S) ES-110-88

ADVANCE/GREGG SECURITY, RESPONDENT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. The Complainant, Retha A. Osborne, is a female. Complainant was hired by respondent on October 25, 1984 as a dispatcher at respondent's Gary facility. Complainant received training as a dispatcher at the time she was hired. Complainant was hired by Respondent as a Guard I, at a pay rate of _____ per hour.

Respondent is a corporation that provides guard service under contract for clients throughout the United States. Respondent has a contract with U. S. Steel Mining Co., Inc., to provide guard services at the latter's coal mines and related surface facilities located in and about the town of Gary, West Virginia.* Respondent provides guard services at the Gary facility through vehicular patrols at five locations and a dispatch unit which maintains communications with the vehicular patrols. Individuals employed by respondent who provide vehicular patrols are referred to as patrol guards and individuals employed in the dispatch unit are referred to as

*For purposes of these findings, the operations of respondent under the U. S. Steel Mining Agreement will be referred to as thhe "Gary facility."

dispatchers. The five different discrete areas encompassing the Gary facility are the Gary Patrol, the No. 9 Patrol, the No. 50 Patrol, the No. 14 Patrol and Seneca Patrol. Each patrol and the dispatch unit has a supervisor who has the rank of either Sergeant or Lieutenant. There is a captain who has supervisory responsibilty over the entire Gary facility of respondent. The employees of respondent are not subject to any collective bargaining agreement or employment contract with respondent.

All of respondents employees, whether on patrol or dispatch recieved eight hours of training for the respective job.

It was not unusual for dispatchers to cross train on patrol for two (2) reasons: 1. to become knowledgable of the mine sites and, 2. to be available to fill in on patrol routes to receive additional pay.

Although this cross training was generally required to be done on the employee's own time, patrol routes were often learned by dispatchers during their regular shifts when patrol guards would cover the dispatching duties while the dispatcher would ride around with another patrol guard to learn the route. In fact, complainant availed herself of the opportunity to learn one of the patrol routes when Phil Dillon filled in for her as dispatcher. Shirley Nance, one of the complainant's witnesses is the only female to testify who was initially hired as a patrol

guard and she testified that she received eight hours training for that job, the same amount of training as males received. According to Ms. Nance, if she wanted to learn a patrol route other than the one for which she was hired, she learned it the same as every other employee, on her own time. Becky Blevins, another of complainant's witnesses, testified that she was trained by the respondent as a dispatcher but also trained on her own time to learn the patrol routes in order that she could fill in as a patrol guard "so I could make a little more money." In fact, according to the testimony of Ms. Blevins, two male employees who were patrol guards received no training by respondent as dispatchers even though they worked as dispatchers on occasion. There were no male guards required to cross train as dispatchers.

Complainant received a promotion in February of 1985 to corporal and within her dispatch unit only two promotions other than her own were made during her employment. One of those promotions went to a female and one to a male employee. The promotion of the male employee occurred after the complainant and the only female employee, Shirley Nance, had been on the job for only four months. The male employee, Milton Smallwood, was promoted in February 1985 to Lieutenant and assigned to supervise the dispatch employees of respondent. Smallwood was a supervisor at the Gary facility, he had kept time sheets, he had been

captain of a mine rescue team, he had over ten years experience in the coal industry and he had attended college. At the time of Smallwood's promotion, complainant's work experience was that of a cashier at a food market and a part-time cashier at a department store.

Smallwood resigned in the spring of 1987. On April 16, 1987, Mike Bryant, who was already a Lieutenant on the No. 9 Partrol, was transferred by Phil Dillon to Smallwood's former duties of day shift dispatcher. Phil Dillon had discussed with Terry Cartwright, a U.S. Steel Mining Company foreman, which was a violation of the employee handbook for which complainant had been discharged, that he was going to place Bryant over the dispatchers.

Mike Bryant was a supervisor at respondents Gary facility and had worked as a dispatcher.

Following the transfer of Mike Bryant to fill the position of supervisor of dispatchers, Betty Greer and Dorothy Allen, female employees in the dispatch unit, decided to complain to respondent's management about the placement.

After Ms. Allen complained to Phil Dillon but received no satisfaction, Betty Greer contacted Elwood Brewer, Phil Dillon's immediate supervisor, and requested a meeting to discuss their complaint. Mr. Brewer met with Betty Greer, Dorothy Allen, Shirley Nance and two male employees in May of 1987. The Complainant was not at the meeting. Following that meeting,

during which the female employees expressed their dissatisfaction over the transfer of Lt. Bryant, Mr. Brewer advised the employees that he would discuss the concerns of the female dispatchers with his supervisor, John Bensey. Mr. Bensey decided to post a notice in order that anyone interested in the job of supervisor could bid for the position. Several individuals signed the sheet indicating an interest in the job. Mr. Brewer talked with the individuals who signed the sheet and Mr. Bensey reviewed their personnel folders. On what, Mr. Brewer evaluated the individuals is not clear, other than their ability to communicate and who in his opinion was most suitable. Mr. Bensey felt the job should be awarded to a female. He decided that Ms. Allen was the most qualified. Mr. Bensey decided that day dispatch job should go to Dorothy Allen.

After Dorothy Allen had been performing the job of day shift dispatcher for a period of time with the additional duties of preparing work schedules and keeping time records, Mr. Bensey promoted her to the position of Lieutenant in July of 1987. Complainant never voiced any dissatisfaction with management over the promotion of Dorothy Allen. In fact, she testified that she did not recent the fact that Ms. Allen received the job or the promotion. Complainant did, however, complain to Ron Osborne, the General Manager of U. S. Steel Mining Co., Inc. Her written complaint to Mr. Osborne was over the failure of the respondent to promote by seniority and the respondent's position that she

was an employee at will.

Complainant raised the issue of respondents failure to promote females. Her complaints also related to a company policy of not promoting by seniority.

In early 1985, the recognized client representative at respondent's Gary facility was John Isherwood who was in charge of the U. S. Steel Mining Company's accounting department. Mr. Isherwood was replaced by Gary Gadley as the recognized client representative and he also was in charge of the accounting department. Mr. Gadley was the recognized client representative at the time of complainant's discharge. It is not clear who was the client contact.

The evidence supported the fact that over the ensuing three to four years there was contact with several client representatives, however, complainant knew at the time she wrote to Ron Osborne that such conduct was forbidden. In fact, complainant stated in the letter that she would probably be fired but she did not care because she believed that the respondent's contract with U.S. Steel Mining Co. was soon to expire anyway or that the mines would be leased to Ted Osborne.

Mr. Ron Osborne
c/o Main Office
US4 Gary, WV 24836

Dear Mr. Osborne:

My name is Retha Osborne. I have worked on the Guard force since October, 1984, when Gregg Security took over your company

as a client. I would like to know if US4 has anything to do or say about who gets "hired," who gets "fired," and who gets "advancement."

I have been Cpl. on the Dispatch Unit since February 1985 and everytime someone quits and I am suppose to advance to a Higher Rank they either move a Patrolman in over us or a part time person is promoted. The last time this happened I was off on a sick leave because of major surgery. I came back on July 10 and no one mentioned to me that on that very date someone who had been a part time employee was advanced to Lieut. I did not find out until July 13 when I reported to work on Hoot Owl Shift and I learned the information from the other Guards.

Mr. Brewer, Supervisor for Advance Security made a statement that "There is nothing you or anyone else can do. You might as well learn to live with our decision." He also said, "We could bring anybody off the street and put them in the Lieut. position if we wish to."

It doesn't seem to matter how dedicated we have been to the company by coming to work when no one else could make it through floods and snow and other threatening conditions. It doesn't seem to matter that I had to go to EMT Recert Classes on my own time in the evening and then work midnights on EMT Duty at the Cleaning Plant. And then the Company says they can bring someone in off the street and be my supervisor.

I know that by talking to you Advance Security will most likely terminate my job. But our contract is soon to expire especially if Ted Osborne takes over or leases the Area Mines. So my discussing this issue may not amount to anything, but if you could contact Mr. Brewer amd tell him how I feel about their company's policy because he already made it clear that if I had any complaints I'd lose my job.

My complaint is not what shift they put me on. I have worked every shift and I've even worked weekends when no one else would Patrol, but what I care about is this - everytime I fail to advance to a higher rank, I lose that increase in wages, as well as the Officers under me fail to advance also. Several of us in the Guard Force have been overlooked every since we began working for your company.

However, I have never allowed my feelings toward advance, Gregg Security, interfere in my ablilty to perform my duties as required by you, our client.

Sincerely,
Retha Osborne
Cpl. Dispatch Unit
US4, Gary Divisions

In a July 28, 1988 response to complainant's letter, William Myers, U.S. Steel Mining Co., Inc.'s Manager of Employee Relations stated:

> "U. S. Steel Mining Co., Inc., does not exercise any control or in any way influence Gregg Security in matters related to personnel, employment, promotions or any other conditions of employment."

A copy of U. S. Steel Mining's letter in response to claimant's letter was delivered to Phil Dillon by Mr. Myers along with a copy of complainant's letter. Mr. Dillon forwarded both letters to John Bensey.

Complainant has attempted to justify her letter to Ron Osborne by claiming that he was the recognized client representative. Claimant was fired for writing a letter to an official of the client. This letter was not a communication made in the normal course of business, but a deliberate and intentional act, whose purpose and intent was not totally devious, but was against respondents policy.

The decision to discharge complainant was made by John Bensey after he reviewed the copy of the letter written by complainant to the client. This decision was made solely by John Bensey without consultation with any other manager of the respondent. Allegedly, this was not the first time an employee of respondent has been fired for unauthorized contact with the client complaining about respondent's employment policy. It was alleged that in 1984, a male employee of the respondent was discharged for unauthorized contact with the client.

In the letter of discharge from Mr. Bensey to the complainant, she was also cited for inappropriate comments to her superior office, which charge was later dropped.

The complainant had been promoted to Corporal on February 2, 1986. Her rate of pay at the time of her termination was Five

Dollars, Ten Cents ($5.10).

Respondent's male employees who were hired at about the same time, or later, than Complainant, received promotions and raises with more frequency and more quickly than Complainant and other female employees of Respondent.

Respondent's promotion practice was as follows: Male employees were promoted within their respective units, but were also promoted outside of the unit into supervisory positions over the all female dispatch unit; female employees were only promoted within their discrete unit. Among the male employees, promotions were based on seniority; promotions between the two sexes, however, were not based on seniority.

Of the five female employees who bid for the open position, Complainant had the most seniority.

Dorothy Allen, was chosen to fill that position despite the fact that at the time she bid for the position, she was a part-time employee. Her appointment was not an immediate promotion, instead she was placed on probation to determine whether she could get along with Philip Dillon, her supervisor. Dillon had expressed dissatisfaction that his choice for the job had not been chosen, and the purpose of the probationary period was to determine if Dillon and Allen could get along and work together.

No male employee had ever been placed on probation following an assignment, transfer, or promotion.

Respondent's promotion of Dorothy Allen was an aberration of

the standard policy. There are no written guidelines regarding basing promotions on seniority, there was an unwritten practice followed for the promotions of males within all male units, based on seniority.

Female employees were not offered the same training opportunities as male employees. Although female employees were given eight hour training in dispatch at the beginning of their employment on company time, they were required to familiarize themselves with the sites on their own time. Male workers were paid for learning the sites that they patrolled. Further, female employees were required to familiarize themselves with the sites even though they were working as dispatchers.

Respondent's male employees routinely used profanity that would constitute indecent behavior under the Security Officer's Guide but were not terminated or reprimanded.

There is no merit to complainants allegation of sexual harassment as a result of statements testified to regarding lack of make up, type of clothes or complainants ability to bear children following her surgery.

Complainants allegations of having suffered psychological and emotional damages as a result of her termination was never substantiated by proper evidence.

CONCLUSIONS OF LAW

1. In a disparate treatment case under the West Virginia Human Rights Act, the burden of persuasion remains always with the complainant, who must prove the allegation by a preponderance of the evidence. The burden of persuasion will never rest with the respondent. See Texas Department of Community Affairs v. Burdine, 450 U. S. 249 (1981); Bradsher v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E. 2d 77 (W. Va. 1985); Shepherdstown V. F. D. v. State of West Virginia Human Rights Commission, 309 S. E. 2d 342 (W. Va. 1983).

2. The evidentiary development of the case follows a three-step process. First, the complainant must prove by a preponderance of the evidence a prima facie case of discrimination. If the complainant succeeds in establishing a prima facie case, the burden of production then shifts to the respondent to articulate some legitimate non-discriminatory reason for the respondent's termination of the complainant. Once the respondent has articulated a non-discriminatory reason, the complainant then bears the burden of proof of proving by a preponderance of the evidence that the legitimate reason offered by the respondent was pretextual and that the true reason for the decision was an intent to discriminate against complainant because of her protected status. Burdine, supra; Bradsher, supra; Shepardstown, supra.

3. In order to establish a prima facie case of employment discrimination, a complainant must prove by a preponderance of the evidence that:

(a) The complainant was a member of a protected class;

(b) the employer made an adverse decision concerning the complainant; and

(c) but for the complainant's protected status, the adverse decision would not have been made.

Bradsher, supra. In this case of an alleged discriminatory discharge based on sex, the complainant must establish a prima facie case by providing that:

(a) she was female;

(b) she was discharged from her employment with respondent;

(c) but for her sex, she would not have been discharged.

4. If the complainant succeeds in establishing a prima facie case of discrimination, the respondent must then articulate a legitimate non-discriminatory reason for its decision to discharge the complainant. The reason need not be a particularly good one, and it need not be one which a judge or jury would have acted upon. The reason can be any other reason except that the complainant was a member of a protected class. Mingo County

Equal Opportunity Coucil et al. v. State of West Virginia Human Rights Commission and et al., No. 18191 (W. Va. Nov. 30, 1988); Conaway v. Eastern Associated Coal Corporation, 358 S. E. 2d 423 (W. Va. 1986).

5. In this proceeding, complainant failed to prove a prima facie case of sex discrimination in that she was unable to establish that there is any probative evidence linking her discharge to her sex. Thus, she was unable to satisfy her prima facie burden that, but for her sex, she would not have been discharged. Although complainant satisified the first two elements necessary to prove a prima facie case, she failed to prove the last element. Complainant was not discharged because she was a female, she was discharged because she engaged in conduct which was considered insubordinate by her employer. By writing a letter to the customer of her employer complaining of respondent's employment practices, complainant knew, as she acknowledged in her letter, she was engaging in conduct which could result in her discharge. There was no evidence introduced by complainant that she would have been treated any differently, if she had been a male. Complainant did attempt without success, to show that males had engaged in similar conduct without being discharged. The only other testimony presented by complainant concerning similar conduct related to an incident in 1985 when she had been instructed by a U. S. Steel

Zick v. Verson Allsteel Press Co., 42 EPD 36, 746 (N.D. Ill. 1986) aff'd., 43 EPD 37, 275 (7th Cir. 1987) ("ADEA is about age discrimination, not shabby or numbskull employment practices"); Donohue v. Custom Management Corp., 42 FEP Cases 1669, 1673, n. 3 (W. D. Pa. 1986) (Plaintiffs' attempt to use the ADEA as a vehicle to review the soundness of legitimate business decisions is clearly inappropriate"); Loeb v. Textron, 600 F. 2d 1003, 1012 n. 6 (1st Cir. 1979) ("While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a project for illegal discrimination").

11. The promotion of Dorothy Allen, who had less seniority than complainant, to the position of Lieutenant, was not a basis for finding complainant was discriminated against because Dorothy Allen is a female and in the same protected class as complainant. In addition, respondent does not have to prove that persons promoted over complainant had superior objective qualifications for the position. While such objective factors may provide a legitimate explanation of the decision, there are also other non-objective factors which an employer may legitimately consider in making such decisions, such as enthusiasm, interest, motivation, ability to learn, promotability and past performance. Non-objective reasons such as these may be properly considered by respondent in making promotional decisions. Conaway v. Eastern

against the complainant. See Schriedel v. Golf Digest/Tennis, Inc., 44 F.E.P. Cases 599, 602 (N.D. Ill. 1987) ("The [employee's] perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant."); Dodd v. Singer Co., 669 F. Supp. 1079, 1084 (N.D. Ga. 1987) (". . . it is only Singer's perception of Dodd's performance or abilities that are relevant to a determination of discriminatory intent."); Smith v. Flax, 618 F. 2d 1062, 1067 (4th Cir. 1980) (Smith's perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant.").

10. Even if John Bensey was in error in his belief that complainant was insubordinate or even if that decision were unfair and mistaken, that does not prove that the reasons for complainant's discharge were a pretext because he had an honest belief that the facts upon which he based his decision were true. Bechold v. IGW Systems, Inc., 817 F. 2d 1282, 1284, (7th Cir. 1987) ("If Black erred in discharging Bechold, that would not prove that age was a determining factor in his discharge. We will not reevaluate business decisions made in good faith."); Causey v. K&B, Inc., 44 FEP Cases 982, 988 (E.D. La. 1987) ("[T]he correctness of the employer's belief is not an issue: Even if the employer wrongly believed the employee to have violated its policies, if the employer acted upon such a belief, it cannot be held guilty of racial discrimination." See also

complainant could be fired at any time with or without cause and no implied contract of employment existed between respondent and complainant.

8. Although complainant stated in her complaint that the date of the incident resulting in the alleged discrimination by respondent was August 7, 1987, complainant was permitted to introduce testimentary evidence of events going back to her date of employment, i.e., October 25, 1984. In determining whether complainant was treated in a discriminatory manner, however, the events occurring prior to 180 days preceding the filing of the Complaint cannot be the basis of a finding of discrimination because the claims relating to those events are barred by the statute of limitations. W. Va. Code 5-11-10. See McJunkin Corporation v. West Virginia Human Rights Commission, No. 17932 p. 1, n. 10 (W. Va. April 22, 1988) The filing of a timely charge is a jurisdictional prerequisite. West Virginia Human Rights Commission v. United Transportation Union, Local 655, 167 W. Va. 282, 280 S. E. 2d 6533 (1981).

9. The testimony relating to the conduct of respondent's supervisors and former co-workers is not relevant to the motive underlying respondent's decision to discharge complainant because the sole decision maker was John Bensey, regional manager of respondent. It is only the perception of the managerial employees involved in the decision-making process that is critical in determining whether the respondent has discriminated

In Cook v. Heck's, Inc., 342 S. E. 2d 453 (W. Va. 1986), an employee handbook contained a list of rules that was discribed in the handbook as a complete list of offenses which would result in termination. The Court found that the employee handbook formed the basis of a unilateral contract of employment because it contained a definite promise by the employer not to discharge covered employees except for the specified reasons. In its opinion, the Court quoted with approval Ruch v. Stawbridge & Clothier, Inc., 567 F. Supp. 1078, 1081 (E.D. Pa. 1983) when it stated that "(no) unilateral contract arises merely by the fact that (the employer) has alerted its employees that certain conduct may form the basis of a discharge." Cook, 342 S. E. 2d at 459. The Heck's decision was interpreted in Zeedick v. Herbert J. Thomas Memorial Hospital, Civil Action No. 2: 85-0787 (S. D. W. V. June 5, 1986), there the court held that under West Virgnia law where there is no promise in the employee handbook that a person would be discharged only for specified reasons "the rule of law is employment at will and there is no action on the basis of employment contract." Slip Opinion p. 4. See also Erskine v. Union Carbide Corporation, Civil Action No. 2:87-1409 (S.D. W. Va. September 27, 1988).

Therefore, based on the law of this state and the lack of a promise not to discharge the complainant except for specified reasons set forth in the Security Officer's Guide, the

Mining Co. employee, her employer's customer, to write to the recognized client representative and explain why that employee had broken into an office of the respondent to obtain keys to a vehicle.

6. Even assuming, arguendo that complainant had proven a prima facie case, the respondent has come forward with a legitimate non-discriminatory reason discharging complainant. It is undisputed that complainant wrote to the customer with a complaint against the respondent concerning the respondent's promotion of another female employee with less seniority than complainant to a supervisory position over complainant. The complainant failed to meet her burden of proof by a preponderance of the evidence that the reason for her discharge was pretextual and not the true reason, and that the true reason for her discharge was an intent by respondent to discriminate against her because of her sex. At all times, the complainant has the ultimate burden of proving that, but for her sex, she would not have been discharged. Conaway, supra; Bradsher, supra; Shepherdstown VFD, supra.

7. The Security Officer's Guide distributed to respondent's employees, including complainant, sets forth a list of "violations which may result in immediate termination" but went on to state that the "offenses listed above are by no means the only ones which will result in disciplinary action."

Associated Coal Corp., supra; Texas Department of Community Affairs v. Burdine, 450 U. S. 248 (1981); Furnco Construction Corporation v. Waters, 438 U. S. 567 (1978); Fair v. AMP, Inc., 632 F. Supp. 561 (W.D.N.C. 1986); Warren v. Halstead Industries, 613 DF. Supp. 499 (M.D.N.C. 1985), aff'd., 835 D. 2d 535 (4th Cir. 1988), cert. denied, 101 L. Ed.2d 907 (1988). Furthermore, Complainant admitted that the promotion of Dorothy Allen was not objectionable to her.

11. In addition to the discriminatory discharge, complainant's initial complaint alleged discrimination based on respondent's failure to promote women, failure to offer women the same training opportunities as men.

12. Although the date of incident cited on complainant's initial complaint was listed as August 7, 1987, that date refers to the most recent act of discrimination. Complainant charged respondent with the discriminatory practice of promoting males over females, and of failing to provide women training opportunities that men were provided. Such a practice, if proven, would constitute a continuing violation of the West Virginia Human Rights Act. See West Virginia Human Rights Commission v. United Transportation Union, 280 SE 2d (W. Va. 1981).

13. In United Transportation Union, the court adopted the three part test in Montgomery Ward v. Fair Employment Practices

Commission, 49 Ill. App. 3d 796, 8 Ill. Dec. 297, 365 NE 2d 535, 541-42 (1977), reh. denied, 365 NE 2d 542. Those three factors required to identify continuing violations are:

1. Showing that the employee was an actual victim of the discriminatory act;

2. This discrimination placed the employee in an inferior status due to subsequent application of an employment such as seniority; and

3. That the effects of the past discrimination continued at least to a date within the limitation period before the filing of the charge. Montgomery Ward, supra.

14. So, there had been a continuing violation by the respondent: 1. Complainant was hired and was given a minor promotion only one time during her period of employment and most other female employees never enjoyed any promotion; 2. Male employees hired at the same time or later were promoted before, and more frequently than complainant and other female employees and have achieved higher seniority, and a higher rate of pay; and 3. Complainant's seniority rating, derived from a period when she, and all other female employees were prohibited by sex from equal employment opportunities, which existed at the time these charges were filed.

15. Complainant proved by her testimony and evidence that women were and are discriminated against in the promotion and training practices of respondent as compared to the men.

The Complainant is further entitled to receive back pay calculated from the time she should have been promoted based on the promotion of those males hired at or near the time that the Complainant was hired. Such back pay shall be calculated up until the date of her dismissal. See Sears v. Atchison, Topeka & Santa Fe Railway 19 FEP 1007 (D. Kan. 1978) aff'd in part, re'd in part, and remanded, 645 F. 2d. 1365 (10th Cir. 1981); Chrapliwy Uniroyal, Inc. 458 F. Supp. 252 (N.D. Ind. 1977); and Patterson v. Patterson v. American Tobacco Co. 535 F. 2d 257 (4th Cir.), cert. denied, 429 U. S. 920 (1976). See also Albemarle Paper Co. v. Moody 422 U. S. 405 (1975).

O R D E R

Based upon the foregoing findings and conclusions, it is hereby ORDERED and DECREED that:

(1) Complainant is not entitled to prevail on the issue of discriminatory discharge. The Complainant having failed to establish a prima facie case and failing to prove that respondent's articulated reason was pretextual.

(2) Complainant is not entitled to prevail on the issue of sexual harassment. The Complainant failing to show any conversation, acts or even subtle sexual advances, innuendos or touching, that would support sexual harassment.

The Complainant is entitled to prevail on the issue of illegal discrimination in promotion and termination of female employees.

Respondent shall cease and desist from its current practices of failing to promote women on the same basis that it promotes men, by failing to give women the same training opportunities that it does men. The respondent shall use only specific objective eligibility criteria applied to prospective promotions without regard to sex and which shall not have the effect of disqualifying members based upon their sex. Respondent shall provide equal training opportunities for women and men in its employ.

The Complainant is entitled to recover Two Thousand Two Hundred ($2,200.00) Dollars for back pay differential income from the date of the first male hired at or near the time of her employment to the date of her dismissal, as if she would have been promoted along the same line as those male employees to the date of her dismissal.

The complainant is entitled to further relief in the form of fringe benefits, which include accrued vacation and sick leave, holidays, personal leave, sickness and accident benefits, and benefits relating to medical and pension coverage for the same period.

The Complainant shall recover her costs, and attorneys' fee shall be awarded in the amount of Fifty ($50.00) Dollars per hour for time expended by complainants counsel on the issue of discrimination in promotions and training of respondents female employees.

The Complainant is entitled to recovery Five Hundred ($500.00) Dollars compensatory damages for humiliation and embarrassment.

The Respondent shall comply with the Commission's order within thirty days from receipt of the order by submitting to the commission a certified check made payable to the Complainant for payment in full to the Complainant.

Recommended:

HEARING EXAMINER

Date: 6/16/89

ENTER this _____ day of _____, 1989.

Chairperson, West Virginia