STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 108A
Charleston, WV 25301-1400

TELEPHONE (304) 558-2616
FAX (304) 558-0085
TDD - (304) 558-2976
TOLL FREE: 1-888-676-5546

Cecil H. Underwood
Governor

Ivin B. Lee
Executive Director

February 4, 2000

Certified Mail
Return Receipt Requested

Peggy J. Prince
503 State Street
Fairmont, WV 26554

WVU/Ruby Memorial Hospital
Medical Center Drive
Morgantown, WV 26505

Alex Shook, Esq..
Hamstead, Hamstead & Williams
231 Walnut Street
Morgantown, WV 26505-5401

Connie Bowling, Esq.
State College and University Systems
Central Office, Legal Division
1018 Kanawha Blvd., East
Charleston, WV 25301

Re: Peggy J. Prince v. WVU/Ruby Memorial Hospital
Docket No. EH-25-96

Dear Parties and Counsel:

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

Sincerely,

IVIN B. LEE
EXECUTIVE DIRECTOR

IBL/jk
Enclosures
cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General
Civil Rights Division

NOTICE OF RIGHT TO APPEAL

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

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

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PEGGY J. PRINCE,

Complainant,

v. DOCKET NO. EH-25-96

WEST VIRGINIA UNIVERSITY HOSPITAL/
RUBY MEMORIAL HOSPITAL,

Respondent.

FINAL ORDER

On October 14, 1999, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Robert B. Wilson. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to and does hereby find that the record supports the opinion of the Administrative Law Judge that there was discrimination based upon disability in the termination of the Complainant. However, for the following reasons, the Commission modifies the Final Decision of the Administrative Law Judge.

The record, exhibits and credibility rulings of the Administrative Law Judge do not support Conclusion of Law ¶ No. 5. This Conclusion contradicts all previous and subsequent findings contained in the Administrative Law Judge's Final Decision. Further, the Administrative Law Judge's Conclusion of Law ¶ No. 7 that the Complainant is entitled to two awards of incidental damages is inconsistent with prevailing law.

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

1. Conclusion of Law ¶ No. 5, at pages 38-39, is deleted and replaced with the following:

> 5. The complainant has established a prima facie case of discrimination in that (1) the complainant has shown that she meets the definition of a person with a disability, (2) the complainant was qualified for the position of patient escort and (3) the complainant was discharged from her position. See Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Commission, 189 W. Va. 314, 431 S.E.2d 353 (1993). The respondent articulated a legitimate, nondiscriminatory defense, stating that they did not receive a return-to-work slip from complainant's treating physician per their policy manual. The complainant proved by a preponderance of the evidence, by testimony of credible witnesses, that the employer's proffered reason was not a legitimate reason but a pretext for the discharge. Therefore, the complainant met her ultimate burden to show that she was discriminated against because of her disability on October 26, 1993, when she was estopped from returning to her position of patient escort.

2. Conclusion of Law ¶ No. 7, at page 39, is deleted and replaced with the following:

> 7. The complainant is entitled to an award of incidental damages for the discrimination she endured, such award being $3,277.45.

3. Relief and Order ¶ No. 5, at pages 40-41, is deleted and replaced with the following:

> 5. Within 31 days of the receipt of this decision, the respondent shall pay the complainant incidental damages in the amount of $3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

All other damages awarded the Complainant by the Administrative Law Judge, such as back pay, interest, front pay and attorney's fees and costs, are affirmed.

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

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 3rd day of February, 2000, in Charleston, Kanawha County, West Virginia.

IVIN B. LEE, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PEGGY J. PRINCE,

Complainant,

v. **DOCKET NUMBER: EH-25-96**

WEST VIRGINIA UNIVERSITY HOSPITAL/,
RUBY MEMORIAL HOSPITAL

Respondents.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on December 1, 1998, in Monongalia County, in the City of Morgantown Council Chambers Room at 389 Spruce Street, Morgantown, West Virginia, before Robert B. Wilson, Administrative Law Judge. The public Hearing in this matter was reconvened on December 2nd and 17th, 1998, and concluded on January 11, 1999.

The complainant, Peggy J. Prince, appeared in person and by counsel Alex Shook, with the firm of Hamstead, Hamstead & Williams. The respondent, West Virginia University appeared in person by its representative, Colleen Lankford, Administrator Program Coordinator for the West Virginia University Department of Human Resources (and its representative in house counsel Beverly D. Kerr); as well as by counsels, Michael L. Glasser, Assistant Attorney General, State Colleges and University Systems, and Connie A. Bowling, Senior Assistant Attorney General, who prepared the Findings of Fact and

Conclusions of Law and Response for the West Virginia Office of the Attorney General.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The complainant, Peggy Prince, is a 39 year old resident of Fairmont, West Virginia, and mother of two children, ages three and thirteen. (Tr. Vol. I, pps. 16 and 17.)

2. The complainant is a "person" and an "employer" as defined in W.Va. Code § 5-11-3. (Uncontroverted.)

3. The complainant was an employee of the respondent, West Virginia University (hereinafter "WVU"), at West Virginia University Hospital/Ruby Memorial Hospital (hereinafter "WVUH") from April, 1979, until her termination on September 12,

1994. Complainant worked as a Nurse's Aide from 1979 until 1986, when she transferred to the Patient Escort position. (Tr. Vol. I, pps. 37 and 38.)

4. Complainant worked as a patient escort for WVU at WVUH from 1986 until October of 1993. The patient escort position generally involved preparing hospital patients for transport and transporting the patients throughout the hospital by walking with the patients or pushing them in a wheelchair, stretcher or bed. (Tr. Vol. I, p. 39.)

5. Complainant has been morbidly obese and has had severe varicose veins her entire adult life and throughout the duration of her employment with the respondent. Complainant's varicose vein problem required surgery in 1978 and again in 1993. (Tr. Vol. I, pps. 53-55.)

6. Donald McDowell, M.D. testified that complainant has substantial limitations on the major life activities of walking and manual tasks involving lifting, pushing, pulling and crouching because of her morbid obesity and vascular problems. This testimony is un-refuted. (Tr. Vol. I, p. 192; and FCAR Dr. McDowell, Complainant's Exhibit No. 24 and Respondent's Exhibit No. 45.)

7. Notwithstanding her limitations, credible testimony and complainant's performance evaluations indicate that she met the responsibilities and performed the essential functions of the patient escort position with or without accommodations each year she was employed as a patient escort, including 1992 and 1993, the years prior and up to her termination. (See Frey, Savage &Prince Testimony, Complainant's Exhibits 31-34.)

