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Cecil H. Underwood
Governor

Herman H. Jones
Executive Director

(2)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

July 18, 1997

Sandra C. B. Rogers
Rt. 1, Box 624
Sod, WV 25564

MTI, Inc.
4350 Glendale/Milford
Cincinnati, OH 45242

Sandra Henson
Assistant Attorney General
Civil Rights Division
Attorney General's Office
PO Box 1789
Charleston, WV 25326-1789

John Teare, Jr., Esq.
Ricklin Brown, Esq.
Bowles, Rice, McDavid, Graff & Love
PO Box 1386
Charleston, WV 25325-1386

Re: Rogers v. MTI, Inc.
ES-116-95

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

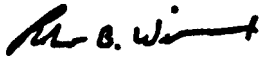
10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Herman H. Jones, Executive Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SANDRA C. B. ROGERS,

Complainant,

v. DOCKET NUMBER(S): ES-116-95

MTI, INC.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on November 21, 1996, in Kanawha County, at the Office of the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Sandra C. B. Rogers, appeared in person and by counsel for the West Virginia Human Rights Commission, Sandra K. Henson, Assistant Attorney General, for the West Virginia Office of the Attorney General, Civil Rights Division. The respondent, MTI, Inc., appeared in person by its representative, Stacy Walker (a former employee) and by counsel, John R. Teare, Jr. and William G. Anderson, Jr. with the firm Bowles, Rice, McDavid, Graff & Love.

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 not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. Complainant, Sandra C. B. Rogers, filed a sex discrimination complaint with the West Virginia Human Rights Commission, alleging that her employer, respondent, MTI, Inc., prior to June 23, 1994, and continuing thereafter, paid her less salary for the position than what it had paid her predecessor, in the same position, based upon her sex, female. Complaint.

2. Respondent, MTI, Inc. is a person and an employer as those terms are defined by W.Va. Code §§5-11-3(a) and 5-11-3(d), respectively. Joint Stipulations of Fact No. 2, Tr. pp. 7-8.

3. Respondent provides technical staffing assistance to various clients by furnishing those clients with temporary and contract employees. Tr. p. 220.

4. Union Carbide Corporation ("Union Carbide") is a client of respondent. Respondent has an "owner referral" relationship with Union Carbide. This means that Union Carbide selects and recruits employees for the respondent to hire. Rather than respondent, Union Carbide contacts the potential employee, explains the position and negotiates the hire date and rate of pay. Nevertheless, respondent actually employs the person selected. Tr. pp. 222-226.

5. In 1992, Union Carbide eliminated its in house construction group which resulted in its termination of a large number of employees. However, Union Carbide continued to have a need for workers at its Sistersville location to perform the functions of the former construction group employees. Union Carbide charged Sterling Walker, construction superintendent at the Sistersville site, with the task of filling the positions. Tr. p. 282.

6. Pursuant to the owner referral method of hiring employees, respondent has given actual agency authority to the clients selecting this method, to act in the hiring of individuals. Thus Mr. Walker and any other supervisory employees at Union Carbide, are the legal agents of respondent for the purposes of this action, and their acts vis a viz the complainant in this action are the acts of respondent.

7. Union Carbide instructed Mr. Walker to hire the necessary employees through respondent. The respondent employed the individuals selected by Mr. Walker. While these individuals were to work at Union Carbides Sistersville facility, Union Carbide did not employ them. Tr. pp. 283, 287 and 323.

8. Pursuant to the owner referral process, Union Carbide selected and recruited the individuals it needed and set their rate of pay. Mr. Walker selected individuals who had worked for Union Carbide in the past and paid them at a rate based upon the rate they had last earned as Union Carbide employees, regardless of whether their prior experience related to the work to be performed at Sistersville. Tr. pp. 285 and 310.

9. Mr. Walker conditioned his willingness to recruit former Union Carbide employees upon the assurance that the former Union Carbide employees would not be offered a dime less than what they had earned at Union Carbide. Tr. p. 284.

10. Mr. Walker hired a number of employees to work at the Union Carbide Sistersville location for respondent, including Russell Gilbert, James Keffer, Terry Whitlock and Harold Parsons. Tr. pp. 282-286.

11. The hourly rate paid to these individuals by the respondent was determined by Mr. Walker, a Union Carbide employee, by adding $480.00 per month per diem to the employee's most recent Union Carbide salary or hourly rate of pay per month, and dividing the resultant monthly salary and per diem by the 176 hours average work hours in a month to reach an hourly rate of pay. Tr. pp. 284-289.

12. Mr. Walker testified that this was the same offer made to each person he hired to work at Union Carbide in Sistersville for respondent. Tr. p. 295.

13. Of those individuals initially selected by Mr. Walker, the exception to this method, was Mr. Keffer, who was only given a $50.00 per month per diem in the calculation because he lived closer to the Sistersville facility according to Mr. Walker. Tr. pp. 285-286.

14. Mr. Walker selected Russell W. Gilbert, Jr. to work at Union Carbide's Sistersville facility. Respondent hired Mr. Gilbert on July 1, 1992. Mr. Gilbert worked as a materials manager in the construction warehouse there and was paid $25.74 per hour throughout his tenure with respondent at the Sistersville Union Carbide facility. Joint Stipulation of Fact No. 5, Tr. pp. 8-9; Tr. pp. 172-173, and 283.

15. Respondent hired complainant as materials manager, to replace Mr. Gilbert at Union Carbide's Sistersville site. Her first day of work was October 12, 1992. Mr. Gilbert resigned and his last day of work for respondent as the materials manager was October 15, 1992. Joint Stipulations of Fact No.. 3 and No. 5, Tr. p. 8; Tr. pp. 21-22 and 184.

16. Mr. Walker originally offered Mr. Gilbert's position as materials manager to Kelly Stowers. Mr. Stowers was retired at the time and Mr. Walker testified that he had only worked one or two years in the warehouse prior to the offer being made. Tr. pp. 293-294.

17. Mr. Walker could not recall wether Mr. Stowers had topped out in his class or not. There was no independent record of any offer having been made to Mr. Stowers or evidencing the rate of pay should

he have been in fact made such an offer. Mr. Walker contends that such an offer was made to Mr. Stowers who allegedly declined that offer. Tr. pp. 293-296.

18. Mr. Walker testified that it was only after Mr. Stowers turned his offer down, that he contacted complainant. He spoke to Mr. Gilbert prior to contacting her and received a positive recommendation for her to replace him in the materials manager post. Mr. Gilbert testified credibly that he had recommended complainant as his replacement. Mr. Gilbert did not testify that he had recommended Mr. Stowers. Tr. pp. 183, and 296-297.

19. Based upon the foregoing findings, the undersigned finds as fact that Mr. Gilbert intentionally discriminated in the initial selection of Mr. Stowers for this post because she was a female, as complainant was specifically recommended by Mr. Gilbert and her job experience in the duties which the post required were much greater than Mr. Stowers.

20. Complainant was making $15.96 per hour working for Union Carbide when she was laid off June 30, 1992. At that time she was topped out in her hourly class for Union Carbide. Joint Stipulation of Fact No. 6; Tr. p. 9 and Tr. pp. 27-28.

21. Applying Mr. Walker's formula, $480 divided by 176 average hours per month yields a figure of $2.72 per hour; which if added to $15.96 yields a figure of $18.68 while the complainant was hired in at $18.84 by respondent. Thus Mr. Walker's formula does not appear to have been applied in the fashion described in his testimony. Joint Stipulation of Fact No. 3; Tr. p. 8.

22. Mr. Stowers is found not to be a viable comparator by the undersigned because there is no evidence collaborating the actual rate of pay that Mr. Stowers was offered. (He testified he was not sure whether Mr. Stowers had topped out in his class, and no documents have been introduced evidencing that Mr. Stowers was offered employment with respondent at a set hourly rate upon which a comparison could be made.)

23. Mr. Gilbert's job duties as materials manager at the Union Carbide Sistersville construction warehouse included storing and dispensing construction materials, performing petty purchases and small dollar value purchase orders, unloading trucks, and inspecting material. Approximately 70-75% of his job involved the use of the computer to document the receipt of materials in the warehouse. Tr. pp. 139-140, 148 and 173-174.

24. When respondent hired Mr. Gilbert he did not supervise any employees. Beginning on August 17, 1992, Mr. Gilbert supervised one employee, Jim Keffer, who was hired by the respondent to work in the warehouse as a materials clerk. Tr. pp. 137-138 and 176.

25. Mr. Gilbert had previously been the materials manager in the construction warehouse for Union Carbide at Sistersville before the in house construction group was eliminated, from October 1991 through June of 1992. Mr. Gilbert's duties were essentially the same at that time, as he was required to use the computer to complete approximately 70-75% of his job duties, using the computer to account for virtually every item of material that passed through the warehouse. Tr. pp. 174-175.

26. Mr. Walker worked for Union Carbide for 26 years. Several of those years were spent at Union Carbide's warehouse in Institute were he worked as a materials supervisor. As a materials supervisor, Mr. Gilbert supervised the storage aspect of the Union Carbide construction warehouse in Institute, while another individual was responsible for supervising the receiving aspect. Mr. Gilbert's major duty was to supervise the employees who performed stores duties at the warehouse and involved very little "hands on" work. Tr. pp. 177-178, 182, 187 and 210.

27. Prior to becoming a materials supervisor, Mr. Gilbert had worked as a materials clerk. Materials clerks did not use computers during the time Mr. Gilbert worked in that capacity. Tr. pp. 179 and 180.

28. Prior to his being transferred by Union Carbide to its Sistersville site as materials manager, Mr. Gilbert had not had much experience with computers and his duties required him to learn computer applications on the MADP-II program. Complainant taught Mr. Gilbert computer applications which enabled him to perform his job duties in Sistersville as materials manager. Upon his assuming his duties at Sistersville, Mr. Gilbert would contact complainant periodically to ask her help in executing job functions requiring the use of the MADP-II computer program. Tr. pp. 33-35, 54-55 and 175-176.

29. Complainant performed all the duties that Mr. Gilbert had when she assumed the position of materials manager at the Union Carbide Sistersville site. Complainant estimated that 60-70% of her duties required the use of the computer. Using the MADP-II computer

program, complainant made records of all materials received in the warehouse. Complainant inspected each order received to verify the vendor had included all materials listed on the purchase order. Complainant interacted with other departments, informing them of the status of materials on order and arranging for expedited materials orders at the request of department managers. Complainant personally executed small dollar value orders, like Mr. Gilbert, and handled petty cash for the construction warehouse. Tr. pp. 28-32, 54, 140 and 173.

30. Complainant also supervised Jim Keffer, who remained the materials clerk after she assumed the position of materials manager at Union Carbide's Sistersville site construction warehouse after Mr. Gilbert's resignation. Mr. Keffer, who worked under the supervision of both complainant and Mr. Gilbert, testified credibly that complainant performed all the duties that Mr. Gilbert had performed. From time to time complainant was required to perform duties above and beyond those of Mr. Gilbert by Union Carbide. Complainant was far more skilled in the use of computers than Mr. Gilbert had been. Tr. pp. 142-148 and 152.

31. Mr. Gilbert had been complainant's immediate supervisor at Union Carbide's Institute site for 15 years prior to her being laid off and subsequently hired by respondent. Mr. Gilbert had vastly greater supervisory experience than had complainant. Tr. pp. 111-112.

32. Nevertheless, the supervisory part of the materials manager at Sistersville was negligible as the majority of duties of the materials manager was hands on tracking of materials on the MADP-II system. Thus, complainant's knowledge and experience was greater than

that of Mr. Gilbert in terms of the actual job duties of materials manager for respondent at the Union Carbide Sistersville site. Complainant had significant experience as supervisor and the initial duties of materials manager did not even involve any supervision. Tr. pp. 53-54 and 176.

33. Complainant complained to several people regarding her rate of pay as compared to that of Mr. Gilbert. In October or November 1992, a male representative from MTI's Parkersburg, West Virginia office called complainant at the Sistersville warehouse. The complainant informed him that she was satisfied with her job but not the rate of pay. Tr. p. 37.

34. Stacy Walker was the contact person for the respondent's employees at the Sistersville site. James A. Keffer testified credibly that respondent informed him that Stacy Walker was the appropriate person to contact in the event he had any questions or problems. To the extent there is testimony from other witnesses that Ms. Walker was not the contact person during the relevant period, such testimony is not credited. Tr. pp. 38 and 152-153.

35. In November 1992, complainant spoke with Ms. Walker and informed her that respondent had paid her less than it had paid to Mr. Gilbert to perform the same job. Ms. Walker explained that she would contact Union Carbide and ask what to do about complainant's salary. Tr. p. 106.

36. In December 1992, complainant again spoke with Ms. Walker concerning the fact that respondent was paying her less than it had paid to Mr. Gilbert to perform the same job as the man she had replaced and that she believed this was because of her gender. In

response, Ms. Walker indicated that Union Carbide set the salaries and that respondent had no part in setting her salary. Tr. p.39.

37. Complainant continued to complain of the failure of respondent to pay her what it had paid to Mr. Gilbert, the man she had replaced, and that her gender appeared to be the only explanation for this. These complaints were also expressed on those occasions when Ms. Walker would call to inform her of the pay raises she did receive while employed by respondent at Union Carbide's Sistersville site. At each time complainant was told that her salary was set by Union Carbide and no further explanation or response as to her complaint of sex based pay disparity was forthcoming. Tr. pp. 40 and 74.

38. Complainant also complained to Union Carbide officials about the difference between her salary and that of Mr. Gilbert. Mr. Walker testified that within a few days or a week after her first day complainant began asking for a raise and commenting that she was worth just as much as Junior Gilbert. Tr. pp. 101-104, 298-299.

39. Mr. Walker testified that he left the Sistersville plant at the end of 1993. Prior to leaving he indicated that complainant should talk to Roy Davis, the project manager, but that he cannot recall discussing complainant's concerns with respondent, MTI, Inc. He testified that Mr. Davis and he reached a decision to give complainant a three dollar an hour raise; he stated that because she was raising such a stink, they were willing to do anything about it. Mr. Walker testified that Rob Profit a construction manager for Union Carbide, stopped the planned raise for reasons unknown to Mr. Walker. Tr. pp. 299-303.

40. The fact that the raise did go forth subsequent to Mr. Walker's departure, while Mr. Profit was still in the picture, causes the undersigned to discredit Mr. Walker's testimony that Mr. Profit had stopped the three dollar an hour raise and to find that Mr. Walker was somehow involved with an intentional effort to thwart the complainant from receiving what the man before her made in the post she occupied, performing work of a comparable nature and requiring comparable skills.

41. Complainant was never paid what Mr. Gilbert had been paid to do the same job as he had been, even though her qualifications exceeded those of Mr. Gilbert for the job in question and even though complainant in fact had duties beyond those that Mr. Gilbert performed.

42. Complainant worked for the respondent until she was laid off on October 17, 1995. Complainant was hired by the respondent on October 12, 1992 to work under the supervision of the Union Carbide Corporation at its Sistersville facility and paid a starting salary of $18.84. On January 4, 1993, complainant received a raise to $21.00 per hour. On November 8, 1993, complainant received a raise to $22.00 per hour. On October 10, 1994, complainant received a raise to $23.15 per hour. On October 2, 1995, complainant received a raise to $23.84. Joint Stipulations of Fact No. 3 and No. 4, Tr. p. 8.

43. Complainant felt degraded and humiliated because respondent paid her less than it had paid Mr. Gilbert, the male who preceded her, to do the same job. Her humiliation was amplified by the fact that she had trained Mr. Gilbert in some of his job duties. Further,

complainant was exasperated by respondent's failure to respond to her complaints. Tr. pp. 54-55.

B.

DISCUSSION

It is undisputed that discrimination in compensation based on gender is a violation of West Virginia Human Rights Acts. Through the West Virginia Human Rights Act, the Legislature has declared:

> It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment...Equal opportunity in the area of employment...is hereby declared to be a human right or civil right of all persons without regard to...sex... The denial of these rights to properly qualified persons by reason of...sex...is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

W.Va. Code § 5-11-2 (1992).

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act [hereinafter "Act or "Human Rights Act"]. Section 5-11-9 (1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment..." (Emphasis supplied). 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...sex..." Accordingly, unequal compensation resulting from sex discrimination is a violation of the Human Rights Act, W.Va. Code § 5-11-9(1).

In West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989), the West Virginia Supreme Court of Appeals addressed a claim of unequal compensation resulting from national origin discrimination. In that instance, the court analyzed the complaint's wage discrimination claim under the framework established for basic disparate treatment claims under the Human Rights Act--the 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 (1973), and adopted by our Supreme Court in Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983).

Under the McDonnell Douglas method, the burden of production shifts back and forth between the complainant and the respondent. However, the burden of persuasion remains with the complainant (or the Commission) who ultimately must prove discrimination by a preponderance of the evidence. Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741, 754 (1995); Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 482, 457 S.E.2d 152, 159 (1995), citing St. Mary's Honor Center v. Hicks, 509 U.S. ____, 113 S. Ct. 2742, 125 L.Ed.2d 407, 62 F.E.P. Cases 96 (1993). First, the complainant (or Commission) must establish a prima facie case of discrimination. Then, the burden of production shifts to respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the analysis

focuses on whether the reason proffered by respondent was not the true reason for the employment decision, but rather a pretext for discrimination.

The term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490, 496 (1989), citing Black's Law Dictionary, 1069 (5th ed. 1979). A proffered reason is pretext if it is not "the true reason for the decision." Conaway v. Eastern Associated Coral Corp., 174 W.Va. 164, 358 S.E.2d 423, 430 (1986). "Pretext may be shown through direct or circumstantial evidence of falsity or discrimination." Barefoot, 457 S.E.2d at 160. Thus, typically, to recover against an employer on the basis of a violation of the Human Rights Act, a person alleging to be a victim of unlawful sex discrimination, or the Commission acting on her behalf, must show by a preponderance of the evidence that:

(1) the employer failed or refused to extend to her an equal opportunity; and

(2) her sex was a motivating or substantial factor causing the employer to fail or refuse to extend to her 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, tenure, terms, conditions or privileges of employment.

There is also the "mixed motive" analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 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 need only show that complainant's gender played some role in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant's gender. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

However, by using the McDonnell Douglas formula in West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989), the Court did not foreclose the application of other analytical approaches to wage discrimination claims. Our Court has stressed that the McDonnell Douglas framework is a flexible one, and moreover, that it does not fit every situation. State ex rel West Virginia Human Right Commission v. Logan Mingo Area Mental Health Agency, 174 W.Va, 711, 329 S.E.2d. 77 (1985). See also, Burdette v. FMC Corp., 566 F.Supp. 808 (N.D. W.Va. 1983). Indeed, in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed.2d 668 (1973), the United States Supreme Court cautioned that the prima facie standard it articulated therein should not be adhered to strictly in every case: "The facts necessarily will vary in Title VII

cases, and the...prima facie proof required from [a complainant] is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n. 13, 36 L. Ed.2d at 677 n. 13. Thus, in determining whether claims of unequal compensation based on sex are better analyzed under some other framework, it is appropriate to look at the federal treatment of such claims and the manner in which federal courts have analyzed those claims under Title VII.

Under federal law, a woman making a claim of unequal compensation may seek relief under either Title VII or under the Equal Pay Act of 1963, 29 U.S.C. §206(d) [hereinafter "EPA"]. The EPA prohibits employers from paying women lower salaries than men to perform the same or "equal" work, unless the reason underlying the difference in pay falls within one of four exceptions. Section 206(d) of the EPA provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, or (iv) any differential based on any other factor other than sex.

29 U.S.C. §206(d)(1).

Title VII, in contrast, provides a broader scope of protection to women as well as members of other protected classes. Under Title VII,

it is unlawful for an employer to "fail or refuse to hire or to discharge any individual with respect to his [or her] compensation, terms, conditions or privileges of employment." 42 U.S.C. §2000e-2.

Likewise, a complainant's burden of proof in an EPA claim differs from what is required in disparate treatment claims under Title VII. Under the Title VII (and the West Virginia Human Rights Act), a complainant need only make a minimal showing to establish a prima facie case of discrimination. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152, 162 (1995). However, to make a prima facie case under the EPA, the complainant must show that her employer paid her a salary lower than what it paid a male employee "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. §206(d)(1). Further, once the complainant meets her prima facie burden under the EPA, the burdens of production and persuasion shift to the employer to prove that unequal compensation results from one of the EPA's four affirmative defenses; a seniority system, a merit system, a system which measures quantity or quality of production, or, any differential based upon any other factor other than sex. Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1, 9 F.E.P. Cases 919 (1974). Thus, under the EPA, a complainant prevails if the employer fails to prove one of the affirmative defenses by a preponderance of the evidence, once a prima facie case has been established.

Regardless of these differences, when Congress passed the Civil Rights Act of 1964, it linked Title VII to the EPA through the Bennett

Amendment which explicitly incorporated the EPA defenses into Title VII:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such difference is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. §2000e-2(h).

Thus, in a Title VII claim, a wage differential will not be considered unlawful if an employer establishes that the differential is a result of a seniority system; a merit system; a system which measure quantity or quality of work; or any differential based on any other factor other than sex. See County of Washington v. Gunther, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed. 2d 751, 25 F.E.P. Cases 1521 (1981).

Since the Bennett Amendment injects the EPA affirmative defenses for wage differentials between men and women into Title VII, federal courts have regarded claims of unequal compensation based on gender discrimination as distinct from other Title VII claims. A fair degree of controversy has arisen surrounding the issue of which burden of proof scheme applies to unequal compensation claims asserted under Title VII-- the Title VII analysis or that analysis followed in EPA claims.

Although the United States Supreme Court recognized this problem in Gunther, it declined to decide how the EPA defenses should be absorbed into Title VII's burden shifting analysis. Gunther, 25 F.E.P. Cases at 1525. Numerous federal courts have addressed Title

VII claims of unequal compensation for equal work and have reached different conclusions.

A number of courts have adopted the EPA's burden of proof structure into Title VII claims of gender based discrimination. See, e.g., Kouba v. Allstate Insurance Co., 691 F.2d 873, 875, 30 F.E.P. Cases 57 (9th Cir. 1982); Korte v. Diemer, 909 F.2d 954, 958-959, 53 F.E.P. Cases 936 (6th Cir. 1990); Floyd v. Kellogg Sales Co., 841 F.2d 226, 229 n.2, 47 F.E.P. Cases 1211 (8th Cir.) cert. denied, 488 U.S. 970, 109 S.Ct. 501, 102 L.Ed.2d 537, 50 F.E.P. Cases 874 (1988); McKee v. Bi-State Development Agency, 801 F.2d 1014, 1018, 42 F.E.P. Cases 431 (8th Cir. 1986); Denny v. Westfield State College, 669 F.Supp. 1146, 1155-1156, 43 F.E.P. Cases 1401 (D. Mass. 1986); Lanegan-Grimm v. Library Association of Portland, 560 F.Supp. 486, 31 F.E.P. Cases 865 (D. Ore. 1983); Miller v. Kansas P & L Co., 39 F.E.P. Cases 1665 (D. Kan. 1984); Grigoletti v. Ortho Pharmaceutical, 118 N.J. 89, 570 A.2d 903, 62 F.E.P. Cases 1850 (N.J. S.Ct. 1990); Higdon v. Evergreen International Airlines, 138 Ariz. 163, 673 P.2d 907 (Ariz. S.Ct. 1983). Such holdings are based on the conclusion that the Supreme Court's decision in County of Washington v. Gunther, 452 U.S. 161, 25 F.E.P. Cases 1521 (1981), requires Title VII and the EPA to be construed in harmony with one another. See, e.g., McKee v. Bi-State Development Agency, 801 F.2d 1014, 1018, 42 F.E.P. Cases 431 (8th Cir. 1986).

For instance, in Kouba v. Allstate Insurance Co., 691 F.2d 873, 875, 30 F.E.P. Cases 57 (9th Cir. 1982), the Ninth Circuit Court of Appeals rejected the employer's argument that Title VII standards governed the analysis of a wage discrimination claim simply because

the complainant filed a claim under Title VII. The Court held that even under Title VII the employer bears the burden of showing that a wage differential between male and female employees resulted from a factor other than sex. The employers argued that the Supreme Court's decision in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207, 25 F.E.P. Cases 113 (1981), required that the burden of persuasion remains at all times upon the complainant in a Title VII claim of sex based wage discrimination. The Court rejected this argument and responded to this argument by stating that "nothing in Burdine converts this affirmative defense, which the employer must plead and prove under Corning Glass, into an element of the cause of action which the employee must show did not exist." Kouba, 30 F.E.P. Cases at 58. Similarly, The Eighth Circuit Court of Appeals has held that "[W]here a claim is for unequal pay for equal work based upon sex, the standards of the Equal Pay Act apply whether the suit alleges a violation of the Equal Pay Act or of Title VII." McKee v. Bi-State Development Agency, 801 F.2d 1014, 1019, 42 F.E.P. Cases at 434 (8th Cir. 1986). Korte v. Diemer, 909 F.2d 954, 53 F.E.P. Cases 936 (6th Cir. 1990), tracks the Eighth Circuit's decision in McKee, and finds that the distinctions between EPA liability and Title VII liability were overly technical, the Sixth Circuit holding that "a finding of 'discrimination in compensation' under one Act is tantamount to a finding of 'pay discrimination on the basis of sex' under the other." Korte, 53 F.E.P. Cases at 940. This position is apparently also that adopted by the Equal Employment Opportunity Commission in its interpretation of the Equal Pay Act as codified in 29 C.F.R. Part 1620, stating in pertinent part:

> In situations where the jurisdictional prerequisites of both the EPA and Title VII of the Civil Rights Act of 1964,as amended, 42 U.S.C. 2000e et seq., are satisfied, any violation of the Equal Pay Act is also a violation of Title VII.

29 C.F.R. §1620.27(a).

In contrast, a greater number of federal courts have refused to apply Equal Pay Act burdens to claims brought under Title VII. See, e.g., Fallon v. Illinois, 882 F.2d 1206, 52 F.E.P. Cases 954 (7th Cir. 1989); Peters v. City of Shreveport, 818 F.2d 1148 (5th Cir. 1987); Churchill v. International Business Machines, 759 F.Supp. 1089 (D. N.J. 1991); Dragon v. State of Rhode Island, 936 F.2d 32, 56 F.E.P. Cases 225 (1st Cir. 1991); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 65 F.E.P. Cases 1846 (4th Cir. 1994); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 60 F.E.P. Cases 295 (11th Cir. 1992); Tidwell v. Fort Howard Corp., 989 F.2d 406 (10th Cir. 1993). These courts have held that it would be improper to depart from the traditional burden of proof allocations under Title VII, eliminating a complainant's ultimate burden to prove intentional discrimination as required under the United States Supreme Court decisions in Burdine, supra, and the later case of St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). It is clear that as far as the general class of West Virginia Human Rights Act claims, the West Virginia Supreme Court has adopted this standard of requiring the complainant to bear the ultimate burden of persuading the trier of fact that the employer intended to discriminate against a member of the protected class, as the Court has held that where pretext is shown discrimination may be inferred, though discrimination need not be

found as a matter of law. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). "The crux of disparate treatment is, of course, discriminatory motive; the doctrine aims squarely at intentional acts." "While Barefoot/McDonnell Douglas allows the employee to shift the burden of production to the employer by establishing a prima facie case, at all times the burden of proof or the risk of nonpersuassion on the issue of whether the employer intended to discriminate remains on the plaintiff." Skaggs v. Elk Run Coal Co., 479 S.E.2d 561, at 584-585 and 582 (W.Va. 1996). This of course begs the question in regards to that allocation required to show a claim under the West Virginia Equal Pay for Equal Work Act, codified in W.Va. Code §21-5b-3, and whether the West Virginia Human Rights Commission is empowered by statute with authority to entertain a cause of action or claim premised upon the Equal Pay for Equal Work Act.

The West Virginia Supreme Court of Appeals has addressed the elements of a prima facie case of intentional salary discrimination in terms of a cause of action for unlawful employment discrimination under the West Virginia Human Rights Act in Martin v. Randolph County Bd of Educ., 463 S.E.2d 399, at 410 (W.Va. 1995) as follows:

> A plaintiff can establish a prima facie case of intentional salary discrimination if she proves that she is a member of a protected class and that she receives a lower salary than an individual who is not a member of the protected class and who is similarly situated to the plaintiff in terms of experience and the comparability of job content.

The Court in this case then set forth the standard burden shifting analysis and inferential proof of pretext as developed under McDonnell

Douglass as well as the mixed motive analysis under Price Waterhouse. Martin, 465 S.E.2d at 412. The West Virginia Supreme Court did not address the West Virginia Equal Pay for Equal Work Act in Martin v. Randolph County Bd. of Educ., supra, because that case was an appeal of a grievance under W.Va. Code §18-29-2; which the Court had previously held had authority to grant relief under the West Virginia Human Rights Act under that Code provision in Vest v. Board of Educ. of County of Nicholas, 193 W.Va. 222, 225, 455 S.E.2d 781, 784 (1995). Thus the case in West Virginia is one of first impression as to whether the West Virginia Human Rights Commission is empowered to grant relief under the West Virginia Equal Pay for Equal Work Act, pursuant to its general authority to prohibit unlawful discrimination in compensation based upon a prohibited factor including gender.

In making such a determination, the West Virginia Supreme Court's analysis in Vest, supra, may provide some guidance. The analysis must begin with a comparison of the requirements imposed under West Virginia Equal Pay for Equal Work Act and determination made regarding whether such a claim would also be a violation of the West Virginia Human Rights Act. Under the Human Rights Act, it is an unlawful discriminatory practice for an employer to discriminate against an individual with respect to compensation. W.Va. Code §5-11-9(1). Such discrimination means to refuse to extend equal opportunities because of sex. W.Va. Code §5-11-3(h). The West Virginia Equal Pay for Equal Work Act at W.Va. Code §21-5B-3 provides:

> (1) No employer shall: (a) In any manner discriminate between the sexes in the payment of wages for work of comparable character, the performance of which requires comparable skills;

> (b) pay wages to an employee at a rate less than that at which he pays wages to his employees of the opposite sex for work of comparable character, the performance of which requires comparable skills.
>
> (2) Subsection (1) of this section does not apply where: (a) Payment is made pursuant to a seniority or merit system which does not discriminate on the basis of sex, (b) a differential in wages between employees is based in good faith on factors other than sex. No employee shall be reduced in wages in order to eliminate an existing, past or future wage discrimination or to effectuate wage equalization.

Thus, it follows that having stated a claim under the West Virginia Equal Pay for Equal Work Act, one has also stated a claim under the Human Rights Act, since its elements are premised upon an employer discriminating in the terms of compensation on the basis of sex. Therefore, it is reasonable that a complainant before the West Virginia Human Rights Commission may prosecute such a claim under either the terms of Martin v. Randolph County Bd. of Educ., supra, in which case the complainant must bear the ultimate burden of persuasion that the respondent intended to discriminate against the complainant on the basis of sex, employing the inferential proof formula and/or the mixed motive analysis; or, alternatively, the complainant may prove that the prima facie elements of the West Virginia Equal Pay for Equal Work Act claim, i.e. she receives less pay than the employee of the opposite sex for work of comparable character, requiring comparable skills, in which case the respondent would bear the ultimate burden of establishing one of the exceptions under W.Va. Code §21-5B-3(2). See Corning Glass Works v. Brennan, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974), indicating that this is the ultimate burden under the federal EPA.

Once a complainant has prevailed upon either of these distinct theories, the West Virginia Human Rights Commission is authorized to grant a remedy of back wages. A wage discrimination case is a continuing violation under the Human Rights Act. Martin, 465 S.E.2d at 409. Regardless of which theory the complainant prevails under, even if the theory is premised in terms of an Equal Pay for Equal Work Act claim, this would also constitute a violation under the terms of the West Virginia Human Rights Act. Thus, the Human Rights Commission may grant back pay back to the date of the passage of the Human Rights Act. See, West Virginia Institute of Technology v. West Virginia Human Rights Commission, 383 S.E.2d 490, at 499-500 (W.Va. 1989). This would be so, even though were the complainant to have filed a suit in a State Circuit court under the Equal Pay for Equal Work Act, back pay would be limited to the one year preceding the filing of the complaint under W.Va. Code §25B-4(1)(a); or if the complainant filed a Title VII claim in federal court, back pay would be limited to two years pursuant to the decision in Payne v. Weirton Steel Company, 397 F.Supp. 192 (N.D.W.Va. 1975).

The undersigned concludes that the complainant has made a prima facie case under either the Martin case or under the West Virginia Equal Pay for Equal Work Act. The complainant replaced Mr. Gilbert as a materials coordinator with respondent, employed at Union Carbide's Sistersville warehouse. She performed the same job as Mr. Gilbert and additional duties as well. Thus she was paid a lower wage than the employee of the opposite sex that she replaced. That job was thus both comparable to and involving similar skill to that previously performed by Mr. Gilbert. The undersigned finds that the proper

comparator in this instance is Mr. Gilbert, who occupied the post that complainant took over for respondent, and not either Mr. Stowers (who never worked for respondent and the terms of whose offer of employment are not verifiable from the record beyond Mr. Walker's somewhat vague representations), or Mr. Keefer (who was promoted after complainant left and after the respondent had been made aware of the complaint at issue herein, and who did not undertake all the duties complainant had previously performed).

The respondent has raised as a valid reason for its decision to pay complainant less than it had paid the man she replaced; that reason being Mr. Walker's decision to set the rate of pay based upon his formula which resulted in the employee receiving their prior Union Carbide salary plus $480.00 per diem per month, reduced to an hourly rate. The undersigned concludes for a number of reasons, that this explanation is pretextual and a cover for sex discrimination in the setting of complainant's compensation. The undersigned finds after viewing the demeanor of the witnesses and the entirety of the record, that Mr. Walkers' decision to pay complainant less than Mr. Gilbert was based at least in part upon the sex of complainant. This finding is based in part upon the testimony of Mr. Walker in respect to the initial offer of employment to Mr. Stowers. Mr. Walker initially offered this position to Mr. Stowers, who did not have more than one or two years experience in warehouse receiving duties, far less relevant experience than complainant had in such duties, nor did Mr. Gilbert recommend that Mr. Stowers be his replacement as he did in regard to complainant. Thus the undersigned finds that sex played a role in his initial decision as to who would be suitable for this

position at the Sistersville Union Carbide warehouse. That being the case, Mr. Walkers' representations that he offered the position to Mr. Stowers at the same salary he offered it to complainant seems somewhat doubtful. Mr. Walker was not able to say for sure whether Mr. Stowers had topped out in his class as an hourly employee before he retired, nor is there any evidence that would confirm that Mr. Walker informed Mr. Stowers what his exact rate of pay would be. Mr. Stowers turned down the job based upon the fact he did not wish to leave the Kanawha valley area after discussing the matter with his wife, and it is far from clear whether the offer was conveyed in terms of any particular rate of pay. Mr. Walkers' testimony in this respect is also called into question by his lack of candor demonstrated by his claims that complainant never stated to him that she was claiming that she had been discriminated against on account of her sex after admitting that shortly after starting work she told him that she was worth as much as Mr. Gilbert. Mr. Gilbert had disclosed his rate of pay to complainant while the two were working for respondent at the same time before he left. Mr. Walker testified that the complainant made such a stink about wanting a raise that he and a Union Carbide general project manager talked about giving her a three dollar raise. Curiously, that raise was not made operative until sometime after Mr. Walker had left Union Carbide at the end of the year. Mr. Walker claimed that when Mr. Gilbert took the position at the Sistersville warehouse, while still employed by Union Carbide, that the position required a supervisor type prior to the dissolution of the construction department, at which time Mr. Gilbert was placed on the respondent's payroll doing the same job. Mr. Gilbert testified that the

requirements of the materials manager position at Sistersville was unchanged when he was put on the respondent's payroll. The fact of the matter is that there was not even anyone for Mr. Gilbert to supervise initially, thus the respondent's claim that Mr. Gilbert's superior supervisory experience justified his overly high pay for what they claim is a position whose duties are more akin to those of a storeroom clerk are without merit. The complainant clearly had superior skills and experience performing the duties required by the materials manager than had Mr. Gilbert. Finally, it is noted that respondent, when it did give complainant a raise, put her into their category of Designer I, within 50 miles, instead of the category for an employee living more than 50 miles from the client's work site. This indicates a certain amount of bad faith on the part of respondent in setting complainant's rate of pay since both respondent and the Union Carbide employees, to whom the respondent had delegated actual agency to set the rates of pay, knew the complainant lived more than fifty miles from Sistersville.

Having concluded that the complainant's sex played some part in the decision of Mr. Walker to pay the complainant less than what Mr. Gilbert received, under "mixed motive" analysis, the respondent is required to show that the complainant would have received the same amount even if she were not a woman. See Price Waterhouse, Barefoot, etc. Thus there is little practical difference whether the case at hand is analyzed in this fashion under Martin, or whether it is analyzed under the West Virginia Equal Pay for Equal Work Act, which requires that the respondent in this case bears the burden of persuasion that the difference is the result of a seniority or merit

system, or that the difference is based in good faith on factors other than sex.

The respondent argues that this a case of red circling, a concept under Title VII which provides that the paying of a higher rate of pay to an employee whose former higher paying position is eliminated and is temporarily transferred to a lower paid position, is a difference based upon a factor other than sex. See 29 C.F.R. §620.26 and Gosa v. Bryce Hospital, 780 F.2d 917 (11th Cir. 1986). There is a very good case to be made for this position. The undersigned finds that this argument is not applicable to the respondent for several reasons. First the respondent is not Union Carbide. The assignment of Mr. Gilbert to Sistersville as materials manager was not shown to have been in the nature of a temporary assignment but rather as a permanent change in position with Union Carbide. There is no evidence that Union Carbide needed to retain Mr. Gilbert for his supervisory expertise, which would be subsequently required by Union Carbide. In fact Union Carbide terminated Mr. Gilbert from this reassignment and restaffed the position with Union Carbide through respondent. This does not indicate any desire to protect Mr. Gilbert's seniority status for future utilization by Union Carbide. Thus the decision must be viewed in light of the respondent's economic reasons for paying Mr. Gilbert more in the position he held with their client Union Carbide while under their employment, and not based upon factors related to his former status and pay as a Union Carbide employee. Nevertheless, were the undersigned to accept at face value, Mr. Walker's assertion that he reasonably relied upon his formula of paying the respondent's new hires at Union Carbide's Sistersville site based upon their former

Union Carbide rate of pay plus a per diem, then respondent would prevail because that difference in pay would be the result of some factor other than sex under the Equal Pay for Equal Work Act and the respondent would have shown that this was the rate of pay that complainant would have received even if she were a man under mixed motive analysis. The undersigned, however, did not find Mr. Walker's testimony that he had offered Mr. Stowers the position in question at the same rate paid to complainant credible. As discussed previously, his demeanor and the elements of his testimony indicated that he indeed did discriminate against complainant because of her sex, in first offering that position to Mr. Stowers. Additionally, there is no evidence to collaborate that Mr. Stowers was tendered this offer under any set rate of pay, since pay had not entered into his reason for declining the opportunity.

Other courts have held that a male employee's skills, in the form of greater experience or qualifications, do not serve as a legitimate factor other than sex which justifies higher pay unless the duties performed require or utilize those skills. DiSalvo v. Chamber of Commerce, 416 F.Supp. 844, 13 F.E.P. Cases 636, 643 (W.D.Mo. 1976); Ellison v. United States, 58 F.E.P. Cases 955, 963 (U.S.Cl.Ct. 1992). In DiSalvo, supra, the Court held that the skills held by the male successor were immaterial, according to that Court, the crucial issue was, instead, whether the duties actually performed by the male successor required or utilized his additional skills. Id. 13 F.E.P. Cases at 643. The New Jersey Supreme court pointed out in Grigoletti v. Ortho Pharmaceutical, 118 N.J. 89, 570 A.2d 903, at 914, 62 F.E.P. Cases 1850, at 1860 (N.J.S.Ct. 1990), "it should make no difference

that wage differentials are the residuals of earlier employment, when the same men and women performed unequal work." Thus other courts have interpreted the "factor other than sex" exception under the EPA as a factor related to the employer's business; and that the employer must use the "factor [other than sex] reasonably in light of the employer's stated purpose as well as its other practices." Kouba v. Allstate Ins. Co., 691 F.2d at 876-877. In judging whether the formula employed by Mr. Walker to arrive at the rate of pay for Mr. Gilbert and complainant meets a valid business purpose, the undersigned finds that it does not meet the standards discussed. It is clear that the respondent did not utilize any of the skills or experience of a supervisory nature in the position at issue. In fact complainant had better skills and experience for that position. There was no business reason to pay Mr. Gilbert what he had been paid in the past as a Union Carbide employee because he indicated that after being terminated from Union Carbide he would have accepted the position with respondent doing that job for less money. Furthermore, it is not reasonable to conclude that it would be fair to pay a former Union Carbide employee based upon the rate of pay for an hourly position at Union Carbide when she is promoted to what is essentially a salaried type position in the Union Carbide system with respondent. Although the duties involved the skills that complainant had utilized in the clerk duties at Union Carbide more than those utilized by a supervisor of a large in house storeroom operation in the construction unit (as Mr. Gilbert testified); it would be a mistake to classify the job as a clerk position. The materials manager clearly had responsibility for accounting for the receipt and distribution of all materials received

for which they were ultimately responsible; they interacted with the other supervisory salaried Union Carbide managers; and complainant ended up being responsible for writing off the storeroom stock that had been left over when the construction department was eliminated. These duties were clearly of a management nature; while the fact of the matter is that complainant also had supervisory responsibility for Mr. Keefer as well. There is simply no business reason for Mr. Walker's formula to be applied to someone hired from Union Carbide for a position that involves a promotion from the position held at Union Carbide. His formula resulted in a wage disparity between the complainant and the member of the opposite sex, when she performed all of the duties he performed and more.

It is clear that the respondent had in fact relied upon the client's employees to determine what they would pay and then arbitrarily assigned their employees to a category under the respondent's categories of employment based merely upon the bottom line dollar amount. The undersigned concludes that the respondent has delegated actual agency status on the client's employees under the owner referral process and is bound by the actions of Union Carbide's employees in regard to the rate of pay set. The respondent has stipulated that it is an employer as defined under W.Va. Code §5-11-3(d); and that it hired the complainant to work under the supervision and control of their client, Union Carbide. At a prehearing status conference Union Carbide's motion to dismiss was argued by the parties, at which time respondent did not object to their client being dismissed as a party. The undersigned dismissed Union Carbide from the action for violation of the Human Rights Act

based upon the facts at issue here, after it was determined that respondent claimed complainant as their employee. The Commission's counsel did not appeal from that dismissal order. Therefore, it is not decided whether both respondent and Union Carbide are joint or co-employers of the complainant, where wages are paid by the respondent but another entity directs the work assignments and hours assigned, as was the case in Amarnare v. Merrill, Lynch, Pierce, Fenner & Smith, 611 F.Supp. 344 (D.C.N.Y. 1984). See Kellam v. Snelling Personnel Services, 866 F.Supp. 812 (D. Del. 1994) for a case holding that employees of a temporary agency who were under the direction and control of other businesses, were not to be counted as employees of the temporary agency for purposes of a Title VII claim of discrimination by one of the temporary agency's employees who worked for the temporary agency directly at that agency's office.

Based on the facts presented, it is preposterous that a temporary agency can advance as a legitimate factor other than sex, that its client wishes to pay a woman less money for performing the same duties and more than her male predecessor, and that it has no further duty to investigate or determine the validity of complainant's complaint of discrimination beyond determining that that is the rate of pay their client set. To allow such an explanation as a factor other than sex would effectively eliminate protection under both the West Virginia Human Rights Act and the West Virginia Equal Pay for Equal Work Act. Should the respondent seek to protect its client from liability under these Acts by claiming individuals as its own employees, than it must accept the duties imposed thereunder and its actions will be measured

by the actions and motives of the employee's of their client, to whom they have delegated the responsibility of setting complainant's wage.

The respondent argues that since the complainant was aware of the rate of pay and continued to work for the wage set forth at the time she was hired, complainant has somehow ratified the rate of pay by accepting the employment when she could simply have refused to work for that pay, or, that complainant has waived the right to prosecute her claim of wage discrimination. There is no basis in law for such an argument. The complainant is in fact required to mitigate her damages. To hold that a complainant ratifies the rate of pay in a discrimination case by accepting the work for a lower wage, would render the Human Rights Act meaningless and would discourage the mitigation of damages by a complainant in such situations.

After consideration of the foregoing, the undersigned finds that the respondent has unlawfully discriminated against the complainant because of her sex in the rate of pay she received to perform the same duties as her male predecessor. The complainant was paid a lower rate than the male she replaced based in part upon the fact that she was a woman. The reason advanced by the complainant that this difference was based upon the application of a non sex based formula applied to everyone hired is found to be pretextual in that there was no business reason not to give a person promoted into a supervisory or management type position from an hourly position a raise in salary. The complainant has met her burden of establishing that the respondent intentionally discriminated against complainant on the basis of her sex, based upon the actions of Mr. Walker. The respondent has also violated the West Virginia Equal Pay for Equal Work Act in that

complainant was paid less than a member of the opposite sex to perform work of a comparable character, the performance of which requires comparable skills; and the difference was not based in either a seniority or merit system which does not discriminate on the basis of sex or based in good faith on a factor other than sex. Neither was this a case of red circling as the fact that Union Carbide let Mr. Gilbert be terminated from his employee status at Union Carbide demonstrated that it had no interest in protecting Mr. Gilbert as a valuable supervisor on a temporary basis by retaining him in a lower paid position on a temporary basis. Mr. Gilbert had been transferred to Sistersville while still an employee of Union Carbide into a position which required none of his supervisory expertise.

The complainant is entitled to back pay. Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W.Va. 53, 365 S.E.2d 251 (1986). The complainant is entitled to interest on back pay. Interest is payable on back pay awards at a rate of ten percent (10%) per annum. Frank's Shoe Store v. West Virginia Human Rights Commission, Id; Bell v. Inland Mutual Insurance Co., 175 W.Va. 165, 332 S.E.2d 127 (1985); W.Va. Code §56-6-31; Tiernan v. Minghini, 28 W.Va. 314 (1886); Douglas v. McCoy, 24 W.Va. 722 (1884). Based upon the rate of pay stipulated to by the parties for Mr. Gilbert, the comparator, and the complainant, the Commission has calculated that the complainant has lost back pay in the amount of $33,378.68, with interest calculated through November of 1996, of $10,419.83, for a total backpay award due of $43,798.51, as calculated through November 1996.

Complainant felt degraded and humiliated because respondent paid her less to do the same job as the male who had preceded her in that post. Complainant was exasperated by respondent's refusal to address her complaints. Complainant has suffered humiliation, embarrassment and emotional and mental distress and loss of personal dignity as a result of the respondent's unlawful discriminatory conduct. The complainant is entitled to incidental damages in the amount of $3,277.45. Pearlman Realty Agency v. West Virginia Human Rights Commission, 239 S.E.2d 145 (W.Va. 1977); Bishop coal Company v. Salyers, 380 S.E.2d 238 (W.Va. 1989). Bishop Coal, supra, provided for a cap on incidental damages awarded by the Commission at $2,500.00 to be adjusted from time to time to conform to the consumer price index.

C.

CONCLUSIONS OF LAW

1. The complainant, Sandra C. B. Rogers, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, W.Va. Code §5-11-10.

2. The respondent, MTI, Inc., is an employer 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.

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

5. Complainant has established a prima facie case of sex discrimination in respect to the amount of her compensation under Martin, supra; and has established a prima facie case of an Equal Pay for Equal Work Act violation pursuant to W.Va. Code §21-5b-1 et seq..

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful sex discrimination. Complainant has proven by a preponderance of the evidence that sex played some part in the motivation to pay complainant less money; and the respondent's explanation that the pay differential resulted from some factor other than sex, or that the same result would not have obtained in the absence of the difference in sex was not found credible.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of $33,378.68, plus statutory interest, (calculated as $10,419.83 through November 1996).

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of $3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. As a result of the unlawful discriminatory action of the respondent, the Commission is entitled to an award of costs in the aggregate amount of $1,156.03.

D.

RELIEF AND ORDER

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

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant $33,378.68, plus statutory interest.

3. Within 31 days of receipt of this decision, the respondent shall pay to the Commission costs in the amount of $1,156.03.

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

5. The respondent shall pay ten percent per annum interest on all monetary relief.

6. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 18th day of July, 1997.

WV HUMAN RIGHTS COMMISSION

BY: _____

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 18th day of July, 1997, to the following:

SANDRA C B ROGERS
RT 1 BOX 624
SOD WV 25564

MTI INC
4350 GLENDALE/MILFORD
CINCINNATI OH 45242

SANDRA HENSON
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
ATTORNEY GENERALS OFFICE
PO BOX 1789
CHARLESTON WV 25326-1789

JOHN TEARE JR ESQ
RICKLIN BROWN ESQ
BOWLES RICE MCDAVID GRAFF & LOVE
PO BOX 1386
CHARLESTON WV 25325-1386

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE