BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DEBBIE L. (KESNER) PRATT AND
JEANETTE F. (LANTZ) TURNER,

Complainants,

v.

DOCKET NUMBERS: ESREP-293-91
ESREP-294-91

AMERICAN LEGION POST #78 AND
KARL BOBO,

Respondents.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

A.

BOILER PLATE

This matter came on for hearing on 19, 20 and 21 May 1993 in the Grant County Courthouse, Petersburg, West Virginia. The complainants appeared in person. The Commission appeared by Deputy Attorney General Mary C. Buchmelter. Respondent Karl Bobo appeared in person; respondent American Legion Post #78 appeared by its personal representative William Kile (its then current Commander); Both respondents also appeared by their counsel, Larry W. Blalock and Tammy Mitchell-Bittorf.

I have read the parties' proposed findings of fact and conclusions of law and the argument contained in their briefs. Although I have not re-read the entire transcript, I have referred back to it and to my contemporaneously recorded notes as needed. Finally, I have considered the oral arguments of the parties during

our 18 August 1993 teleconference and the written responses to my letter summarizing that teleconference (which letter is dated 19 August 1993).

Where the testimony of any witness is not consistent with the findings of fact as stated herein, that testimony was not credited. Where any finding of fact should have been labeled a conclusion of law or vice versa, it should be so read. The findings of fact are based upon the evidence produced taking into account each witness' motive, state of mind, strength of memory and demeanor while on the witness stand and considering the plausibility of the evidence in view of the other evidence of record.

B.

FACTUAL AND ANALYTICAL OVERVIEW

This claim began with the respondent offering to stipulate that Karl Bobo had engaged in conduct which amounted to sexual harassment; the respondent has again invited me to accept that stipulation; I now do. That Mr. Bobo is a blatant harasser of women employees of the Post is obvious.

The Post's main problem is that it is a non-traditional employer with diffuse management authority which is passed around frequently from member to member with no clear responsibility and no effective means of redressing problems that arise. The fact that the "good old boys" who are members have well and faithfully served their country in times of war, and that they see themselves as just trying to have a little fun, absolutely does not relieve them of the responsibility

of complying with civil rights (and other relevant) laws. Persons who come to them for employment are entitled to the same protections as are any other workers. This includes OSHA laws, wage and hour laws, environmental laws, labor laws and the like. These are the responsibility of those who do business.

It is respondent's chief contention that it is not an employer within the meaning of the Human Rights Act. The law in this area is undeveloped in West Virginia, with the Human Rights Act providing simply that an employer is an entity which has 12 or more employees. In keeping with the Commission's duty to construe the Act broadly to accomplish its remedial purpose, I hereinafter find that the Legion is an employer because it had 12 employees during the complainants' tenure. Title VII provides specific and restrictive guidance on how the number of employees must be counted while the HRA has no such limiting language. Thus, I construe the Act liberally in favor of the complainants and find that the Legion is an employer.

While I do find in favor of the complainants herein, and while it is plain that Bobo forced them to run a gauntlet of sexual abuse bordering, at times, on criminal conduct (See, Code Section 61-8B-9 and Section 61-8B-1(c)(6)) I nevertheless felt that the complainants were, at times, attempting to "gild the lily". They plainly wanted to "have it both ways" on damages as they want to avoid tax liability for receiving unreported income but want, at the same time, to have had greater earnings so as to increase the amount of their damages. Further, while Debbie Pratt was believable when she began to testify, I found it rather remarkable that she had neglected to testify during her earlier deposition that Bobo had fondled her buttocks. This is

too major an incident to have forgotten during the deposition and only to have recalled on subsequent reflection.

During Turner's testimony, I also wrote in my notes, "Why did they lie about who typed the letter." (Complainant's exhibit 6.) It seemed evident to me that the plaintiffs had committed to an untrue version of how and by whom their letters had been prepared and that they stuck to their story even though it was obviously false. Notwithstanding that I thought that both Turner and Pratt were a little loose with the facts, I was convinced by a preponderance of the evidence both that they were subjected to sexual harassment and that they were subjected to acts of reprisal for complaining about it, and they will not be denied a recovery for overstating their cases.

On the other hand, I found numerous of the Legion's witnesses to be bold-faced liars. Throughout my notes from Irene Smith's testimony I have repeated indications that she was totally lacking in credibility. She had an outrageously inflated sense of her worth, she was inappropriately angry throughout her testimony and by the end of her testimony I wrote, "She is lying, lying, lying."

For example, she claimed that she didn't know that Turner and Pratt quit because of Bobo's sexual harassment. I wrote, "This is outrageous testimony--how could she not know they quit over sexual harassment or claimed sexual harassment?" I also wrote, "She says she didn't know until months later that there were charges of sexual harassment, but she admits that Kesner delivered her letter of resignation to her." Kesner's letter of resignation (complainant's exhibit 6) explicitly cited sexual harassment as the basis for her

resignation. Ultimately Smith had to fall back to the ridiculous claim that the letter of resignation she received was not the same letter that was admitted as complainant's exhibit 6 despite that C-6 appeared in both respondent's and complainants' files. Elsewhere I wrote, "She is shaking like a leaf." I found her testimony totally lacking in candor and her totally lacking in credibility.

I likewise found Bill Kile's testimony to be lacking in credibility, although he was neither angry nor defiant like Irene Smith. Kile's testimony felt more like that of someone who had taken conflicting oaths, with the first being an oath of loyalty to an organization, which oath was of greater importance to him than his subsequent oath to tell the truth during his testimony. He appeared nevertheless to find it uncomfortable to favor one oath over the other. He appeared to be uncomfortable lying while Mrs. Smith appeared to relish it.

Bobo displayed somewhat remarkable candor to the extent that he admitted to numerous instances of misconduct. Notwithstanding this, he appeared a bit like a criminal defendant who is willing to admit to "having been there and watched" but who just can't quite own up to being actively involved. I felt that he minimized his conduct. His conduct is so out of the realm of normal human behavior that it rises to a level of pathology and I recommend to the respondent American Legion that it never place him in a position of supervisory responsibility over female employees and to respondent Bobo that he obtain professional counseling.

C.

FINDINGS OF FACT

1. Complainant Kesner was first employed as a waitress in respondent American Legion's dining room and restaurant in February of 1990.

2. Complainant Lantz was first employed as a waitress in respondent American Legion's dining room and restaurant in March of 1990.

3. Respondent American Legion operates the dining room and restaurant facility at which the complainants were employed.

4. Respondent Bobo has been a member of the American Legion since approximately 1955, and between November 1990 and January 1991 he was assigned to supervise the operations of the American Legion's dining room and restaurant.

5. The Legion, a veterans' organization chartered by the United States Congress, maintains a restaurant in Petersburg, West Virginia which is open to the public. The Legion is run by a Board of Directors comprised of individuals elected from the membership. The various key positions (such as Commander, Chaplain, Restaurant Manager and so on) are rotated among the members of the organization.

6. In or about November 1990, the governing board of the Legion appointed one of its "House Committee" members, respondent Karl Bobo, as manager of the restaurant. Bobo also served on the governing board and had managed the restaurant previously, but had been removed from management of the dining room when he was accused of sexually harassing Debbie Van Meter, who was a waitress in the

dining room. Both complainants had heard that Debbie Van Meter had been harassed by Mr. Bobo.

7. During the time that respondent Bobo was supervising the dining room and restaurant, both complainants were subjected to sexual harassment by respondent Bobo. He fondled or attempted to fondle the women despite their objections, he chased them, rubbed up against them, made sexual gestures towards them and addressed comments laden with sexual innuendo towards them. (For more detail concerning the specific acts of sexual harassment see both parties' proposed findings of fact.)

8. Although it is of little moment, given the abundance of evidence of other intentional sexual harassment, a question did arise concerning whether Bobo intended a particular type of conduct which the parties came to call "flapping" to be taken in a sexual context. After having watched the World Series last night, I am reminded that men do sometimes grasp their genitals without intending it to be taken sexually. I am, however, convinced that at least on some occasions Bobo's genital grasping was intended to convey a sexual message and, when taken in conjunction with his other conduct, did constitute sexual harassment.

9. Each of the complainants resigned because of respondent Bobo's conduct. Kesner resigned her position as waitress at the American Legion on or about 14 January 1991 and Lantz resigned on or about 19 January 1991.

10. Bobo's sexual harassment of both women was severe and pervasive. Any reasonable woman would have resigned under these circumstances.

11. Ms. Pratt reported Bobo's harassment. She talked to Legion members, both individually and in groups. She followed the chain of command. She asked the Board members for help and spoke to the Commander about the problem.

12. On 24 January 1991 the complainants received an opportunity to appear before the assembled Legionnaires at a Board meeting to report and complain of the harassment to which they had been subjected. During the meeting the Board members appeared unresponsive to their requests, but the next day Pratt was told by Bill Kile (who was then the Commander) that they had taken care of the situation and that both complainants could return to work.

13. The complainants returned to their jobs a few days later and Bobo had been removed from his position as manager.

14. Although I found some of the complainants' testimony in this regard to strain credulity, I nevertheless do conclude by a preponderance of the evidence that Bobo continued to exert influence over the restaurant through Irene Smith, the on-site manager he had hired to run the dining room. She, at his instance, assigned the complainants to unfavorable shifts and cut their hours drastically.

15. Smith claimed that the complainants' hours had been cut because of poor performance as waitresses or lack of cooperation. The respondent also contended that the complainants' hours had been cut because it was a slow time of the year and because they had hired replacement workers after Kesner and Turner had resigned due to the sexual harassment and before they had been reinstated. I find all of the assigned reasons to be pretextual or, at least, to pale in importance as compared to the true motive of Irene Smith: to

retaliate against the complainants because they had complained of Bobo's sexual harassment.

16. I found Irene Smith to be transparently dishonest and manipulative in her testimony.

17. The complainants' work schedules were cut so short that they had to look for other employment. This retaliation created an atmosphere that a reasonable person would not have continued to tolerate and the complainants did again resign.

18. The American Legion vigorously opposed, both in discovery and at hearing, the Commission's attempts to explore the numbers and names of its employees.

19. On 18 April 1991 the Commission promulgated an interrogatory to the respondent American Legion Post #78 requesting a breakdown of the Legion's workforce by sex and position. In response to this interrogatory, the respondent listed the following employees: Irene Smith, Susan Mongold, Suzette Rowan, Dawn Kuykendall, Debbie Miller, Lori Crites, Darlene Bible, Rebecca Hovatter, Carol Simmons, Phyllis Gonzage, Brenda McLaw, John Juker and Dwight Beck. (See complainant's exhibit no. 8). Also, the Commission requested by interrogatory a list of all terminations, resignations and layoffs from January 1990 to 31 March 1991. In response to this interrogatory, the respondent listed the following employees: Leta Carr, Twila Kimble, Debbie Rotruck, Stephanie Sturn, Katie Fanslet, Juanita Lambert, Maybelle Long, Irene Warner, Janet Ours, Janet Owens, Holley Groves, Patty Warner, Jeanette Lantz and Debbie Kesner. (See, complainant's exhibit no. 8). Therefore, I find

that during that period there were at least 14 employees of the American Legion.

20. Ms. Elizabeth Van Meter, a Vice President of Grant County Bank, testified for the Commission and the complainants. Ms. Van Meter, in response to a subpoena duces tecum, brought payroll records from the American Legion for the payroll periods of November and December 1990. Ms. Van Meter testified that she called the respondent American Legion and asked if they could supply the actual checking account statements. They brought her the two months' worth of checks. (Tr. 282, 283.) Ms. Van Meter inspected the checks, verified that they were all there and that there were no alterations that would "necessitate going to film." (Tr. 283.) She testified that she then looked for checks that looked like payroll checks to individuals and determined that there were three payroll cycles during that period. She checked numbers and accounts to make sure that they were all there. (Tr. 284.) Ms. Van Meter testified that she believed that these checks represented payroll checks. Ms. Van Meter further testified that in reaching this conclusion she had access to and looked at copies of all payroll checks from November 1 to December 31, 1993, that all of the persons (except Rodney Hawk) received a check during that period, and that she determined that the employees listed had indeed received payroll checks during those periods. (Tr. 288, 289.) In one cycle, 13 persons received payroll checks; in another cycle, 14 persons received payroll checks; and in a third cycle, 15 persons received payroll checks.

21. Ms. Van Meter's list of employees is reflected in Commission's Exhibit No. 5 and contains the following list of

employees: Lisa Juker, Patty Warren, Helen Berg, Wilma Rogers, Ruby Sites, Elizabeth "Ann" Axel, David Beck, Goldie Berg, Leta Carr, Rebecca Hovatter, John Juker, Debbie Kesner, Jeanette Lantz, Susan Mongold, Lee Ann Cratchford, and Rodney Hawk.

22. I found Elizabeth Van Meter's testimony to be professional and competent. She was totally credible. She had no personal interest in this case and no reason to "puff up" the numbers. I find that during the period of November and December 1990, the respondent American Legion had at least 13 to 15 employees.

23. Ms. Van Meter testified that in compiling this list she requested the cooperation of the respondent's bookkeeper. This indicates that at all times during this action the American Legion had sufficient documents in the form of cancelled payroll checks to refute the Commission's allegations that it was not an employer. Although the Commission does have the burden of proving jurisdiction, it appears that the American Legion has consistently acted to thwart that process.

24. Finally, complainant Jeanette Turner testified about the persons with whom she worked at the American Legion during 1990 and 1991. Ms. Turner listed the following persons: Brenda McLain, Irene Smith, Susan Mongold, Suzette Rowan, Dawn Kuykendall, Debbie Miller, Darlene Bible, Rebecca Hovatter, Carol Simmons, John Juker, Dwight (Dave) Beck, Leta Carr, Ann Axel, Debbie Kesner, Jeanette Turner, Patty Warner, Goldie Berg, Kim Carr, Ruby Sites, Twila Kimble, Olin Hawk, Katie somebody, Debbie Rotruck, Helen Berg, and Boyd (Ruby's husband). (Tr. 802-809.)

25. The Commission attempted to bring on records from the Department of Tax to prove the number of employees. Again, the American Legion objected to the presentation of such evidence. The Legion did stipulate that such documents would show that it had cumulatively employed at least 12 persons in the relevant calendar years. (Tr. 278.)

26. The respondent American Legion qualifies as an employer who employed at least 12 employees on a full-time or part-time basis during 1989, 1990 and 1991.

27. The respondent Karl Bobo is a "person" and thus is subject to the jurisdiction of the HRA for engaging in a conspiracy with or aiding and abetting others to commit activities constituting a violation of the West Virginia Human Rights Act. The American Legion, aided and abetted by Karl Bobo, sexually harassed the complainants and then effectively terminated each of them when they complained of it.

28. Although the complaints herein are styled as reprisal claims they contain allegations of both reprisal and sexual harassment and I treat the damages issues as being unified, which is to say that my assessment of incidental damages next following takes into account the distress that each woman felt both as a result of the sexual harassment that precipitated their complaints to the Board (as cited in the complaints) and as a result of the distress that attended having their hours cut in reprisal for those complaints.

29. Although the complainants did exaggerate their claims, I think they would have been handsomely compensated by a jury. The level of distress that they felt should not be underestimated and

their accounts and demeanor provided vivid testament to it. I find that each woman suffered distress, embarrassment and humiliation that would be fully compensated by an award of incidental damages in the amount of $15,000.00 per woman. Inasmuch as the jurisdictional limit on awards of incidental damages is $2,950.00 per respondent, I will hereinafter award only $5,900.00 to each complainant. (It should be remembered that these claims were joined for administrative convenience and that each complainants' case could stand alone. The claims were joined at the request and agreement of the parties.) The award of incidental damages will be broken down as follows: $2,950.00 from the American Legion to Ms. Turner; $2,950.00 from respondent Karl Bobo to Ms. Turner; $2,950.00 from the American Legion to Ms. Pratt; $2,950.00 from respondent Karl Bobo to Ms. Pratt.

30. Punitive damages may not be awarded in this forum, either directly or under the guise of general or incidental damages. No award is made for nor consideration given to punitive damages.

31. While employed at the American Legion, the complainants would sometimes report tips they did not get to bring them up to minimum wage, they sometimes got more tips than they reported, and, on good nights they sometimes gave a portion of their tips to the cook and dishwasher. H. Tr. at 97, 202-203 and 457-459. Nevertheless, the amounts that were reported by the complainants in total income, as reflected in respondent's exhibits 7 and 8, are substantially accurate reflections of their total income during their employment with the American Legion. H. Tr. at 461-462.

32. Complainant Kesner earned a total of $2,511.19 for 1990 and 1991 as a waitress at the American Legion. See H. Tr. at 460-461,

respondent's exhibits 4 and 5a and W-2s for the American Legion contained in respondent's exhibit 7. This figure represents the accurate amount of her earnings during her employment with the American Legion in 1990 and 1991. H. Tr. at 461-462.

33. The 1990 and 1991 Employee Earnings Record the American Legion maintained on complainant Kesner for the pay periods April 16 1990 through April 1, 1991 were used to calculate complainant Kesner's average weekly paid wages and tips. It was determined that in 1990 her average weekly paid wages were $48.74 and her tips were $10.75 and that in 1991 they were $25.79 and $4.80, respectively. Complainant Kesner's 1990 and 1991 cumulative average weekly paid wages were $44.34, and her average weekly tips were $9.61. See H. Tr. at 584 and respondent's exhibits 4 and 5a.

34. Complainant Lantz earned a total of $2,273.92 for 1990 and 1991 as a waitress at the American Legion, except for tips that may not have been reported. See H. Tr. at 198 and 204-205, respondent's exhibits 2 and 3, and W-2s for the American Legion contained in respondent's exhibit 8.

35. The American Legion also maintained complainant Lantz' Employee Earnings Record for 1990 and 1991. The 1990 earnings record contains only the back page for her employment for that year, which includes the pay periods ending July 2, 1990 through December 31, 1990. H. Tr. at 583. However, the total yearly gross earnings contained on complainant Lantz' earnings record for 1990 are identical to the W-2 complainant Lantz used in calculating her income tax. Compare respondent's exhibit 2 and the W-2 contained in respondent's exhibit 8. Using the existing pay period information

for 1990 and the total yearly earnings reported on complainant Lantz' earning records maintained by the American Legion, it was determined that complainant Lantz' average weekly paid wages in 1990 were $46.76 and her average weekly tips were $9.92. Her average weekly paid wages and tips for 1991 were $58.22 and $4.75, respectively. The combined 1990 and 1991 average weekly paid wages for complainant Lantz were $50.49 and her tips were $8.24. See H. Tr. at 582 and respondent's exhibit 2.

36. Several months following her resignation with the American Legion, complainant Lantz became employed as a waitress at Poor Joe's making approximately $2.00 per hour. Business was slow at this restaurant, since it was a new business, so the complainants were not always paid in money, but sometimes with food that probably averaged $25.00 per week. 35% of the time complainants received approximately $8.00 a night about 3 times per week; another 35% of the time they would not receive anything; and the remainder of the time they received somewhere between $0 to $8.00 to compensate them for their services. Complainant Lantz voluntarily ceased her employment at Poor Joe's around August or September of 1991. H. Tr. at 120-121, 176-179 and 182-191.

37. In January 1992, complainant Lantz was offered a position as a waitress at the Highlander in which the income would have substantially replaced that which she made at the American Legion; however, she refused that employment to sign up for nursing classes at Grant County Nursing Home where she became employed around February 1992, making $4.25 per hour and working approximately 16 hours per week. Likewise, the income made at the nursing home

substantially replaced that which she made while employed with the American Legion. H. Tr. at 122-123, 179-181, and 194. Thus, Lantz is entitled to her average weekly earnings of $58.73 from April, 1991 to January 1992 (9 months) reduced by her earnings at Poor Joe's.

38. Complainant Kesner has worked full-time for Standard Laboratories in Mount Storm since 1983 and continued her employment there during and following her employment with the American Legion. The waitress job at the American Legion was a part-time job complainant Kesner held in the evenings in addition to her day-time job. H. Tr. at 343.

39. Around June of 1991, following her final resignation with the American Legion, complainant Kesner became employed as a waitress at Poor Joe's. H. Tr. at 370. She worked approximately 8 hours a week trading off with complainant Lantz and another waitress at Poor Joe's. Complainant Kesner worked there for a couple of months. H. Tr. at 371-373 and 411.

40. Complainant Kesner terminated her employment at Poor Joe's around the first of August, 1991, because she had taken on more responsibilities at her job at Standard Laboratories in preparation for an office manager's position to which she was promoted in September or October 1992, and she did not desire to moonlight anymore. H. Tr. at 416-418. Complainant Kesner stated that: "I was pursuing an interest in a career that I felt would be a better opportunity." H. Tr. at 416. As a matter of fact, complainant Kesner never applied anywhere for moonlighting employment after terminating her employment at Poor Joe's in or around August, 1991. H. Tr. at 417-418. Thus, Kesner is entitled to her average weekly

earnings ($54.94) from April, 1991 to August, 1991 (4 months), reduced by her earnings at Poor Joe's.

D.

DISCUSSION

1. The respondent is an employer.

The only real issue in this case is whether the respondent is an employer. The respondent American Legion brought on no documents or credible testimony to refute the Commission's witnesses as to its numbers of employees. Although it is the Commission's burden to prove jurisdiction, the employer should not be permitted to simply hunker down and resist disclosing evidence. It should rebut evidence presented by the complainant. The Commission points me to Norman v. Levy, 756 F. Supp. 1060 (N.D. Ill. 1990), wherein the District Court held that when an employer failed to rebut an affidavit asserting that certain persons are employees, those persons should be found to be employees. The Court in Levy specifically stated:

> "Although it may be suggested that the plaintiff failed to carry her burden of demonstrating the existence of jurisdiction in response to [defendant's] contention that it is lacking, it may in some sense also be suggested that [defendant] has failed adequately to suggest the absence thereof in light of its own failure to properly address the relevant issues." Levy, 765 F. Supp. at 1065.

The only rebuttal to the Commission's testimony and documentation to substantiate its claim of jurisdiction was the testimony of Bill Kile, who was not the Commander during the period the complainants were employed. (Tr. 526, 612, 661.) Kile disputed the Commission's

list of employees by "memory" only. He claimed to have reviewed all the records but failed to bring them with him. His testimony was calculated and self-serving. Kile knew that the only way to prevail against the Commission's charges of sexual harassment and retaliation was to convince me that the Legion was not an employer. Documents which would refute the Commission's assertion of jurisdiction were never produced. Since the American Legion failed to rebut the Commission's evidence, I find that the American Legion indeed employed at least 12 employees during the relevant periods.

The West Virginia Human Rights Act is based upon Title VII of the Civil Rights Act of 1964. EEOC Policy Guidance No. 915.052, 2 Empl. Prac. Guide ¶5266 (April 20, 1990), states that all part-time employees are to be counted whether they work part of each day or part of each week, as long as they are on the payroll, for purposes of determining jurisdiction under Title VII. The Commission cites Thurber v. Jack Reilly's, Inc., 32 F.E.P. Cases 1511, 717 F.2d 633 (1st Cir. 1983), in support of its argument that the Commission should also count part-time employees as employees for purposes of jurisdiction. Inasmuch as the West Virginia Supreme Court has never interpreted the West Virginia Human Rights Act to be narrower than Title VII, I find that part-time employees are counted as employees under the Wet Virginia Human Rights Act. To the extent that any of the employees listed by the Commission might be part-time employees, I nevertheless find that they are employees under the Act.

Although Title VII contains a requirement that employees be retained for 20 weeks in a calendar year, there is no such requirement under the Human Rights Act. (Title VII contains no

requirement that these weeks be consecutive weeks and, in fact, courts have interpreted the provision "each working day for 20 or more calendar weeks" otherwise.) In Pascutoi v. Washburn-McReavy Mortuary, 11 F.E.P. Cases 1325, 10 E.P.D. ¶10,442 (D. Minn. 1972) the Court indicated that the crucial test is not have many employees are at work on a given day, but rather how many employees are on the payroll in each week of the twenty-week period chosen for counting. Pascutoi, 11 F.E.P. Cases at 1326-1327 (Emphasis supplied). Since there is no provision in the Human Rights Act stating how many weeks a person must be employed in order to qualify as an employee, I surmise that the Legislature did not intend to limit our Act in a fashion similar to Title VII. I therefore find that there is no minimal length of time a person must be employed to qualify as an employee under the Act. If the Legislature had desired a minimum, it would have so stated. Also, since the Title VII "20 weeks requirement" is not interpreted to mean 20 consecutive weeks, I doubt that our Court would interpret the Human Rights Act in that manner. I therefore conclude that it is not necessary for a person to be employed any requisite number of consecutive weeks to be considered an employee under the Act.

In Teakall v. WERD, Inc., 23 F.E.P. Cases 947, 19 E.P.D. ¶9035 (M.D. FL 1979), the Court held that the relevant time period for the determination of employees is "not only the calendar year in which the alleged discriminatory conduct occurred, but also the calendar year preceding that year." I find no persuasive argument that there must be the requisite number of employees at precisely the time of the discriminatory conduct. In fact, such a ruling would provide

respondents with a virtual "escape hatch" from liability. A respondent could discriminate and then merely "lay off" enough employees to put it under the required number. This could easily be achieved in failure to hire cases as well as racial or sexual harassment cases. I conclude that it is not a jurisdictional requirement that an employer have 12 employees at the time of discrimination if, indeed, that employer employed 12 or more employees during that year or the preceding year.

For the above reasons, and incorporating all other reasons offered by the Commission in pages 40 to 55 of its Memorandum of Law, I find that the American Legion is an employer under the Act and as such is subject to the jurisdiction of the Commission.

2. The complainants were subjected to unlawful sex discrimination.

> "In order to prove 'quid pro quo' sexual harassment at the workplace, the complainant must prove: (1) that the complainant belongs to a protected class; (2) that the complainant was subject to an unwelcome sexual advance by an employer, or an agent of the employer who appears to have the authority to influence vital job decisions; and (3) the complainant's reaction to the advance was expressly or impliedly linked by the employer or the employer's agent to tangible aspects of employment." Westmoreland Coal Co. v. Human Rights Commission, 382 S.E.2d 562, Syll Pt. 1 (WV 1989).

The foregoing findings of fact make it clear that the complainants were subjected to severe and pervasive sexual harassment by a workplace manager, respondent Karl Bobo.

In response to the sexual harassment the complainants went to the Board of the Legion and complained of Bobo's conduct. This is a protected activity under the Human Rights Act. In order to prove that

the respondent retaliated against the complainants for having engaged in this protected activity, the complainants must prove by a preponderance of the evidence:

> "(1) that the complainant engaged in a protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the Court can infer retaliatory motivation." Frank's Shoe Store v. Human Rights Commission, 365 S.E.2d 251, Syll Pt. 4, (WV 1986).

It is obvious that the Legion was aware of these complainants' assertion of their rights under the Human Rights Act--they appeared before the Board precisely for that purpose. Immediately thereafter the complainants' hours were sharply reduced and both the timing of this action and the other (albeit somewhat marginal) evidence surrounding this tend to establish the retaliatory motive.

Although the complainants herein were not actively discharged by the respondents, they were constructively discharged by them.

> "A constructive discharge cause of action arises when the employee claims that because of...sex...discrimination, the employer has created a hostile working climate which was so intolerable that the employee was forced to leave his or her employment." Slack v. Kanawha County Housing, 423 S.E.2d 547, Syll. Pt. 4 (WV 1992).

In Slack, supra, the Supreme Court of Appeals explicitly rejected the requirement that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit. Id, Syll. Pt. 6. Even if that standard were the law in West Virginia (See, Hopkins v. Shoe Show, 678 F.Supp. 1241 (S.D.W.Va. 1988)), I would find that complainants herein prevailed. Under the

more liberal standard adopted in Slack, complainants likewise clearly prevail.

E.

CONCLUSIONS OF LAW

1. The complainants are proper parties to maintain an action for unlawful employment discrimination on account of sex under the Human Rights Act.

2. The respondent is an "employer" within the meaning of the Human Rights Act.

3. The respondent American Legion Post, acting by and through its authorized restaurant manager, Karl Bobo, and Karl Bobo individually, engaged in unlawful sex discrimination by creating an atmosphere of sexual hostility and by conditioning the complainants' continued employment upon their submission to his sexual overtures.

4. The complainants' reporting of sexual harassment to the Board is a protected activity under the Human Rights Act. The retaliatory behavior following this reporting constitutes illegal retaliation in violation of the Human Rights Act.

5. The respondents' retaliatory conduct was intended to and did create a hostile working climate so intolerable that complainants were forced to resign.

6. The complainants having proved unlawful discrimination, they are entitled to a make-whole remedy including back wages and incidental or general damages (such incidental damages not to exceed the jurisdictional limit of the Human Rights Commission).

F.

CONCLUSION

The respondent shall make appropriate payment to the complainant forthwith, but in no event later than 31 days from the date of entry of this order. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Legal Unit Manager, Glenda S. Gooden, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

Anyone adversely affected by this order may appeal as set out in Exhibit A.

WV HUMAN RIGHTS COMMISSION

ENTER: 11 December 93

BY: _____
RICHARD M. RIFFE
ADMINISTRATIVE LAW JUDGE