8. Complainant's performance evaluations, which were prepared by her

supervisor, Sharon Savage, indicated that she was "good at what she does", that she "escorts patients safely and courteously, maintains the integrity of IV and drainage device[s], completes records accurately", and that she "discharges patients safely and promptly." (Complainant's Exhibits Nos. 31-34.)

9. Lou Frey, a former co-worker of complainant, testified at trial that she worked with complainant in the patient escort department during the entire time period complainant was a patient escort. Ms. Frey testified that she worked directly with her on calls and had opportunities to personally observe her perform her job duties. Ms. Frey stated that complainant "was a good worker" and agreed that she transported the patients to where they needed to be on time. (Tr. Vol. I, p. 227.)

10. In late April of 1993, complainant had a varicose vein rupture while at home. Complainant consulted vascular surgeon Donald McDowell, M.D., and on May 11, 1993, complainant had vein ligation surgery on 22 varicose veins on her legs. (Tr. Vol. I, p. 57.)

11. Complainant returned to work two weeks after the surgery. Her return to work was full duty with the exception that she did not push the heavy beds for a limited period of time. (Tr. Vol. I, p. 59, Vol. 2, p. 20.)

12. Complainant experienced transient periods of seepage from two slow healing wound sites between June and October 1993. At all times, the wound sites were covered with bandages, wrapped in an ace bandage, and under a layer of clothing. The seepage was controlled with the bandaging, and at no time did she expose patients or co-workers to open wounds or bodily fluids. (Tr. Vol. I, pps. 62, 228 and 229.)

13. Complainant testified at trial that she was still able to perform the essential functions of her job during the period of time she was recovering from the two slow healing wound sites. This testimony was corroborated by co-worker Lou Frey, who testified that she observed her performing her job duties after she had the surgery. (Tr. Vol. I, pps. 65, 228 and 229.)

14. During direct examination, Supervisor Savage testified that the only time she saw the seepage was when complainant was in the office changing the dressing on the wound. (Tr. Vol. 2, p. 14.)

15. On October 4, 1993, complainant had in-patient surgery where two sutures were put in the remaining slow healing wound site and on October 5, 1993, the wound was dry and healing. Dr. McDowell released complainant to work full duty on October 6, 1993. Supervisor Savage testified that she did not see any seepage after the surgery. (Complainant's Exhibit No. 10, and Tr. Vol. I, p. 65; Vol. 2, p. 17.)

16. Complainant has worn prescription high pressure stockings since early 1994 to guard against future varicose vein ruptures. Un-refuted testimony and the medical record indicate that the transient seepage problem was resolved after the October 4, 1993 in-patient surgery, and that she has had no acute vascular problems since that time. (Tr. Vol. I, pps. 78-80.)

17. Upon returning to work on October 6, 1993, complainant informed Supervisor Savage that the wound site was fine and that Dr. McDowell had told her that she was released to return to work full duty. Supervisor Savage told complainant that she could no

longer be a patient escort because a doctor said she couldn't do her job. However, Supervisor Savage's statement was not substantiated nor was it predicated upon the diagnosis of a treating physician. (Tr. Vol. 1, p. 65.)

18. Because Supervisor Savage would not accept complainant's word that Dr. McDowell cleared her for work, complainant obtained a written work release for October 26, 1993. Complainant presented the release to Supervisor Savage, who still refused to allow her to return and advised her that she could not return to her department. (Tr. Vol. I, pps. 66-67; Complainant's Exhibit No. 11.)

19. Although complainant was released to return to work by Dr. McDowell and had orally informed Supervisor Savage of McDowell's release on October 6, 1993, and presented a written release to work for October 26, 1993, she was not allowed to return to work and was effectively forced to go on medical leave. (Tr. Vol. I, pps. 68-69.)

20. For the first three days during the trial of this case, it was the respondent's position that it did not have any knowledge that complainant was ever released to work by oral directive on October 5th, 1993, and by written release dated October 26, 1993 by Dr. McDowell.

21. During cross-examination of Supervisor Savage, when she was asked why she didn't allow complainant to return to work after released by Dr. McDowell in October of 1993, respondent replied that Supervisor Savage never saw any return to work slips or had knowledge that McDowell cleared complainant for work. (Tr. Vol. 3, pps. 63-65, 68 and 70.)

22. During cross-examination of Supervisor Savage, she originally testified that she knew Dr. McDowell released complainant to return to work in October of 1993, but later recanted her testimony. (Tr. Vol. 3, p.63.)

23. During cross-examination of Jennifer McIntosh, an employee of the respondent, the respondent again denied that the respondent had knowledge that Dr. McDowell cleared complainant for work. (Tr. Vol. 3, p. 193.)

24. Jennifer McIntosh testified that she was never told that Dr. McDowell cleared complainant for work in October of 1993, nor was Ms. McIntosh told that Dr. Patel also cleared complainant to work upon her examination in February, 1994. (Tr. Vol. 3, p. 195.)

25. Ms. McIntosh testified that if complainant was released to return to work, then someone would have told her. (Tr. Vol. 3, p. 201.)

26. Ms. McIntosh answered "Absolutely Not" when asked whether she was told by University officials that complainant was released to return to work. (Tr. Vol. 3, p. 201.)

27. Sandy Serpento, a consultant hired by the respondent, testified that he was not told that Dr. McDowell released complainant for work in October of 1993. (Tr. Vol. 1, pps. 263 and 264)

28. In the respondent's opening statement the respondent again stated that complainant did not provide the October 1993 work releases by Dr. McDowell to the respondent. This statement is not credible. (Tr. Vol. 4, p. 6)

29. During cross-examination of respondent's expert, Barbara Judy, respondent again took the position that it was not provided any information regarding the fact that Dr. McDowell released complainant to return to work in October of 1993. (Tr. Vol. 4, pps. 35-37).

30. June Blosser, former employee of the respondent, testified that she did not have knowledge of the October, 1993 releases by Dr. McDowell. This testimony is not credible. (Tr. Vol. 4, p. 116.)

31. Two handwritten notes by June Blosser dated November 9 & 11, 1993, were introduced into evidence during the cross-examination of June Blosser. The language of these notes conclusively established that June Blosser, Supervisor Savage, and Colleen Lankford had knowledge that complainant was released to return to work by Dr. McDowell in October of 1993. Initially, these documents were withheld from discovery by the respondent and were only produced after a motion to compel by complainant. (Complainant's Exhibit's Nos. 37 and 38.)

32. After being confronted with these documents, Ms. Blosser recanted her earlier testimony and admitted that the respondent had knowledge of the release to work. Ms. Blosser's earlier testimony was false and appears to have been an attempt to mislead the Court. (Tr. Vol. 4, p. 119.)

