BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

VICTOR T. PEOPLES,
Complainant,

v. **DOCKET NO. ER-71-05**

SUE J. ERPS and WILLIAM G. ERPS,
d/b/a IMPROVEMENTS UNLIMITED,
Respondents.

CHIEF ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

A public hearing in the above-captioned matter was convened on December 5-6, 2006, in the Mercer County Memorial Building, at 1500 West Main Street, Princeton, West Virginia.

The Complainant, Victor T. Peoples, appeared in person and his case was presented by Jonathan L. Matthews, Assistant Attorney General, Civil Rights Division, West Virginia Attorney General's Office. The Respondents, Sue J. Erps and William G. Erps, d/b/a Improvements Unlimited, appeared in person by owner, William G. Erps, and by the Respondents' attorney, Anthony R. Veneri, Esquire, of Veneri Law Offices.

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 the applicable law. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and legal analysis of the chief 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 arguments are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary for a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, they are not credited.

I.

STATEMENT OF THE CASE

On June 16, 2004, Victor T. Peoples, an African American male, was employed by Improvements Unlimited. He along with Wayne Bragg, a white male, were working side by side at a job site in Virginia. When Mr. Peoples asked Mr. Bragg to drill deeper holes in the cross ties; Mr. Bragg, while holding a shovel responded, "You say another word and I'll cut your fucking head off with this shovel nigger!" Mr. Bragg was angry when he made this statement and testified that when he made the statement that he meant it.

Mr Peoples immediately asked David W. Yontz, his supervisor, to address the comment. Mr. Yontz separated the men and told each man to return to work. Mr. Peoples asked if he could leave and go home. Mr. Yontz directed Mr. Peoples to return to work or be terminated. Mr. Peoples refused to return to work until Mr. Yontz addressed the incident. Mr. Yontz did not address the incident. He fired Mr. Peoples who left the job site and walked eight to ten miles home to Bluefield, West Virginia because he had ridden to the job site in Yontz's truck and did not have any other way to get home.

Improvements Unlimited terminated Mr. Peoples for insisting that it take action to remedy a racially hostile work environment, which Improvements Unlimited fostered by not taking swift and decisive action to remedy a serious incident of harassment and by not having any policies or procedures in place to address such conduct.

Improvements Unlimited subjected Mr. Peoples to retaliation through a series of actions such as following him, staring at him and offering him money to try to dissuade him from going forward with his Complaint.

II.

PARTIES' CONTENTIONS

a. Commission's Contentions

The Commission contends that Improvements Unlimited wrongfully discharged Mr.

Peoples in violation of the West Virginia Human Rights Act when it subjected him to a racially hostile work environment created by Mr. Bragg, co-worker and Mr. Yontz, the supervisor. Improvements Unlimited failed to take sufficiently prompt and effective remedial action to end the harassment.

When Mr. Peoples reported Mr. Bragg's racial slur and angry threat of bodily harm to Mr. Yontz, Yontz failed to take appropriate action to correct the situation. Improvements Unlimited did not have any rules forbidding racial harassment and did not have a mechanism for receiving, investigating and resolving complaints of harassment.

Also, the Commission contends that employees of Improvements Unlimited subjected Mr. Peoples to retaliatory acts because he filed a Complaint with the West Virginia Human Rights Commission.

b. Respondents' Contentions

Improvements Unlimited contends that Mr. Peoples was terminated for refusing to work. Improvements Unlimited contends that it later offered Mr. Peoples the opportunity to return to work and Mr. Peoples did not. According to Improvements Unlimited, if Mr. Peoples had returned to work, it would have taken remedial action to address the June 16, 2004 incident of harassment. Improvements Unlimited, William Erps, the company owner, and employees deny participation in any retaliatory acts and deny knowledge of any retaliatory acts against Mr. Peoples as a result of his filing a complaint with the West Virginia Human Rights Commission.

III.

SUMMARY OF THE DECISION

The employer is responsible for the workplace environment not the employee. Racial slurs and threats of violent bodily harm of any kind are never appropriate in the workplace. When an employer allows employees to participate in name calling of any kind and fails to address this kind of behavior with swift and decisive action and then has no policies or

procedures in place to deal with this kind of behavior, a reasonable person can conclude that things will get out of hand. This acquiescence in allowing racial slurs and horse play creates a discriminatory, hostile work environment that becomes abusive and insulting. Because the work environment is within the control of the employer, it is the employer who must stop the name calling, racial slurs and threats of physical bodily harm.

Mr. Peoples was wrong to call Mr. Bragg and Mr. Yontz names such as "honky", "white trash.", "red neck". However, Mr. Peoples name calling was non-threatening. His name calling was not coupled with a threat of violent, physical bodily harm and anger as was Mr. Bragg's comment. This kind of behavior can be expected when the employer does not have established standards of conduct and does not take control of the work environment.

The evidentiary record clearly supports a finding that Mr. Peoples was subjected to a racially hostile work environment that was created by Mr. Bragg, co-worker and Mr. Yontz, the supervisor. After Mr. Peoples reported that Mr. Bragg, a co-worker, while holding a large shovel in his hands, called Mr. Peoples a "nigger" (the "n" word) and threatened to cut off his fucking ("f" word) (Hr. Tr Vol. II at 132) head with a shovel, Improvements Unlimited and Dave Yontz, its supervisor failed to take immediate and swift action, preferring to terminate Mr. Peoples if he did not return to work.

Mr. Bragg testified that he meant what he said to Mr. Peoples. The racial slur coupled with a violent threat of physical bodily harm all of which Mr. Bragg said he meant and the fact that Mr. Peoples walked from Tazewell County, Virginia eight to ten miles home to Bluefield, West Virginia because he had no other way to get home, clearly rises to the level of "severe" discriminatory conduct that was "physically threatening and humiliating."

The Respondents' actions constitute violations of the West Virginia Human Rights Act. Improvements Unlimited did not have any policies or procedures in place to deal with such conduct and based on the testimony at the public hearing does not have any intentions of implementing any policies and procedures to address future hostile work environment incidents.

Once Mr. Peoples filed a Complaint with the West Virginia Human Rights Commission,

the Respondents' engaged in actions toward Mr. Peoples that constitute retaliation according to the West Virginia Human Rights Act.

IV.
FINDINGS OF FACT

1. Complainant Victor T. Peoples is an African American male who resides in Bluefield, West Virginia. (Hr. Tr. Vol. I, at 21; Joint Exhibit 1).

2. Mr. Peoples began his employment with Improvements Unlimited on April 13, 2004. His last day of work was June 16, 2004. (Hr. Tr. Vol. II, at 172, 182; Tab 11F; Respondent's Exhibit 3, Tab 10(c) and Tab 10(I)). The evidence in the record shows that Peoples received his last paycheck on June 25, 2004. (Respondent's Exhibit 2).

3. Mr. Peoples earned $6.00 an hour straight time and $9.00 per hour overtime. During the course of his employment, Mr. Peoples earned $2,097.00 in regular earnings and $535.50 in overtime earnings for a total of $2,632.50. (Joint stipulation I).

4. Mr. Peoples and Respondents' other employees were paid on Friday morning one week after the given week of work. (Hr. Tr. Vol. II, at 171-172).

5. Respondent Improvements Unlimited is located in Princeton, West Virginia. (Hr. Tr. Vol. II, at 162).

6. William Erps, owner of Improvements Unlimited, began operating the proprietorship in 1993. Mr. Erps is white. (Hr. Tr. Vol. II, at 162-163).

7. David W Yontz, Mr. Peoples supervisor, is white. (Hr. Tr. Vol. I, at 30-32; Joint Exhibit 1).

8. Wayne Bragg and Jason Harris, Mr. Peoples' fellow crew members are white. (Hr. Tr. Vol. I, at 30-32; Joint Exhibit 1).

9. Prior to June 16, 2004, Mr. Peoples and other employees joked and engaged in non-threatening "horseplay". (Hr. Tr. Vol. I, at 104, 311, 312).

10. On June 16, 2004, Mr. Peoples along with fellow crew members Mr. Bragg, Mr. Harris and crew supervisor Mr. Yontz traveled to the business college across the Southern West Virginia border to Tazewell County, Virginia. The day's task consisted of

building a tie wall. (Hr. Tr. Vol. I, at 30-32).

11. The crew had different tasks to perform. Mr. Bragg was drilling holes. Mr. Peoples and Mr. Harris were operating the sledge-hammers. Supervisor Yontz operated a bobcat also known as a skid steerer and drilling holes. (Hr. Tr. Vol. I, at 32-33, 300 and Hr. Tr. Vol. II, at 9 and 12). The crew worked in an area where the wall would be 45 -50 feet in length and the height would be seven to eight feet when the job was completed. ((Hr. Tr. Vol. II, at 10).

12. Mr. Bragg was drilling holes five to six feet ahead of Mr. Yontz who was also drilling holes. (Hr. Tr. Vol. II, at 14).

13. Mr. Peoples picked on Mr. Bragg and called him names such as "white trash" and "honky." (Hr. Tr Vol. II, at 130-131). The name calling angered Mr. Bragg. (Hr. Tr Vol. II, at 127, 132).

14. Mr. Bragg stated that the reason he got so mad with Mr. Peoples was because Mr. Peoples made fun of the way Mr. Bragg talked and because Mr. Peoples called Mr. Bragg names. (Hr. Tr. Vol. II, at 127-130).

15. Prior to the June 16, 2004 incident, Mr. Bragg and Mr, Peoples had not had an argument or been involved in any type of conflict. (Hr.Tr Vol. II, at 130).

16. Mr. Peoples was having trouble fitting the rebar into the holes that Mr. Bragg was drilling. He asked Mr. Bragg to drill the holes deeper. (Hr. Tr. Vol. I, at 32).

17. Mr. Bragg angrily said to Mr. Peoples, "You say another word I'll cut your fucking head off with this shovel, nigger." (Hr. Tr. Vol. II, at 33-34; Hr. Tr Vol. II at 132).

18. Mr. Bragg admitted that when he made this statement, he meant it. (Hr. Tr Vol. II, at 146).

19. Mr. Yontz said he did not hear what was said between Mr. Peoples and Mr. Bragg because he was drilling holes. (Hr. Tr. Vol. II, at 17).

20. Mr. Yontz said that when Mr. Peoples and Mr. Bragg approached him, he could see that they were upset and angry. (Hr. Tr. Vol. II, at 16-17).

21. Prior to the June 16, 2004 incident, there had not been any problems or tension between Mr. Bragg and Mr. Peoples. (Hr. Tr. Vol. I, at 131).

22. Mr. Peoples asked his supervisor, Mr. Yontz, "What are you going to do about that?" Mr. Yontz did not respond to Mr. Peoples' question instead, he told Mr. Peoples, "That's done, over, get back to work." (Hr. Tr. Vol. I, at 36).

23. When Mr. Peoples insisted that Mr. Yontz take action, Mr. Yontz told Mr. Peoples to get back to work or he was fired. (Hr. Tr. Vol. I, at 36).

24. Mr. Peoples told Mr. Yontz to send him home. (Hr. Tr. Vol. II, at 31).

25. Mr. Yontz feared that the situation could escalate and that there might be a physical altercation.

26. Mr. Yontz separated Mr. Peoples and Mr. Bragg and instructed both men to return to work. (Hr. Tr. Vol. II, at 28).

27. Mr. Yontz was trained at Western Michigan Teen Challenge on how to handle hostile angry youth. He used his training to separate the men and instruct them to return to work. (Hr. Tr. Vol. II, 43, 44, and 45).

28. Mr. Peoples asked Mr. Yontz to address the situation immediately. Mr. Peoples would not go back to work and handed his hammer to Mr. Harris and told Mr. Yontz "to do what he had to do." (Hr. Tr. Vol. I, at 132).

29. Mr. Peoples persisted, but Mr. Yontz again refused to address the incident with Mr. Bragg and said to Mr. Peoples, "You're fired, get off the premises." (Hr. Tr. Vol. I, at 35-36).

30. Mr. Peoples walked approximately eight to ten miles to his home in Bluefield, West Virginia because he rode to the work site with his supervisor Mr. Yontz and co-workers Mr. Bragg and Mr. Harris. (Hr. Tr. Vol. I, at 37).

31. When he arrived at his home, Mr. Peoples called the owner of Improvements Unlimited, William Erps, on his cell phone and told him about the incident with Mr. Bragg. Mr. Erps told Mr. Peoples that Mr. Bragg should not have called him the "n" word and that he (Erps) would handle it. (Hr. Tr. Vol. I, at 39, 97-100 and Hr. Tr. Vol. II, 192-193, 198).

32. Mr. Erps investigation consisted of taking statements from Mr. Yontz and Mr. Harris the evening of June 16, 2004 after Church. (Hr. Tr. Vol. II, at 218). Mr. Erps talked to Mr. Bragg about not using the "n" word. (Hr. Tr. Vol. II, at 138).

33. Mr. Yontz took Mr. Bragg's statement in 2006. (Hr. Tr. Vol. II, at 150). Mr. Bragg cannot read or write. (Hr. Tr. Vol. II, at 138). Mr. Yontz prepared Mr. Bragg's statement. Mr. Yontz read the statement to Mr. Bragg before he signed it. (Hr. Tr. Vol. II, at 138-139, 147).

34. Although Mr. Peoples went to the Improvements Unlimited office on June 18, 2004 to pick up his paycheck, he did not speak with Mr. Erps. (Hr. Tr. Vol. II, at 194 and 195).

35. Mr. Peoples returned to Mr. Erps' office again on June 25, 2004 to pick up his final paycheck and again did not talk to Mr. Erps about the incident involving himself and Mr. Bragg. (Hr. Tr Vol. II, at 195).

36. Each time Mr. Peoples went to the Improvements Unlimited office to pick up his pay check, Mr. Erps asked Mr. Peoples to stay until after the checks were distributed. Mr. Peoples left before Mr. Erps could speak to him.

37. There is no evidence in the record that Mr. Erps ever attempted to contact Mr. Peoples at home or by letter to discuss the June 16, 2004 incident involving Mr. Bragg and Mr. Peoples.

38. Mr. Erps took no disciplinary action against Mr. Bragg. (Hr. Tr. Vol. II, at 136-137).

39. Mr. Bragg admitted that he made a racial slur to Mr. Peoples and that he threatened Mr. Peoples with physical bodily harm with a shovel. (Hr. Tr. Vol. II, at 135).

40. Mr. Erps admitted that Mr. Bragg made a racial slur and a physical threat that constituted a serious and severe incident. (Hr. Tr. Vol. I, at 270).

41. Mr. Yontz admitted that Mr. Peoples told him about the racial slur and the threat with the shovel immediately after the incident happened. (Hr. Tr. Vol. II, at 22 and 25).

42. At no time before or after the incident did Improvements Unlimited have an anti-harassment policy, distribute an anti-harassment policy or discuss one with its' supervisors and employees. (Hr. Tr. Vol. I, at 266-267, 277-278).

43. In 2005, Sue Erps of Improvements Unlimited, developed a three page

employee handbook in response to Mr. Peoples discrimination complaint. Prior to Mr. Peoples discrimination complaint, Improvements Unlimited did not have an employee handbook. (Hr. Tr. Vol. II, at 188-190).

44. Mr. Erps has never taken an anti-discrimination class. (Hr. Tr. Vol. I, at 266).

45. Mr. Erps has no plans to implement an anti-harassment policy. ((Hr. Tr. Vol. I, at 269-270).

46. Mr. Erps stated that a racial harassment policy is not necessary because Improvements Unlimited is a small company (Hr. Tr. Vol. I, at pp. 266) and if anything like the Mr. Peoples/Mr. Bragg incident comes up again, he will handle it. (Hr. Tr. Vol. I, at 279).

47. Mr. Erps stated that Mr. Yontz, his supervisor, is trained to handle incidents like the Mr. Peoples/Mr. Bragg incident and that Mr. Yontz received his training through Western Michigan Teen Challenge. (Hr. Tr. Vol. I, at pp. 280).

48. Western Michigan Teen Challenge is a Christian organization oriented towards young men and women who have problems with alcohol, drugs and eating disorders. (Hr. Tr. Vol. I, at 281-282).

49. There is no evidence in the record that Mr. Yontz received any racial harassment training through Western Michigan Teen Challenge or any other source.

50. Western Michigan Teen Challenge did not train Mr. Yontz to diffuse a racial situation. (Hr. Tr. Vol. I, at 287-288).

51. On June 23, 2004, Mr. Peoples, called the West Virginia Human Rights Commission and requested a form to file a discrimination complaint. He filed his Complaint with the Commission on July 2, 2004. (Hr. Tr. Vol. I, at 37, 43-44; Commission's Exhibits 1, 2, 3, and 4).

52. After the Complaint was filed, Mr. Peoples felt that Mr. Erps and employees of Improvements Unlimited were following him, and chasing him. He also stated that Brian Eaves, an African American employee of Improvements Unlimited, on behalf of Mr. Erps offered him money, to drop his Complaint with the West Virginia Human Rights Commission. (Hr. Tr. Vol. I, at 82).

53. Mr. Peoples testimony that Claude Erps' workers attempted to intimidate him is found credible and believable. (Hr. Tr. Vol. I at 190).

54. Mr. Peoples testimony that William Erps attempted to have Brian Eaves, an African American employee of Improvements Unlimited offer Mr. Peoples money to drop his human rights claim is credible.

55. Mr. Peoples started receiving partial disability benefits from the Veteran's Administration in August 2004. (Hr. Tr. Vol I, at 152).

56. Mr. Peoples signed up for the job service in west Virginia and Virginia. He sought employment at the Foundry in Radford, Virginia and the Volvo Plant in Dublin, Virginia. He also put in an application at the Pepsi Plant in Wytheville, Virginia. (Hr. Tr. Vol. I, at 59-60).

57. The record is unclear as to the exact date Mr. Peoples was unable to work. (Hr. Tr. Vol. I, at 145-153, 199-200).

V.

DISCUSSION

The Commission and the Complainant have proven not only a prima facie case of retaliatory discharge, racial discrimination and retaliation, but, have also proven by a preponderance of the evidence that the Commission and the Complainant should prevail on each charge.

The West Virginia Human Rights Act declares that it is "the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment" and "equal opportunity in the areas of employment . . . without regard to . . . race." W. Va. Code § 5-11-2. The Act is a remedial statute that is "liberally construed to accomplish its objectives and purposes. West Virginia Human Rights Comm'n v. Moore, 186 W. Va. 183, 187; 411 S. E. 2d 702, 706 (1991) and West Virginia Code §5-11-5.

W. Va. Code § 5-11-9(1) of the West Virginia Human Rights Act, makes it unlawful "for any employer to discriminate against an individual with respect to ... hire, tenure,

conditions or privileges of employment if the person is able and competent to perform the services required..." The term "discriminate" or "discrimination" as defined in W. Va. Code § 5-11-3(h) means to "exclude from, or fail or refuse to extend to, a person equal opportunities because of race . . ."

The West Virginia Supreme Court of Appeals has consistently held that cases brought under the West Virginia Human Rights Act are governed under the same analytical framework and structures developed under Title VIII, at least where the Act does not direct otherwise. West Va. University v. Decker, 191 W. Va. 567, 447 S. E. 2d 259 (1994); Conaway v. Eastern Associated Coal Corp., 178 W. Va. 164, 358 S. E. 2d 423 (1986).

The courts have adopted two evidentiary theories for proving a claim for race discrimination under Title VIII: disparate impact and disparate treatment. This case is about disparate treatment.

A discrimination case may be proven under a disparate treatment theory. See Barefoot v. Sundale Nursing Home, Syl. pt. 6, 193 W. Va. 475, 457 S.E.2d 152 (1995); West Virginia University v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994); Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission, 181 W. Va. 251, 382 S.E.2d 88 (1989).

A disparate treatment case requires proof which can be inferential of discriminatory intent. Discriminatory intent may be established by showing that the decision maker acted out of stereotypical thinking, such as racial stereotypes, and need not involve some type of malice or hatred.

In order to establish a case of disparate treatment for discriminatory discharge or failure to hire under W.Va. Code § 5-11-9, with regard to race, the Complainant must prove the following last three elements as part of a prima facie case:

(1) The Complainant is a member of a protected class;

(2) The employer made an adverse decision concerning the Complainant; and,

(3) But for the Complainant's protected status, the adverse decision would not have been made. Conaway, 178 W.Va. at 475, 358 S.E.2d at 423.

Furthermore, the Commission acting on behalf of the Complainant must show by a preponderance of the evidence that:

(1) the employer excluded him from, or failed or refused to extend to him, an equal opportunity; and

(2) that one or more impermissible reasons were a motivating or substantial factor causing the employer to exclude the Complainant from, or fail or refuse to extend to him, an equal opportunity. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed.2d 268 (1989); and

(3) the equal opportunity denied a Complainant is related to any one of the following employment factors: compensation, hire, promotion, tenure, terms, conditions or privileges of employment.

A disparate treatment case can be proved with circumstantial evidence. This is the most common way to prove disparate treatment because those who discriminate hide their biases and stereotypes, making direct evidence unavailable. The Complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 and, adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342. Under this formula, the Complainant must first establish a prima facie case of discrimination; the Respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the Complainant must show that the reason proffered by the Respondent was not the true reason for the decision, but rather pretext for discrimination. Cases analyzed under the McDonnell Douglas test often turn on the credibility of explanation given by the Respondent for its decision.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490. A proffered reason is pretext if it is not the true reason for the decision. Conaway, 358 S.E.2d 423. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and, where pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152. Discrimination need

not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S.502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); Skaggs v. Elk Run Coal Co., Inc., 198 W. Va. 51, 479 S. E. 2d 561 (1996). Pretext need not be the product of an illicit motive. As stated in Skaggs, at 583, pretext may be the product of subconscious or stereotypical thinking.

If the Commission fails to show pretext, and the evidence reveals that there was a mixture of motives and the Complainant's race was at least a factor, it can still prevail. The Respondent can avoid damages only if it carries the burden of proving that it would have taken the same adverse action even if the Complainant's protected class status had not been considered. Skaggs 479 S.E.2d at 584-585; Barefoot, 457 S.E.2d at 162, n.16, at 164, n.18; West Virginia Institute of Technology, 181 W. Va. 525, 383 S.E.2d 490. The evidence presented at the hearing does not support a finding in the Respondents' favor. Quite the contrary, the evidence clearly establishes that the Complainant was subjected to severe racial harassment and that when it was brought to the employer's attention, the owner took no action.

Second, there is also the "mixed motive" analysis under which a Complainant may proceed to show disparate treatment, as established by the United States Supreme Court in Price Waterhouse, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. "Mixed motive" applies where the Respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the Complainant needs only show that the Complainant's protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the Complainant's protected class had not been considered. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

A Complainant may also prove a disparate treatment case by direct evidence of discriminatory intent. Proof of this type shifts the burden to the Respondents to prove by a preponderance of the evidence that it would have made the same decisions even if it had not considered the illicit reason(s). Trans World Airlines v. Thurston, 469 U.S.111, 36 Fair

Empl. Prac. Cas. 977 (1985). This analysis is similar to that used in mixed motive cases.

Applying these standards, Mr. Peoples has established that he is a member of a protected class, in that he is African American. Improvements Unlimited took adverse employment action against Mr. Peoples when it terminated his employment. The third element of the prima facie case is also satisfied because it requires the Complainant to show only an inference of discrimination. The Commission and the Complainant made such a showing. Barefoot, syl. pt.2, 457 S.E.2d at 152. See also Powell v. Wyoming Cablevision, Inc.,184 W. Va. 700, 403 S. E. 2d 717, 721-722; West Virginia Institute of Technology, 181 W.Va. 525, 383 S.E.2d 490.

A. Retaliatory Discharge

There are four elements that the Complainant must prove, by a preponderance of the evidence, in a retaliatory discharge case. The elements are (1) that the Complainant engaged in a protected activity; (2) that the Respondent was aware of the protected activity; (3) that an adverse action occurred; and (4) that the adverse action followed the protected activity within such period of time that the Court can infer retaliatory motivation. Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S. E. 2d 251, 259 (1986); Brammer v. West Virginia Human Rights Commission, 183 W. Va. 108, 394S. E. 2d 340 (1990) and West Virginia Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S. E. 2d229 (1994).

Regarding the first element, Mr. Peoples was engaged in an protected activity when he asked Mr. Yontz, his supervisor, to take immediate, swift and decisive action in addressing the June 16, 2004 incident.

Regarding the second element, Mr. Yontz admitted that Mr. Peoples reported the June 16, 2004 incident to him and that he was asked to take immediate , swift and decisive action and asked him what was he going to do about it.

Regarding the third element, Mr. Yontz admitted that he terminated Mr. Peoples when Mr. Peoples refused to return to work. Termination of employment is an adverse action.

Regarding the fourth element, Mr. Peoples was terminated immediately when he refused to return to work until Mr. Yontz addressed the racial slur and the threat of physical bodily harm. The short period of time between the protected activity and the termination is enough to infer a retaliatory motive.

Improvements Unlimited argued that Mr. Peoples was terminated because he refused to return to work when given a direct order. Mr. Peoples, however, was justified in not returning to work because the terms and conditions of his employment changed when he was called a nigger coupled with a physical threat by Mr. Bragg, a white co-worker who was angry and holding a shovel.

On direct examination, Mr. Bragg made it clear that when he made this physical threat, he meant it. He was angry and he was holding a shovel which could be used as a dangerous weapon. Mr. Peoples was justified in ceasing to work until his employer, Improvements Unlimited, responded to what it admitted was a "severe" and "serious" incident.

William Erps stated that he told Mr. Peoples to come by his office on June 17, 2004 to discuss the incident. Although Mr. Mr. Peoples went to the office to pick up two paychecks, he did not talk to Mr. Erps. Mr. Erps felt that Mr. Peoples should have talked to him on each one of these occasions. However, the fact that Mr. Yontz, the Improvements Unlimited's supervisor failed to take swift and decisive action against Mr. Bragg on June 16, 2004, given the nature of the threat made to Mr. Peoples, the use of the "N" word and the fact that Mr. Bragg, Mr. Yontz and Mr. Erps are white; Mr. Peoples was justified in not discussing the matter further with Mr. Erps.

Also, Improvements Unlimited asserted that it was justified in terminating Mr. Peoples because of his past work performance. Mr. Peoples work performance did not become an issue until the June 16, 2004 incident. (Commission's Exhibit 10-B).

Mr. Erps testified that Mr. Peoples' work performance did not play a role in his discharge. Mr. Yontz subsequently admitted that even if Mr. Peoples had been a perfect employee, up to June 16, 2004, he would have terminated him for refusing to work. (Hr. Tr. Vol. II, at 74-75). Clearly, Mr. Peoples' past work performance is irrelevant.

B. Racial Harassment

Mr. Peoples was subjected to a hostile work environment that was severe. The West Virginia Human Rights Commission recognizes claims of discrimination based upon allegations of a racially hostile work environment. In Terrell v. Eastern Associated Coal Corp., Docket No. ER-304-98, the Commission explains that, consistent with the West Virginia Supreme Court of Appeals' decision regarding harassment and national origin/ancestry, for the purposes of the West Virginia Human Rights Act, the principles governing sexual harassment also govern racial harassment. (Terrell Final Order, at p. 12 and Fairmont Specialty Services v. West Virginia Human Rights Commission, 206 W. Va. 86, 522 S.E.2d 180 (1999) The Commission's Final Order in Terrell was not appealed by either party.

The prima facie case established with respect to national origin and ancestry in Fairmont Specialty is consistent with the Commission's articulation and adoption of the Hanlon v. Chambers 195 W.Va. 99, 464 S.E.2d 741 (1995) test in Terrell.

The Court held in Fairmont Specialty, that to establish a hostile or abusive work environment claim, a plaintiff-employee must prove:

> (1) that the subject conduct was unwelcome;
>
> (2) it was based on the [protected characteristic] of the plaintiff;
>
> (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment; and
>
> (4) it was imputable on some factual basis to the employer.

Fairmont Specialty, at Syl. pt. 2.

As to the first two elements, it is undisputed that Mr. Bragg's comment, "I'll cut your fucking head off with this shovel, nigger," was unwelcome and based on race.

As to the third element, Mr. Bragg's angry physical threat of bodily harm, coupled with his use of the racial slur "nigger", is sufficiently severe to alter the conditions of employment for Mr. Peoples.

As to the fourth element, Mr. Bragg's comment and Mr. Yontz's adverse action against Mr. Peoples is imputable to Improvements Unlimited because Improvements Unlimited did not take swift and decisive action to remedy the situation.

When a co-worker creates a hostile environment, an employer can only escape liability if it takes prompt remedial action. Fairmont Specialty, 522 S. E. 2d at 187-189. This action must be swift, decisive, meaningful, and reasonably calculated to end the harassment. Fairmont Specialty, 522 S. E. 2d at 190.

The West Virginia Supreme Court of Appeals has identified five factors to consider when determining whether the employer took the appropriate action. The five factors are the promptness of the employer's response; the employer's degree of acquiescence in the harassment; the gravity of the harm; the nature of the work environment; and the sincerity of the employer's actions. Fairmont Specialty, 522 S. E. 2d at 191.

Justice Cleckley instructed in Hanlon v. Chambers, 195 W. Va. 99, 464 S. E. 2d 741 (1995) that "common sense must be applied to facts in sexual harassment cases to determine whether the employer took direct and prompt action reasonably calculated to end harassment, for purposes of determining employer's liability." This instruction also applies to racial harassment cases. The five factors and common sense can be applied to this case.

Regarding the first factor, Improvements Unlimited had no further plans to affirmatively address the June 16, 2004 incident between Mr. Bragg and Mr. Peoples other than to separate them and have them return to work. Although Mr. Yontz and Mr. Erps testified at the hearing about what they might have done later in the day or the next day, the fact is that Improvements Unlimited had no other plan of action to address the situation other than to separate the two men and direct them to return to work.

Regarding the second factor, clearly the evidence in the record supports a finding that Improvements Unlimited acquiesced in the harassment when it did not control the work in environment in such as a manner as to discourage its employees from engaging in name calling and horse play that escalated into racial slurs and a threat of bodily harm. Improvements Unlimited did not have any anti-harassment policies. At the public hearing, Mr. Erps made it clear that he has no plans to implement an anti-harassment policy or any

other measures to prevent harassment in the future. He specifically stated that if a similar incident happens in the future that he will take care of it.

Regarding the third factor, the use of the word "nigger", coupled with a physical threat of bodily harm while holding a shovel that can easily become a dangerous weapon is very grave. Any reasonable person would be apprehensive of imminent physical harm. The use of the word "nigger"is so offensive when directed toward an African American that even a one time use of the word "intended to denigrate" constitutes "outrageous discriminatory conduct" that cannot be tolerated in the workplace." Fairmont Specialty Services, 522 S.E.2d at 187-188, n.8. When Mr. Bragg called Mr. Peoples a "nigger", Mr. Bragg intended to denigrate and belittle Mr. Peoples.

Regarding the fourth factor, Mr. Bragg, Mr. Yontz, Mr. Peoples and Mr. Harris all worked in close proximity with each other. The crew worked in an assembly type line. Mr. Harris was in front of Mr. Peoples drilling holes. Mr. Peoples was behind him fitting the rebar in the holes that Mr. Bragg drilled. The crew worked in an area where the wall would be 45 -50 feet in length and the height would be seven to eight feet when the job was completed. It was June, it was hot and the work was hard. Mr. Yontz's testimony regarding the physical conditions is as follows.

> I mean, it was hot, during the day. I mean, these railroad ties, if you're familiar with any type of construction, these things are heavy. There's a lot of weight involved with them and they are filled with creosote. So when you're cutting it, you've got the sun bearing down on you and the heat and you're working out in the open area. It's, it's hot. Because of the blacktop. So it was– -I mean, it's hard work.
>
> (Hr. Tr. Vol. II, at 87).

Given the severity of the threat of physical bodily harm, the racial slur, Mr. Yontz should have done more than separate the men.

Regarding the fifth factor, Improvements Unlimited did not respond to the harassment in a swift and decisive manner and left it up to Mr. Peoples to contact Mr. Erps about the incident. Respondents did not make efforts to contact Mr. Peoples directly nor did Mr. Erps take any steps to develop an anti-harassment plan. Improvements Unlimited

response to Mr. Bragg's actions was to terminate Mr. Peoples. Improvements Unlimited's acts of intimidation, coercion and failure to develop an anti-harassment are examples of the Respondents' lack of sincerity.

Fairmont Specialty also addressed the question of severity and pervasiveness. The West Virginia Supreme Court of Appeals made it clear that employers have a duty to investigate any reasonable notice of harassment and to eradicate all such harassment. The Court stated the following.

> The aggravated nature of discriminatory conduct, together with its frequency and severity, are factors to be considered in assessing the efficacy of an employer's response to such conduct. Instances of aggravated discriminatory conduct in the workplace, where words or actions on their face clearly denigrate another human being on the basis of race, ancestry, gender, or other unlawful classification, and which are clearly unacceptable in a civilized society, are unlawful under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to -20 (1999), and in violation of the public policy of this State. When such instances of aggravated discriminatory conduct occur, the employer must take swift and decisive action to eliminate such conduct from the workplace.

Fairmont Specialty, at Syl. pt. 3.

In the text of the opinion, the Court elaborated by saying:

> Conduct such as use of the "N" word to describe an African-American, the "C" word to describe women, the terms "Spic," "W.P." or "Jap" to describe those of other ancestral heritages, or other racial, sexual or ethnic pseudonym, intended to denigrate others, cannot be tolerated in the workplace. They are the type of outrageous discriminatory conduct that may be considered to be of an aggravated nature such that the threshold for it to be actionable is much lower than more subtle forms of discrimination which cumulatively cause conduct to be actionable under the Human Rights Act.

Fairmont Specialty, 522 S.E.2d at 187-188, n.8.

The United States Supreme Court has stated that while there is no precise test for determining a hostile work environment there are certain "guideposts" that include "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc. 510 U. S. 17,21, 23; 114 S. Ct. 367, 126 L. Ed. 2d. 295 (1993) quoting Meritor Savings Bank, FSB v. Vinson, 477 U.

S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). The employment environment must be abusive both objectively and subjectively. Id. at 21, 114 S. Ct. 376.

There is little doubt that the following actions are certainly severe enough to subjectively alter the conditions of employment in these cases. The actions are

1. Mr. Bragg's use of the "N" word coupled with an angry violent threat while holding a potentially dangerous instrument and saying "I'll cut your fucking head off with this shovel nigger".

2. Mr. Yontz's failure to address Mr. Peoples request for swift and prompt action.

3. Mr. Yontz's termination of Mr. Peoples' employment.

4. Mr. Peoples walked eight to ten miles back from Tazewell County, Virginia to Bluefield, West Virginia.

The racial slur coupled with a violent threat is not only physically threatening but also humiliating as was Mr. Peoples walking eight to ten miles home to Bluefield, West Virginia because he was fired at the job site and had no other way to get home except to walk. Clearly Mr. Yontz and Mr. Bragg's actions unreasonably interfered with Mr. Peoples work performance thus contributing to the hostile work environment.

Hostile work environments are generally imputed to the employer unless the employer can show that it took appropriate action to remedy the situation. Improvements Unlimited failed to take any action to remedy the situation once Mr. Peoples informed Mr. Erps about the discriminatory conduct of Mr. Bragg, and Mr. Yontz.

C. Retaliation

The Complainant has established a prima facie case for retaliation against the Respondents and has proven by a preponderance of the evidence that the Respondents, did retaliate against him because he filed a Complaint with the West Virginia Human Rights Commission.

It is a violation of the West Virginia Human Rights Act for an employer or a person to retaliate against any individual for engaging in a protected activity, such as filing a Complaint with the West Virginia Human Rights Commission. Retaliation is a separate and

distinct cause of action. The Act specifically provides that it is unlawful for any person, employer or employment agency to "[e]ngage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss. . . ." W. Va. Code § 5-11-9(7)(A). Subpart (C) of the same section provides that it is unlawful for any person, employer or employment agency to "[e]ngage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article. . . . ." W. Va. Code § 5-11-9(7)(C). "The legislative purpose in including the anti-retaliation provision was obviously to encourage people to come forward and expose unlawful employment practices and to do so without fear of reprisal." Hanlon v. Chambers, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995).

The West Virginia Supreme Court first addressed the issue of retaliation in Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986). The Court, adopting the standard of proof scheme established by the United States Supreme Court in McDonnell Douglas, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), set out the prima facie standard for retaliation claims. A Complainant must prove by a preponderance of the evidence the following.

(1) The Complainant engaged in a protected activity;

(2) The Complainant's employer was aware of the protected activity;

(3) The Complainant was subsequently discharged and (absent other evidence tending to establish retaliatory motivation); and

(4) The Respondent's adverse action followed his protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store, 365 S.E.2d at 259; Conrad v. ARA Szabo, 198 W. Va.362, 480 S.E.2d 801 (1996); Hanlon v. Chambers, 195 W. Va. 288, 464 S.E.2d 741 (1995); West Virginia Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994); Frank's Shoe Store , 179 W. Va. 53, 365 S.E.2d 251 (1990).

As to the first standard, Mr. Peoples engaged in several protected activities. First, he asked Mr. Yontz to take immediate and swift action against Mr. Bragg after Mr. Bragg

angrily told Mr. Peoples he would "cut his fucking head off with a shovel" and after Mr. Bragg called Mr. Peoples a "nigger." The Complainant's attempts to have his concerns addressed were not productive.

As to the second standard, Respondents admit they were aware of Mr. Peoples' Human Rights Complaint as well as the Amended Complainant. Mr. Peoples engaged in the protected activity of making a Complaint of discrimination to the West Virginia Human Rights Commission on June 23, 2004. Mr. Peoples signed his Complaint July 2, 2004. The Complaint was served on the Respondents September 8, 2004 (Joint Exhibit 1, tab 2). Respondents responded to the Complaint on September 22, 2004 (Commission's Exhibit 5, tab 4). The Respondents answered the Amended Complaint on April 18, 2005. Therefore, the employers were aware of the protected activity.

As to the third standard, Mr. Peoples engaged in the protected activity of reporting acts of reprisal committed by the Respondents to the Commission who in turn amended the initial Complaint to include a retaliation/reprisal charge.

The traditional formulation of the third standard is that subsequent to engaging in the protected activity, the individual was discharged from employment. Frank's Shoe Store, 365 S.E.2d at 259. This formulation was developed in the context of a retaliatory discharge case. Id.

However, the anti-retaliation provisions of the West Virginia Human Rights Act do not limit reprisal actions to cases of termination. The clear language of the Act prohibits an employer, an employment agency or a person from engaging in "any form of threats or reprisal." W. Va. Code §§ 5-11-(9)(7)(A)&(C) (emphasis added). While such prohibition is certainly inclusive of a retaliatory discharge, it is not limited to that specific form of reprisal.

In this case, reprisal took the form of William Erps and his employees following and one of Claude Erps' employees chasing Mr. Peoples across a bridge to his side of town; having an African American employee offer Mr. Peoples money and Mr. Erps giving Mr. Peoples weird looks. (Hr. Tr. Vol. I, at 73-79; 80, 85).

Specifically, after filing the Complaint with the Commission, there were several occasions when Mr. Peoples felt Improvements Unlimited was intimidating him. One time,

Mr. Peoples was leaving a bar in Bluefield and a large man got out of a van with an "Erps" sign on it and chased him. (Hr. Tr. Vol. I, at 73-79).

Another time Brian Eaves, a former Improvements Unlimited employee, approached Mr. Peoples in a bar in Bluefield and asked Mr. Peoples about the incident with Mr. Bragg. Mr. Eaves then showed Mr. Peoples a roll of money and told him to take the money and that Mr. Erps knew a lot of important people. This gave Mr. Peoples the impression that Improvements Unlimited had sent Eaves to pay him off. (Hr. Tr. Vol. I, at 74-75, 80).

Mr. Erps drove by Mr. Peoples a couple of times and stared at him and gave him weird looks. Another time, Mr. Erps sat in a parked car and looked at Mr. Peoples. And, on another occasion, Mr. Erps' brother drove past Mr. Peoples ten to fifteen times one day and stared at him as he rode by.

These actions of intimidation and coercion are strictly prohibited by the West Virginia Human Rights Act. They further demonstrate that Improvements Unlimited was never serious about preventing or remedying harassment, and was only interested in ending this case, even if it meant ending the case by intimidation or coercion.

As to the fourth standard, Improvements Unlimited's acts of reprisal and intimidation against Mr. Peoples because of his initiation of his human rights complaint are a clear violation of the retaliation provisions of the West Virginia Human Rights Act, and irrefutably link Respondents' conduct to Mr. Peoples protected activity.

To prevail, the Respondent must show by a preponderance of the evidence that it would have taken the actions complained of against the Complainant even if it had not considered the illicit reason. Trans World Airlines v. Thurston, 469 U.S. 111, 36 Fair Empl. Prac. Cas. 977 (1985).

In this case, there is no justification for following and chasing Mr. Peoples; having an African American employee offer Mr. Peoples money and giving staring at Mr. Peoples or driving up and down the street Mr. Peoples lives on up to ten times in a day. The Commission has established all elements of the prima facie test for retaliation as articulated in Frank's Shoe Store.

The Commission has met its burden and proven by a preponderance of the evidence

that Respondent retaliated against the Complainant. The Commission and the Complainant are entitled to a finding of liability against Respondent without further inquiry.

VI.

DAMAGES

Mr. Peoples is entitled to such relief as will effectuate the purposes of the West Virginia Human Rights Act and "make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). The injured party is to be placed, as near as possible, in the situation which he would have occupied had he not been discriminated against.

It has been the policy of the Commission, in keeping with the "make whole" objective of the Act, to calculate back pay awards on a periodic basis, and to calculate interest on back pay at the rate of ten percent simple interest per annum prior to December 31, 2006 and at the rate of 9.75% simple interest per annum effective date of January 1, 2007 as back pay accrues. The Commission does not compound interest.

Mr. Peoples, under the "make whole" rule, is entitled to receive back pay including benefits with prejudgment interest. Rodriguez v. Consolidation Coal Co., 206 W. Va. 317, 524 S.E.2d 672 (1999); Hensley v. West Virginia Dep't of Health and Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998); Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986); Bell v. Inland Mutual Ins. Co., 175. W. Va. 165, 332 S.E.2d 127 (1985); W. Va. Code § 56-6-31.

Mr. Peoples is entitled to lost wages from the date of his termination to the date he was no longer physically able to perform a laborer job such as the job he performed for Improvements Unlimited. Respondents are entitled to mitigation, if any is available.

Mr. Peoples is entitled to incidental damages with respect to his claim against Respondents. Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977); Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989). Bishop Coal provides that the $2,500 cap on incidental damages may be adjusted

from time to time to conform to the Consumer Price Index. Bishop Coal, 380 S.E.2d at 247. In keeping with this language, the Commission has periodically raised the cap on incidental damages. Currently the cap for emotional distress damages is $5,000.00 for each claim. The Complainant is entitled to such damages from the Respondents in no less than this amount. The Commission takes the position that in virtually all cases where discrimination is held to have occurred, the Complainant will have suffered at least the maximum worth of damages. The Complainant here has suffered injury well in excess of the $5,000.00 available under the cap. Accordingly, Respondents should be charged with the maximum available award.

The Commission and the Complainant are entitled to a cease and desist order. The Commission in its cease and desist order may make provisions which will aid in eliminating future discrimination. The cease and desist order may require an affirmative action program and a sworn affirmation from a responsible officer of the Respondent that the Commission's order has been implemented and will continue to be implemented. Whittington v. Monsanto Corp., Docket No. ES-2-77, and Pittinger, et al. v. Shepherdstown Volunteer Fire Dep't, Docket No. PAS-48-77; *see also* Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission,172 W. Va. 627, 309 S.E.2d 342 (1983).

The greatest priority in civil rights law enforcement is the elimination of discrimination, and virtually every statute and ordinance provides for authority to issue cease and desist orders. Therefore, as a part of the remedy to each charge where discrimination is found, the Respondents should be prevented from initiating or continuing a discriminatory policy or practice. This cease and desist authority is always consistent with a make whole remedy, because the charging party is never made whole when the real possibility of future discrimination remains following resolution of the individual charge. A cease and desist order is particularly warranted in this case because of Respondents' failure to take swift and deceive action to address Mr. Bragg's behavior towards Mr. Peoples and because the Respondents had no anti-harassment policies, procedures or training in place at the time of Mr. Bragg's Actions to prevent or remedy harassment. The evidence is that William Erps has no plans to adopt such policies or procedures.

A cease and desist order against the Respondents is appropriate to protect present and future employees of the Respondents against discrimination.

Mr. Peoples, the Commission and its counsel should be awarded their costs and expenses associated with prosecuting this Amended Complainant.

It is well settled that discrimination complainants, such as Mr. Peoples, have a duty to mitigate their damages by accepting equivalent employment. Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990). An individual is required to mitigate damages by being reasonably diligent in seeking employment substantially equivalent to the position he was denied. Smith v. American Service Company of Atlanta, Inc., 796 F.2d 1430, 1431 (5th Cir. 1986). However, the burden of raising the issue of mitigation is on the employer. Mason County Board of Education v. State Superintendent of Schools, Syl. pt. 2, 170 W. Va. 632, 395 S.E.2d 719 (1982).

VII.

CONCLUSIONS OF LAW

1. The Complainant, Victor T. Mr. Peoples, 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. At all times relevant hereto, the Complainant is a person within the meaning of W. Va. Code § 5-11-3(a), and was an employee of the Respondent, Improvements Unlimited, as defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(e).

3. The Respondents, Sue J. Erps and William G. Erps, d/b/a Improvements Unlimited, are employers and persons as defined by the West Virginia Human Rights Act, W. Va. Code §§ 5-11-3(d) and (a), respectively, and the West Virginia Human Rights Commission's Legislative Rules, *The Definition of Employer Under the West Virginia Human Rights Act*, W. Va. Code R. § 77-7-2.1. (2002).

4. The Complaint in this matter was timely filed in accordance with W. Va. Code § 5-11-10.

5. The Complainant met his prima facie burden and proved that the Respondents retaliated against him, in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-9(7)(A).

6. The Respondents' defense to the Complainant's charge of retaliation was pretextual.

7. The Commission proved by a preponderance of the evidence that the Respondents terminated Mr. Peoples in retaliation for a protected activity.

8. The Respondents discriminated against the Complainant in the terms, conditions or privileges of employment within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-9(1).

9. The Respondents are liable for back pay and prejudgment interest for the illegal termination of the Complainant.

10. Respondents' agent Wayne Bragg's comment, "I'll cut your fucking head off with this shovel, nigger," is sufficiently severe to constitute racial harassment.

11. The evidence that the Respondents took no immediate action, except for separating Mr. Bragg and Mr. Peoples, proves that the Respondents did not take swift and decisive action to remedy this severe incident of racial harassment.

12. The evidence that the Respondents had no harassment policies, reporting measures, procedures, or training in place at the time of Mr. Bragg's comment to prevent or remedy harassment, the evidence they had adopted no such measures since Mr. Bragg's comment, and the testimony of owner Respondent William Erps at hearing that they had no future plans to adopt such measures, is further proof that the Respondents did not sincerely attempt to remedy the hostile work environment.

13. Given this evidence, the Commission proved by a preponderance of the evidence that the Respondents are liable for fostering a hostile work environment for the Complainant, in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-9(1).

14. The evidence further proves that the Respondents intimidated and coerced Mr. Peoples, in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-9(7)(A).

15. Respondents' unlawful actions caused the Complainant emotional distress,

pain, and anguish. After being threatened and called a "nigger", the Complainant was terminated and had no choice but to walk from Tazewell, Virginia eight to ten miles to get home in Bluefield, West Virginia. This made the Complainant feel "degraded" and "humiliated." The Complainant's testimony, coupled with the serious nature of the Respondents' discriminatory conduct, proves the severity of Complainant's embarrassment and humiliation and warrants an award of the maximum amount of incidental damages allowable under the West Virginia Human Rights Act.

16. As a result of the discriminatory actions of the Respondents, the Complainant is entitled to:

(a) Lost wages from the date of the Complainant's termination to the date that he was no longer physically able to perform a laborer job, such as the job he performed at Improvements Unlimited;

(b) Interest on the lost wages award of 10% per annum prior to January 2007, and 9.75% per annum subsequent to January 1, 2007;

(c) Incidental damages in the amount of $5,000.00 for the humiliation, embarrassment and loss of personal dignity suffered by the Complainant as a result of the discriminatory actions of the Respondents;

(d) Reimbursement of the West Virginia Human Rights Commission's hearing transcript costs in the amount of $1,669.60 associated with prosecuting this claim, and travel expenses incurred by the Attorney General's Office, Civil Rights Division, in the amount of $184.46;

(e) A cease and desist order aimed at preventing the Respondents from continuing the illegal discriminatory practices evidenced in their actions; and

(f) An order requiring the Respondents to take the following action within thirty-one days of its entry: (1) adopt a harassment reporting procedure to be approved by the West Virginia Human Rights Commission; (2) adopt a harassment policy to be approved by the West Virginia Human Rights Commission; (3) to distribute this policy to all employees and to all future hires; (4) that all Improvements Unlimited management and supervisory personnel undergo one hour of anti-harassment training, subject matter to be approved by

the West Virginia Human Rights Commission.

VIII.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, this Administrative Law Judge orders the following relief:

1. The above-named Respondents, Sue J. Erps and William G. Erps, d/b/a Improvements Unlimited, shall cease and desist from engaging in unlawful discriminatory practices.

2. The Respondents are ORDERED to pay the Complainant, Victor T. Mr. Peoples, a back pay award that includes the value of lost wages from the date of his June 23, 2004, termination up until the date upon which Mr. Peoples was physically unable to perform the laborer job that he performed while working for the Respondents. The Commission and Respondents are directed to determined the exact date that Mr. Peoples was unable to work. I am requesting that the date be established with documentary evidence if possible. The record is unclear as to the exact date.

In addition, the Commission is directed to submit its final calculations regarding back pay and interest on the back pay to me and the Respondent by April 20, 2007. The Commission's final calculations shall take into account the fact that Mr. Peoples began receiving a VA check for partial disability in August 2004 and indicate what impact, if any, that has on the back pay award as well as documentary evidence that establishes the date of his total disability.

Respondents is directed to file its objection to the Complainant's calculations with me by May 4, 2007. The Commission's Reply Brief is due April 27 2007. Respondents' Response to the Commission's Reply Brief is due May 4, 2007.

A Supplemental Final Decision on Damages will be issued by May 30, 2007. Please submit any documentation you are relying on to support your calculations.

3. The Respondents are ORDERED to pay the Complainant, Victor T. Mr. Peoples, prejudgment interest on the award of lost wages at the rate of 10% per annum until January 1, 2007, at which point the Respondents shall pay 9.75% per annum. Please

determine this amount based on the aforementioned directive.

4. The Respondents are ORDERED to take the following action within thirty-one days of this order's entry: (1) adopt a harassment reporting procedure to be approved by the West Virginia Human Rights Commission; (2) adopt a harassment policy to be approved by the West Virginia Human Rights Commission; (3) to distribute this policy to all employees and to all future hires; (4) require all Improvements Unlimited management and supervisory personnel to undergo one hour of anti-harassment training, where the subject matter of such training is to be approved by the West Virginia Human Rights Commission.

5. As a result of the Respondents' unlawful discriminatory conduct, the Respondents are ORDERED to pay Mr. Peoples an award of $5,000.00 for humiliation, embarrassment, and loss of personal dignity.

6. The Respondents are ORDERED to:

(a) Reimburse the West Virginia Human Rights Commission for hearing transcript costs associated with prosecuting this claim in the amount of $1,669.60, and to send this amount to the West Virginia Human Rights Commission, 1321 Plaza East, Room 108A, Charleston, West Virginia 25301-1400; and

(b) Reimburse the Attorney General's Office for travel expenses of $184.46 incurred in the prosecution of this claim and to send this amount to the Attorney General's Office, c/o Assistant Attorney General Jonathan L. Matthews, at Post Office Box 1789, Charleston, West Virginia 25326-1789.

7. In the event of the Respondents' failure to perform any of the obligations hereinbefore set forth, Complainant is directed to immediately so advise the West Virginia Human Rights Commission, Ivin B. Lee, Executive Director, 1321 Plaza East, Room 108A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 6th day of April, 2007.

WV HUMAN RIGHTS COMMISSION

BY: Phyllis Harden Carter

PHYLLIS HARDEN CARTER
CHIEF ADMINISTRATIVE LAW JUDGE