33. Complainant's Exhibits 37 and 38 indicate that the respondent deliberated and sought legal advice on whether it could avoid referring complainant to Dr. McDowell

because he had given a favorable opinion of her ability to return to work. (Complainant's Exhibits Nos. 37 and 38.)

34. Colleen Lankford, an employee of the respondent, finally admitted that the respondent had knowledge of Dr. McDowell's October 26,1993 work release. (Tr. Vol. 4, p.193.)

35. Ms. Lankford originally testified that Ms. Prince gave the October 26, 1993 written release directly to her. She later recanted and alleged that the release was given to some other University official. Ms. Lankford's testimony is not credible. (Tr. Vol. 4, pps. 193 and 198.)

36. Ms. Lankford testified that the releases were "insufficient" to allow complainant to return to work because she had been off more than five days. Ms.Lankford's testimony contradicted prior witnesses for the respondent who denied knowing that Dr. McDowell released complainant to work or that they saw the October 26, 1993 release. (Tr. Vol. 4, pps.193-194 and 200.)

37. Only after confronted with irrefutable evidence at trial that the respondent knew about the October 1993 releases did the respondent state that the releases were "insufficient". The inconsistent testimony by the respondent's witnesses casts serious doubt on Ms. Lankford's credibility.

38. Respondent presented no objective evidence at trial that complainant was required to provide a "full explanation" of her medical condition before she returned to

work when she was off for more than five days after the May, 1993 surgery, or in other situations where she was off more than five days. The credible evidence indicated that employees were only required to receive medical clearance before returning to work.

39. Testimony from Ms. Blosser indicates that the respondent's policy when a person is absent for more than five days is that the person must provide a return to work slip before returning. Complainant clearly did provide a return to work slip. (Tr. Vol. 4, p. 115.)

40. The respondent's own employee handbook clearly refutes the respondent's excuse for failing to allow complainant to return to work in October, 1993. Pages 34 & 35 of the handbook detail the respondent's sick leave policies and provides that proof of injury or illness must be provided to the University before sick leave for more than five consecutive days can be granted. An employee must provide a "full explanation" of her medical condition prior to obtaining medical leave. The only requirement stated in the handbook before an employee can return to work is that the employee "must obtain medical clearance." (Respondent's Exhibit No. 37, pgs. 34 and 35.)

41. Respondent could not identify any reference in the employee handbook which indicates that an employee must produce "extensive medical documentation" prior to returning to work after an absence of five days or more. The respondent's testimony regarding the release is not credible. (Respondent's Exhibit No. 37, p. 34.)

42. Ms. Prince testified at trial that she told Supervisor Savage on October 6,

1993, that Dr. McDowell had released her to return to work full duty. Dr. McDowell's records corroborate this testimony. Complainant had only been off work for one day at this point, so the alleged policy requiring an FCAR or Medical Verification would not have been in effect. (Tr. Vol. 1, p. 65, Complainant's Exhibit No. 24, October 5, 1993 treatment note).

43. The respondent's initial position that it had not received information from Dr. McDowell via complainant which released her to work in October of 1993 clearly changed on its last witness at trial. The respondent's amended position asserted that it did receive the release information, but that the releases were somehow insufficient. The respondent presented no evidence that complainant was informed in October of 1993 that the releases were "insufficient". This position was never quantified or qualified to complainant, and it appears to have been formed at trial.

44. In November of 1993, complainant offered to go on part-time duty and asked if she could return and perform some of the lighter escort duties, but Supervisor Savage refused. Supervisor Savage testified at trial that she could not accommodate her because "if you allow one to do it you're going to have to allow others to do it ..." and "it could really hinder your operation." Respondent presented no evidence that the suggested accommodation would have been an undue hardship. (Tr. Vol. 1, p. 21.)

45. Supervisor Savage's testimony that was not performing the same number of runs as other escorts is unreliable in light of credible testimony to the contrary from Ms.

Frey and complainant, and her own positive performance evaluations. The respondent failed to present any objective evidence to support its assertion that complainant did not perform adequately, although during the period of slow recovery between May and November 1993 she may have made a lesser number of runs.

46. Although cleared for work by her treating physician, in October of 1993, the respondent informed complainant that she was required to go through a functional capacities analysis before she could return to work. Complainant agreed to participate with the belief that the process was going to help her retain her patient escort position or another position with the respondent. (Tr. Vol. 1, p. 76.)

47. Ms. Lankford testified at trial that "we" [respondent] contacted Dr. McDowell and Dr. Ghosal for "clarification" after receiving the October 26, 1993, return to work slip. Dr. McDowell denied being contacted. (Tr. Vol. 4, pps. 193 and 194.)

48. At this point respondent having no medical information to support its decision to not honor complainant's return to work sought justification for Supervisor Savage's refusal to allow her back by obtaining FCAR's from complainant's physicians. Without specifying the requirements of the position or their specific inquiries regarding physical limitations that concerned Supervisor Savage, a general FCAR form was sent to Dr. McDowell only on December 8, 1993 over a month after her refusal to honor Dr. McDowell's return to work slip. (Respondent's Exhibit No. 22.)

49. Dr. McDowell completed his FCAR January 3, 1994 and indicated that

complainant had severe limitations for sustained walking for 2 hours or standing for 2 hours, and stair climbing. He indicated moderately severe limitations for equilibrium and footing, pushing, pulling and crouching. In his comments he indicated poor healing of incisions and chronic incapacitating morbid obesity causing varicose veins. (Respondent's Exhibit No. 45.)

50. The form did not ask whether complainant had clearance to return to work. Dr. McDowell testified that had he been asked he would have said she could return to work. Other than sending him the FCAR form, the respondent never contacted Dr. McDowell personally for clarification, or to ask for any suggested accommodation. (Tr. Vol. 1, pps. 205, 206 and 216.)

51. Dr. McDowell testified at trial that the surgery was a success and that subject to her pre-existing limitations of morbid obesity and the chronic vascular problems, complainant would have been able to work at the same ability level or better than she did prior to the surgery. (Tr. Vol. 1, p. 216.)

52. Dr. Patel completed a later FCAR and complainant's treatment had been turned over to her at that time by Dr. McDowell who had not seen her since the return to work note. Dr. Patel's FCAR indicated only moderate limitation on walking for 2 hours, standing for 2 hours, crouching and stair climbing; and only mild restrictions on pushing or pulling. Dr. Patel's FCAR was completed on February 1, 1994. Both FCAR's indicated no pain for complainant. (Complainant's Exhibit No. 15 and Respondent's

Exhibit No. 45.)

53. Complainant testified that because she was not allowed to return to work, and because all paid sick leave would be exhausted on November 29, 1993, she submitted a written request for medical catastrophic leave to have a source of income. The respondent required complainant to have a doctor complete a medical leave form in order to get the paid leave benefits, as is detailed on pages 34 and 35 of the employee handbook. Complainant's testimony is credible and uncontroverted. (Tr. Vol. 1, p., Respondent's Exhibit 37.)

54. Complainant went to her long time family doctor, Amitiva Ghosal, M.D., and asked Dr. Ghosal to complete the medical leave form so that she could be eligible for catastrophic medical leave benefits. She testified that she did not go back to Dr. McDowell because he had continually released her to return to work, although the respondent would not allow her to return. Dr. Ghosal completed the form, writing that she had temporary limitations on her ability to stand and walk for long periods of time. Dr. Ghosal never stated complainant was unable to work. (Complainant's Exhibit No. 13.) 55. The respondent requested medical information on complainant from Dr. Jyoti Patel whose FCAR essentially indicated there was no problem performing physical requirements of her job indicating it would be appropriate for her to return to work. However, witnesses for the respondent testified that it could not rely on Dr. Patel's detailed medical clearance on the pretext she was not a vascular surgeon. Witnesses for

the respondent testified that it could not allow complainant to return to work based on vascular surgeon Dr. McDowell's medical clearance on the pretext that his releases did not provide enough medical information. The respondent asserted this position for the first time only after trial was underway.

56. Dr. Ghosal was not a vascular surgeon, but Ms. Lankford testified they relied on his statement in the medical leave form that complainant had some temporary limitations on her ability to stand and walk for long periods of time to deny reinstating her to her job. Although, it is clear that this form was used solely for the purpose of allowing complainant to obtain medical leave benefits, the respondent's false testimony regarding this form also illuminates its malicious discriminatory intent. It is clear that the respondent would rely on medical information from a non-vascular surgeon only when it could use the information as a pretext to discriminate against complainant in her attempt to return to work following her surgery.

57. The evidence shows that the respondent's reasons for not accepting any medical evidence favorable to the respondent were a pretext for discrimination.

58. Complainant testified that she was willing and able to work in October and November of 1993, but was not allowed to return. Complainant also managed rental property and cared for a toddler during this time frame. Her duties with the rental property often included manual labor, which she performed without incident. Her testimony is credible. (Tr. Vol. 1, p. 71.)

59. The credible evidence of record shows that complainant successfully performed the essential functions of the patient escort position for the 7 years prior to the May, 1993 surgery, and was able to perform the essential functions with reasonable accommodations after the surgery.

60. Supervisor Savage admitted during cross-examination that complainant met the responsibilities of her job, that the bleeding after the surgery was a temporary problem, and that once the temporary problem healed she would have been able to perform her job at the same ability level prior to the surgery. (Tr. Vol. 3, p. 63.)

61. Supervisor Savage originally admitted during cross-examination that she was aware that Dr. McDowell released complainant to return to work in October of 1993, but still refused to allow her to return to her job. (Tr. Vol. 3, p. 63.)

62. Based on the January 3rd, 1994, FCAR, the respondent took the position that complainant was no longer capable of performing any job that required any physical effort. (Respondent's Exhibit No. 40.)

63. The respondent, without showing Ms. Prince a copy of the FCAR, intentionally mislead complaint by telling her Dr. McDowell's report stated she could no longer perform the patient escort position. (Tr. Vol. I, pps. 74 and 75, Complainant's Exhibit No. 14.)

64. Dr. Jyoti Patel completed a functional capacities report On February 1, 1994, and found complainant to have mild to moderate impairment in her ability to walk and

perform manual tasks. Although the form was identical to the form sent to Dr. McDowell, Dr. Patel plainly cleared complainant for work and suggested that she wear the high pressure stockings. The respondent refused to accept this medical clearance on the pretext that Dr. Patel was not a vascular surgeon. Respondent's arbitrary reliance on only certain information from certain physicians and capricious disregard for other physicians is emblematic of the clear discriminatory practices imposed upon complainant. (Complainant's Exhibit No. 15.)

65. Dr. Patel also suggested that Ms. Prince may benefit from elevating her feet post 2 hours of activity for a 20 minute period. The employer refused to accept or even attempt Dr. Patel's recommendations and totally discounted her evaluation. The respondent never attempted to contact Dr. Patel for clarification or for any possible accommodations. (Complainant's Exhibit No. 15.)

66. Within days after Dr. Patel essentially cleared complainant for work in the FCAR, the respondent, without complainant's knowledge or consent, contacted independent consultant Sandy Serpento for purposes of having him prepare a report regarding complainant's vocational ability to continue work as a patient transport. Mr. Serpento was not an employee of the respondent, but rather an outside consultant the respondent contracted with to draft a report.

67. Complainant had no knowledge that Mr. Serpento was evaluating her or preparing a vocational report. Mr. Serpento never contacted complainant; or asked for

permission to review her confidential FCARs. The respondent intentionally released the confidential FCARs to Mr. Serpento without complainant's knowledge or her express consent for review by a vocational expert. (Tr. Vol. 1, p. 260.)

68. Mr. Serpento concluded that complainant was unable to perform the essential functions of the patient escort position without ever contacting complainant, reviewing any medical evidence other than the FCARs, speaking with Dr. McDowell or Dr. Patel, or performing any physical evaluation. In addition, the respondent never informed Mr. Serpento that Dr. McDowell had released complainant to return to work just prior to preparing the FCAR. (Tr. Vol. 1, p. 261-263.)

69. Mr. Serpento submitted a "draft report" to the respondent to see if it met the respondent's satisfaction and to adjust the report prior to submitting a final report. Mr. Serpento's draft report was prepared on February 17, 1994 and made no mention of the physical requirement's of the patient escort position for which complainant's fitness was being evaluated, yet concludes that complainant is unable to perform those duties. Interestingly, no other final report of Mr. Serpento is of record. Further, a memorandum from Supervisor Savage to June Blosser dated March 3, 1994 indicates that the patient escort position is composed of 98% walking, standing, pushing, pulling, crouching; and, that Dr. McDowell's FCAR states complainant is severely impaired in her ability to perform essential functions of the job. This assessment neglects Dr. Patel's FCAR and the Patient Escort position description which indicates many other duties that do not require

walking, standing, pushing, pulling, crouching; and, which surely must account for more than 2% of the shift to perform. (Tr. Vol. 1, p. 261, Complainant's Exhibit No. 25, and Respondent's Exhibits Nos. 17 and 18.)

70. Mr. Serpento admitted that the respondent did not hire him to consider possible accommodations for complainant, and that he did not consider any accommodations. The respondent intentionally withheld from Mr. Serpento the fact that Dr. McDowell had released complainant to return to work in October of 1993. (Tr. Vol. 1, pps. 263, 264 and 265.)

71. The respondent intentionally failed to make complainant aware of Mr. Serpento's vocational report. Complainant had no knowledge that Mr. Serpento had prepared a report based on her confidential medical information or was involved with her in any way until 1997. The respondent intentionally ignored medical evidence which indicated that complainant could return to work and intentionally withheld from Mr. Serpento, and ADA compliance personnel Jennifer McIntosh and Barbara Judy, the fact that Dr. McDowell released complainant to work in October of 1993. (Tr. Vol. 3, p. 195; Tr. Vol. 1, pps. 263 and 264.)

72. The evidence shows that the respondent intentionally misinterpreted Dr. McDowell's January FCAR in an effort to preclude complainant from returning to the patient escort position.

73. All of the credible medical evidence of record indicates that complainant was

cleared to return to work after October 5, 1993; and that no medical evidence existed until the FCAR of Dr. McDowell upon which to question complainant's suitability for the patient escort position which she had performed adequately until that time.

74. The harshest criticism of complainant's performance came from Supervisor Savage who testified that after the surgery complainant was having problems and that her job became difficult for her at times. The respondent produced no objective evidence, however, that complainant did not adequately perform her duties. Supervisor Savage admitted under direct examination that the only problem affecting complainant's ability to do her job was the temporary seepage problem that occurred after the surgery. (Tr. Vol. 3, pps. 9, 19, 22, and 34.)

75. Supervisor Savage also admitted that complainant could transport patients as well as the other escorts, and that she met the responsibilities of her job. However, Supervisor Savage later contradicted her own prior testimony and performance evaluations when she answered "no" when asked if complainant could perform the job. Supervisor Savage's inconsistent testimony is not reconcilable and this latter testimony is not credible. (Tr. Vol. 3, p. 34.)

76. The credible evidence of record clearly shows that, at worst, complainant had some transient bleeding which caused her to miss some work between June and October 1993. Nonetheless, complainant could perform the essential functions with or without accommodations at all times.

77. The FCAR form used by the respondent contained no questions regarding whether the person was cleared to work or if any accommodations would aid the person. The form focused only on the severity level of the person's impairments.

78. An individual can have substantial limitations and still perform the essential functions of her job.

79. Credible eyewitness testimony indicated that complainant was able to perform the essential functions of the patient escort position at all times with minimal reasonable accommodations.

80. The evidence shows that complainant could perform the essential functions of her patient escort position with the reasonable accommodation of wearing the high pressure support hose.

81. The only accommodations that would have been necessary for complainant to continue working immediately after the surgery was that she temporarily refrained from pushing the heavier objects while she was still in the healing process, and that she use the elevator rather than the stairs.

82. The evidence shows that the respondent treated complainant as if she were unable to perform any job which required any physical effort.

83. The evidence shows that the respondent had a discriminatory intent when it refused to allow complainant to return to work after her treating physician, Dr. McDowell, gave her medical clearance to return in October 1993.

84. The evidence shows that the respondent had a discriminatory intent when it again refused to allow complainant to return to work after Dr. Patel gave medical evidence that indicated her limitations were so mild as to allow for her to return in February 1994.

85. The evidence shows that witnesses for the respondent intentionally gave false testimony concerning knowledge of Dr. McDowell's releases at the trial of this matter.

86. Supervisor Savage asked June Blosser to withhold the fact that complainant had been released to return to work from the Vice President of Human Resources, Larry Evans. (Complainant's Exhibit No. 35.)

87. The evidence indicates that complainant was essentially terminated from her employment with the respondent at the time Supervisor Savage refused to allow her return to work in October 1993. Following this refusal, the complainant continued on sick leave and then catastrophic leave until she was terminated from employment by letter dated September 12, 1994. (Complainant's Exhibit No. 17.)

88. During this time period, respondent through its Department of Personnel, undertook a period of special monitoring, during which respondent attempted to match complainant with job openings with respondent for which she was suited. In May of 1994 this process had begun, by which time respondent had evidently concluded that complainant could not be accommodated in her patient escort position; and at that time the respondent had concluded that complainant was incapable of performing any physical activity of any sort, while her poor clerical scores involving typing skills, grammar and

spelling precluded any other types of positions. By August 30, 1994 complainant was evidently taken off of special monitoring status. (Respondent's Exhibits Nos. 24 and 28.)

89. This situation as described in the forgoing findings of fact presents a unique set of circumstances from the standpoint of its legal implications. The complainant was essentially terminated in October 1993; while the complainant was not in a position to realize the fact of her termination until the termination notice was received by complainant in September 1994. In essence the termination of complainant , under these set of facts constituted a continuing violation termination (and failure to hire) by the respondent for a period extending up until the termination; both of which causes were timely filed by complainant as the basis for her Human Rights Complaint in July 1995. (Docket No. EH-25-96 Complaint.)

90. Respondent has litigated the cause of termination by addressing the issues of complainant's refusal to be allowed to return to work following her release in October 1993 and having undertaken a special monitoring program to find alternative employment during the period prior to her termination, subjected themselves to undertake that program in a fashion that would not discriminate against the complainant on the basis of her disabilities under the terms of that program. The respondent's Affirmative Action Plan For Disabled Employees states the respondent's goal of providing equal employment opportunities and specifically states that the respondent will review physical and mental job qualifications to see that they are job related and consistent with business necessity and safe

performance and that appropriate medical information regarding functional limitations or restrictions of duties for applicants and employees will be obtained from medical authorities. (Respondent's Exhibit No. 34.)

91. The complainant applied for numerous positions with respondent from October 1993 through 1996. Although personnel records for the time period were destroyed, respondents acknowledge that complainant specifically applied for Assignment Assistant/ Housing & Residence Life, Posted 6-16-94; Office Assistant/ Housing & Residence Life, Posted 7-14-94; Secretary, positions with School of Journalism and Ag & Forestry, and Clerical Assistant, Administrative Services, Posted 8-11-94. Complainant also applied for the Postal Worker position at WVU Hospital, Posted 4-12-94. (Complainant's Exhibit No. 18.)

92. Complainant introduced the testimony of Deborah Frost, a Rehabilitation Counselor with a BA in Psychology and a Masters in Rehabilitation Counseling from WVU. Ms. Frost's experience qualifies her as an expert in rehabilitation counseling. (Tr. Vol. 2; pps. 90-95.)

93. Ms. Frost reviewed all the medical records pertaining to complainant and made numerous recommendations as to possible accommodations that could have been attempted in trying to get complainant back to work as a patient transport. None of these suggestions had been tried and therefore Ms. Frost could not say whether complainant would conclusively have been able to be 100% successful in her job. (Tr. Vol. 2; pps.

101-104.)

94. Ms. Frost performed an ability profile based upon her work history and compared those with the ability requirements of various positions as listed in the Dictionary of Job Titles compiled by the federal government. Comparing those to the jobs complainant had applied for with the respondent, Ms. Frost testified credibly that she would have been a good fit for the office assistant in the Housing & Resident Life position where the typing requirements are marginal at 2%, with those other abilities and skills being exceeded by complainant for the position. This was also the case with the Assignment Assistant position with Housing & Resident Life. (Tr. Vol. 2; pps. 105-110, 116 and 117.)

95. The evidence shows that but for the respondent's discriminatory intent, complainant would not have been terminated on September 12, 1994.

96. The evidence shows that complainant suffered a loss of back wages and benefits in the amount of $113,130.00, through May 31, 1999 if she had been moved to the Assignment Assistant position effective August 16, 1994. (Calculation submitted by respondent dated May 16, 1999.)

97. The total value of complainant's present salary and benefits package if she were still employed with the respondent would be at least $25,160.00.

98. Complainant has suffered severe emotional distress because of the respondent's conduct.

99. Complainant has experience running her own business, namely a beauty salon, which she did between 1988 and 1992. Complainant also currently runs a business, Creative Memories, which focuses on teaching people to create and preserve photo albums and displays.

100. The respondent effectively discharged complainant on October 6, 1993, when it failed to allow complainant to return to work despite medical clearance by Dr. McDowell.

101. Complainant received $5,607.04 in unemployment benefits in 1994. In 1997 complainant received $1,531.10 from Ray's Classic Car Care and $545.00 from Creative Image. Complainant cannot recall applying for any work in 1998. Complainant had mitigation earnings of $2,076.10. (Tr. Vol. 2 p. 57; Respondent's Exhibits Nos. 3 and 7.)

102. Complainant previously attempted to apply for jobs at the University and Hospital where her retirement of 15 years would continue to accrue. She continued to apply for jobs there through April 1996. (Tr. Vol. 2 pps. 18, 26 and 57.)

103. The complainant's pregnancy in 1995 will not be considered as preventing her availability for work in computing mitigation as it would be speculative as to whether she would not have been available to work outside of any maternity leave available to her had she continued to be employed by respondent.

104. Complainant is entitled to back pay damages of $111,054.90, plus

prejudgment interest.

B.

DISCUSSION

West Virginia Code § 5-11-9(1) prohibits unlawful discriminatory practices of any employer who discriminates against an employee who "is able and competent to perform services required even if such person is blind or handicapped..."

> "In order to establish a case of discriminatory discharge under W.Va. Code § 5-11-9 , with regard to employment because of handicap, the complainant must prove as prima facie case, that (1) he or she meets the definition of 'handicapped', (23) he or she is a 'qualified handicapped person', and (3) he or she was discharged from his or her job." Sly. Pt. 2, in relevant part, Morris Memorial Convalescent Nursing Home, Inc. v. Human Rights Commission, 189 W.Va. 314, 431 S.E.2d 353 (1993).

Syllabus Point 3, Hosaflook V. Consolidation Coal Co., 201 W.Va. 325, 497 S.E.2d 174 (1997).

West Virginia Code § 5-11-3(m) provides:

> The term "handicap" means a person who:
> (1) Has a mental or physical impairment which substantially limits one or more of such person's major life activities. The term "major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;
> (2) Has a record of such impairment; or,
> (3) Is regarded as having such an impairment.

In Syllabus Point 3 of Morris Memorial Convalescent Nursing Home, Inc. v. Human Rights Commission, 189 W.Va. 314, 431 S.E.2d 353 (1993), the Supreme Court stated,"A "qualified handicapped person' under the West Virginia Human Rights Act and the accompanying regulations is one who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question."

The Legislative Rules Regarding Discrimination Against Individuals With Disabilities, 77 C.S.R. 1 § 4.13 provides in part:

> When an individual acquires a disability in the course of employment, the employer shall, if possible through reasonable accommodation, continue the individual in the same position, or reassign the employee to a new position for which he/she is qualified or for which, with training , she/he may become qualified.

Although respondent has steadfastly refused to stipulate that complainant is handicapped under the statute such contention is hardly worthy of being addressed. The respondent has terminated her from her employment because they contend she cannot perform the "walking, pushing and pulling" required by her job. What is more they contend in their memoranda associated with her special placement period that she is incapable of performing any physical activities. Clearly Doctor McDowell's FCAR indicates that complainant is substantially impaired in her ability to walk and to work and that she has a record of such impairment; further respondent's treatment of those records as precluding any

physical employment prove she was clearly regarded as being handicapped by respondent. Thus complainant meets the definition of handicap under the West Virginia Human Rights Act. The next element of the prima facie case is to establish that she was capable of performing the essential functions of her job either with or without reasonable accommodations.

Determining the question of whether complainant was capable of performing the essential functions of her job relates to several events in a chain of events leading to her termination in September of 1994 and the refusal to reinstate her after being cleared to return following to work by Dr. McDowell again in October 1994; which chain of events also includes the respondent's failure to hire her during a special placement period they undertook within this time period. These events also include the related question of what adverse employment actions are at issue in this case as well. These aspects of the prima facie case might just as well address the consideration of these matters in light of the overall burden upon complainant to prove by the preponderance of the evidence that she was discriminated against on the basis of her handicap.

This course of events began in October 1993 when the complainant testified that she attempted to return to work following an absence related to her vein ligation surgery and the follow up care for slow healing of those wounds. Even were the undersigned to ignore the evidence produced during discovery over the objection of respondent's counsel, which conclusively establishes that the respondent's agent supervisor Savage was presented with a return to work slip and that their other agents were aware of this fact; this was established

by the independent testimony of the complainant and a credibility determination of the undersigned that this testimony was much more believable and forthright, than the testimony which the undersigned observed coming from Supervisor Savage. The undersigned specifically made note of this relative credibility in a rare note to himself while observing the testimony of Supervisor Savage. Supervisor Savage had no medical authority to refuse to reinstate complainant to her position at that point in time and cited no other reason for her refusal to accept complainant's return to work on that date regarding poor performance or inability to do her job. This was in fact the point in time when complainant was terminated for all practical purposes. Complainant had no way to know this at the time however because she was continually told that she would be allowed to return to work after she got the FCAR's, and alternatively told that they would work with her to find other employment with respondent during this special placement period.

Thus complainant was not in a position to realize that she had been effectively terminated until she actually was formally terminated by the respondent in their correspondence dated September 12, 1994. The nature of the process by which complainant was ultimately terminated has to be treated as one continuing violation of the Human Rights Act as those events were all part of the same transactions between the parties which were the subject of the complainant's complainant as filed with the West Virginia Human Rights Commission in July 1995. This complainant alleged both the refusal to hire for other positions as well as the refusal to accommodate her for the position from which she had been fired. The respondent further has waived any objection as to the timely nature of the filing

of the complaint by extensively defending the matter by reference to these activities and events leading up to complainant's termination. This being the case the undersigned finds as a matter of law and based upon these particular facts that a continuing violation has occurred both for the termination from complainant's patient escort position and for the refusal to hire for any position from October 1993 until the present for those positions with respondent for which she was qualified to perform the essential functions of those jobs. Therefore the undersigned concludes that the complainant was discriminated against on the basis of her handicap or disability as of October 26, 1993 when respondent defacto terminated her employment in violation of the Human Rights Act. Such action was taken against a qualified individual on the basis of her perceived disability and was an adverse action by the employer. Complainant suffered emotionally from this termination as it involved great stress and inconvenience to her. She was damaged to the extent that she lost sick benefits which were expended and lost wages for the period from this point in time until such time as the respondent first obtained medical evidence which could reasonably be relied upon as the basis for a conclusion that she was not capable of performing her duties as patient escort.

The next issue is much more difficult to decide. The evidence shows that respondent had in its possession an FCAR dated January 3, 1994 prepared by Dr. McDowell from which they evidently concluded complainant was unable to perform the essential functions of her job. This conclusion is supported by that evidence. Unfortunately, it is clear that the decision that complainant could not perform the essential functions of her job was obviously

already made by Supervisor Savage on the basis of impermissible discrimination against complainant on the basis of her handicaps of obesity and hypertension causing varicose veins. Subsequent events taken after her refusal to accept complainant back to work are tainted by this fact and other steps taken by respondent that indicate they were not taking a good faith effort to appraise complainant's abilities but rather to justify their actions undertaken by Supervisor Savage. These steps include the fact that Mr. Serpento was never informed of the medical records that indicated complainant was capable of returning to work, his disregard of the FCAR of Dr. Patel which indicates that she could perform the essential duties, and his submission of a vocational report which did not even address job requirements in particular in relation to the FCAR limitations (as his draft report was received prior to Supervisor Savage's memo detaining that the FCAR supported her conclusion that the essential duties could not be performed, which opinion clearly did not indicate Dr. Patel's FCAR was given any consideration). The fact that complainant was never informed that Mr. Serpento's vocational report was the basis of their conclusion that she was incapable of returning to her previous employment or that they had made relative determinations regarding the validity of the FCAR's which had been completed, made the transmission of the reports to complainant in May 1994 incapable of any action on her part in response to the alleged inability to meet the essential duties of patient escort. This clearly violated complainant's due process rights to submit the kinds of evidence she would have needed to submit to prove her ability to perform her job with reasonable accommodation. Indeed complainant might have supposed that she had submitted the report of Dr. Patel

indicating her ability to perform her job in February 1994, that being the most recent FCAR completed based upon the most recent examination of the complainant by an individual qualified to determine her ability to undertake these types of physical activities. Certainly she could suppose that the provision of a return to work notice from the doctor whose FCAR was being relied upon in her termination in October 1994 following their termination of her should be indicative of her ability to perform the essential functions of her job. Nothing it seems would be sufficient to change the respondent's determination that complainant was not fit for return to her former job as they would ignore any evidence conflicting with Supervisor Savages initially unsupported determination made in excess of her authority ab initio. Dr. McDowell's subsequent explanations that complainant's conditions as reported in his FCAR were the same during the course of her seven year performance of patient escort duties prior to his submission of his assessment, and that he would have indicated that complainant could have returned to work if Mr. Serpento had requested clarification of his report certainly casts grave doubt as to respondent's contention that complainant is incapable of performing patient escort duties. The failure of respondent's agents at Human Resources and their independent vocational expert to obtain additional information by discussing the matter with Dr. McDowell, when they were all aware of the conflicting nature of the return to work and FCAR clearly established bad faith and malice on the part of respondent in undertaking her subsequent termination. Such a tort of wrongful discharge is not the undersigned's concern however enraged he may be by this activity on behalf of respondent by its Human Resources Department. Violation of constitutional due process rights is not

with the undersigned's purview. Instead the undersigned must determine whether complainant has proven that she was capable of performing the essential duties of patient escort which duties clearly involve lifting, pushing, pulling and walking. Those duties could be modified reasonably to exclude stair climbing as a matter of factual finding. The evidence of record supports respondent's conclusion that complainant was substantially unable to perform those essential duties based upon Dr. McDowell's FCAR. He was the treating physician for the vascular problems and he was the vascular specialist. He did not retreat from his FCAR evaluation at hearing, thus the undersigned concludes that no amount of bad faith predicated upon unlawful discriminatory motive on the part of respondent or lack of diligence in the pursuit of accurate information to assess the ability of complainant to perform the essential functions of her position, vests the undersigned with the authority to substitute my opinion that complainant could perform the essential duties based upon the common sense impression that she had been able to in the past and her condition had not changed following her recuperation from the transient bleeding, for that of respondent that she could not based upon the valid finding of the treating vascular surgeon reporting her functional limitations.

The next issue to be addressed involves that of the respondent's refusal to hire complainant for alternative employment with respondent for which she was capable of performing the essential functions of that employment. In addressing this issue it must be remembered that it is not necessary to prove that the respondent intended to discriminate on an impermissible basis but rather only that the complainant show by a preponderance of the

evidence that the respondent discriminated against her in her attempt to be employed with it on an impermissible basis; in this instance that they made false assumptions based upon their preconceived notion about her abilities because of her handicap resulting in their refusal to hire her for other positions for which she applied. By May 1994 the respondent, through its agents in charge of their special monitoring period during which they were ostensibly trying to find alternative employment with respondent, stated in a memoranda that complainant was unable to perform any physical activities. This conclusion was based upon their conception of her handicap as detailed by Dr. McDowell's FCAR; which conclusion is certainly well beyond anything contained in the FCAR in fact. Thus the entire effort was biased by an impermissible discrimination against complainant as it undertook its ongoing efforts on her behalf.

As indicated in the foregoing discussion the entire effort was an ongoing process constituting a continuing violation under the West Virginia Human Rights Act, and as such any positions for which complainant applied from that time in November 1993 when she was first discriminated against in the defacto discharge from her patient escort position through that time when the Human Rights complaint was filed with the Commission in July 1995 is properly subject to the jurisdiction of the Commission because it was properly raised as the subject of the complaint in its particulars as a continuing violation and because the respondent has made those individual events the basis of its defense of its own will in the course of its defense. Analysis of the particulars of this case causes the undersigned to find that the respondent discriminated against complainant in failing to properly determine

whether she could be accommodated for the position of Mail Clerk at WVUH, but cannot find by a preponderance of the evidence that complainant could in fact have performed those duties with or without reasonable accommodation. The undersigned finds on the basis of uncontradicted evidence of the vocational expert Deborah Frost, that complainant was certainly qualified for the positions of Assignment Assistant and Office Assistant with Housing & Resident Life with respondent posted 6-16-94 and 7-14-94 respectively; and that she was discriminated against on the basis of her handicap in the respondent's failure to hire her for those positions. The complainant is entitled to back pay she would have earned in those positions and is entitled to front pay until such time as she is hired to fill an opening in either of those positions.

The complainant has proven that she suffered emotional distress in relation to all the incidents of discrimination including the discrimination incurred at the time off the respondent's failure to allow her return to work, at the time respondent failed to hire her as an Assignment Clerk or Office Assistant for Housing & Residence Life, and in its firing of her when it terminated her on September 12, 1994. This is based upon the emotional distress which accompanied complainant's testimony regarding the events even after the passage of these many years. Particulary devastating to the complainant was the trauma that accompanied being forced to obtain catastrophic leave and using her husbands accumulated leave for that purpose as a direct result of the discriminatory failure to allow her return to work after obtaining proper medical clearance to return in October 1993. She is entitled to the maximum award of incidental damages for emotional distress and humiliation which the

undersigned can award by law of $3,277.45 for that and another $3,277.45 in incidental damages for the emotional distress and humiliation caused by the respondent in failing to hire her for the position of Assignment Assistant or Office Assistant for Housing & Residence Life.

The undersigned also finds that the complainant is entitled to award of attorneys fees and costs in the amount of $35,289.28, as previously detailed in the complainant's Affidavit of Attorney Fees and Litigation Costs and Affidavit of Additional attorneys Fees and Costs; of which $31,945.00 was for attorneys fees billed at $100.00/ hour out of court and $125.00/ hour in court time, and $3,344.28 was for litigation costs. The respondent did not raise any objection to the fees and costs, which are reasonable in light of similar fees awarded in cases of equal complexity, considering said rates are lower than those that have been obtained by more experienced counsel in similar instances, and the time and forgone opportunity costs invested in this contingent litigation were considerable given respondent's aggressive and contentious litigation of every issue from pre hearing motions to dismiss, through denial of discovery and refusal to stipulate to the even the most obvious of facts.

C.

CONCLUSIONS OF LAW

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

2. The respondent, is an "employer" and "person" as defined by W. Va. Code § 5-11-

1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.

3. The complaint in this matter was properly and timely filed in accordance with W. Va. Code § 5-11-10 and properly alleges discrimination in the termination of complainant and the failure to hire her for other positions for which she applied. Such causes of action were in the nature of continuing violations under the peculiar factual situation involved and any timeliness issue as to the complaint alleging these particular acts were waived by virtue of their having been tried by consent of respondent as the particulars were raised as evidence of the non discriminatory nature of their actions as alleged in the complaint.

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

5. The complainant has established a prima facie case of discrimination, in that the complainant discriminated against her on the basis of her handicap in its de facto termination of complainant when it refused to allow her return to work in October 1993 and also discriminated against the complainant on the basis of her handicap in refusing to hire her for either the position of Assignment Assistant or Office Assistant with Housing & Residence Life for which complainant proved she was qualified. The respondent has articulated a legitimate non discriminatory motive for the respondent's action in terminating complainant from her patient escort position on September 12, 1994, that the complainant was unable to perform the essential functions of that position, which complainant was unable to show by a preponderance of the evidence was pretextual as the undersigned, although he believes complainant was still capable of performing those essential functions, refuses to overrule the

judgment of the respondent as to her fitness for the post of patient escort since the respondent had substantial evidence before it at the time of its discrimination to support a conclusion that she is incapable of performing those duties and complainant has not proven that she is capable of performing those essential functions; and that it has articulated claims of valid non discriminatory basis for failure to hire for other positions that complainant was not qualified for those positions; which the complainant, by a preponderance of the evidence has proven to be pretext for discrimination based upon her handicap as alleged, and that she was a qualified individual for the Assignment Assistant and Office Assistant positions with Housing & Residence Life.

6. The complainant is entitled to an award of back pay from October 26, 1993 through August 18, 1994 for her position of patient escort; and for Back pay and front pay for the position of Assignment Assistant or Office Assistant with Housing & Residence Life with respondent form August 18, 1994 until the present; totaling $111,054.90 through May 31, 1999; and to be instated to the next available position as Assignment Assistant or Office Assistant in Housing & Residence Life or other position for which she is suited. Front pay will accrue until she is instated in a position or refuses employment at the rate of $25,160.00 per year.

7. The complainant is entitled to an award of $3,277.45 for each of the acts of discrimination involving the failure to allow her return to work in October 1993 and her failure to be hired as Assignment Assistant with Housing & Residence Life in June 1994; totaling $6,554.90.

8. Complainant is entitled to an award of attorneys fees and costs totaling $35,289.28.

D.

RELIEF AND ORDER

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

1. The respondent named hereinabove shall cease and desist from engaging in unlawful discriminatory practices. Such provision includes but is not limited to ascertaining which clerical support positions require a sufficient degree of typing to require a 40 Word per minute requirement; as well as, notice of specific physical limitation requirements precluding continued employment with respondent whenever employees are terminated from employment on the grounds of their alleged inability to perform essential functions of the job.

2. Within 31 days of receipt of the undersigned's order, the respondent shall pay back pay in the amount of $111,054.90, plus statutory interest.

3. The respondent shall pay front pay at the rate of $25,160.00 per year until complainant is instated to a position with respondent as Assignment Assistant or Office Assistant with Housing and Resident Life, or some other suitable position.

4. Within 31 days of receipt of the undersigned's order, the respondent shall pay the complainant reasonable attorneys fees and costs in the aggregate amount of $ 35,289.28.

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

complainant incidental damages in the amount of $6,554.90 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination, plus statutory interest of ten percent.

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

It is so **ORDERED**.

Entered this 10th day of June, 1999.

WV HUMAN RIGHTS COMMISSION

BY: _____

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE