STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
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Ivin B. Lee
Executive Director

VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

March 24, 2004

Clarence Scott
902 Sixth Street
Charleston, WV 25302

Davis & Burton Contractors, Inc.
11433 Midland Trail
Ashland, Kentucky 41102

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Re: Scott v. Davis & Burton Contractors, Inc.
EAR-18-02

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 January 1, 1999, 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 administrative law 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 an 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 an 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 administrative law 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.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

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

10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. 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 an 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 Ivin B. Lee, Executive Director of the commission at the above address.

Yours truly,

Robert B. Wilson
Administrative Law Judge

RBW/jek

Enclosure

cc: Ivin B. Lee, Executive Director
Lew Tyree, Chairperson

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CLARENCE SCOTT,

Complainant,

v.

Docket Number: EAR-18-02
EEOC Number: 17JA10292

DAVIS & BURTON CONTRACTORS, INC.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on November 17, 2003, in Kanawha County, in Conference Room B of the West Virginia Human Rights Commission Offices at 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The Complainant, Clarence Scott, appeared in person and by counsel for the Commission, Jon L. Matthews, Assistant Attorney General, for the Office of the West Virginia Attorney General, Civil Rights Division. The Respondent appeared in person by its representative, Carolyn Sue Ranson, Office Manager/Business Administrator; as well as by counsel, Stephen S. Burchette, Esquire, and Holly G. DiCocco, Esquire, with the firm Offutt, Fisher & Nord. The parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof, and response briefs through February 9, 2003.

All proposed findings submitted by the parties have been considered and reviewed in

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

A.

FINDINGS OF FACT

1. Respondent, Davis & Burton Contractors, Inc., has not contested that it is an "employer" and a "person" as those terms are defined in W.Va. Code §§5-11-3(a) and (d) respectively.

2. Complainant, Clarence W. Scott, is an African American, who at the time of the Public Hearing was a fifty-three year-old, lifelong resident of Charleston, West Virginia. He had spent approximately 21 years in the Laborer's Union. Tr. Pages 96, 98 and 159.

3. Craig Harvey is the Business Manager for Laborer's Local 1353, since 2000. He testified that when the union receives a work order, its members are referred out in the order

in which they signed in on the referral list. Complainant was referred out on February 22, 2001, to a job with Respondent, working at the John Amos power plant. Complainant was laid off on April 24, 2001 from that job. Tr. Pages 15, 16 and 31.

4. Carolyn Ranson, is the Respondent's Business Administrator, Office Manager and Contract Administrator. She testified that at the time Complainant worked for Respondent at the John Amos plant, Respondent designated the Superintendent, who was Carl King. The Foremen and General Foreman, are selected by the union. Respondent's Superintendent would direct the General Foreman and Foremen concerning what work was to be done. The Foremen in turn would tell the union employees what to do. Tr. Pages 55, and 65-67.

5. Complainant testified credibly, that he worked at a site in the John Amos plant out of a trailer, where there were twelve Laborers and Carpenters, and two Safety Men. None of these other people were African-American. Tr. Page 98.

6. One white individual once used the terms "black bitch" in his presence. Complainant objected to that individual, "Man, I don't want to hear that black thing, black bitch, 'cause I don't say 'white bitch.'" He did not complain to anyone with the Respondent or the union. Tr. Page 99 and 126.

7. Complainant, was with another white Carpenter, putting his tools up in the trailer when that individual said, "Hey Lightning." Complainant said, "I'll put my foot in your ass if you quit saying things like that." The white Carpenter tried to apologize. Tr. Page 100.

8. On another occasion, Complainant complained to Carl King, that he wanted to work more overtime, because other white employees were being given overtime and he wasn't. Tr. Page 102.

9. Complainant had to cease eating in the trailer, because two large brothers, who worked there and were also white, threatened to "whip his ass". They were always throwing things around. Tr. Pages 103 and 104.

10. Complainant eventually complained to Carl King about the incidents involving the use of the terms "black bitch" and "lightening". Complainant told him "Carl, you know, I just can't take it." Carl King replied that he didn't want to hear that "black s***" around him no more. This was said in a loud and nasty manner. Carl King, was the Superintendent, the head man for the Respondent, and Complainant was taken aback and didn't know who else he should take his complaint to with Respondent. Tr. Pages 105 and 106.

11. In just a two month period, Complainant was subjected to a derogatory racial slur, being called "lightning". He had to complain to the Superintendent to be given overtime work. He was intimidated by two large white co-workers, who threatened to "whip his ass", and threw things around the lunch room. This intimidation resulted in his fear to utilize the lunch room with his co-workers. When he went to complain to the Superintendent, Carl King, he was given the response that he didn't want to hear that black "s***" in his office.

12. Taken together, these incidents, were pervasive in that they occurred in such a short period of time. They were sufficiently severe to alter the conditions under which he

worked, in that he was subjected to being referred to by a very demeaning stereotype, "Lightening", an Amos and Andy character, with negative Step'n'Fetchit associations; and, subject to physical intimidation by white co-workers, resulting in his inability to use the lunch room. This environment is imputable to the Respondent on the basis of the Superintendent's failure to address Complainant's concerns about the racially hostile environment, and by the Superintendent's prior reluctance to schedule the Complainant for overtime while other white co-worker's were. The undersigned finds as a matter of fact the Complainant was subjected to a racially hostile work environment.

13. On his first day on the job, Complainant took pliers from the trailer and put them in his lunch box, to wire down the hood of his car, which had come loose from its latch. He was called into the office with the General Foreman, Marshall Bland, by the Union Steward, Cheryl Mallett, when the pliers were discovered missing. He was asked to open his lunch box and explained that he was going to bring them back. He was permitted to barrow the pliers to fix his hood. He was not disciplined or written up for anything as far as Ms. Mallett was aware. Tr. 78, 83 and 84.

14. Complainant was laid off from Respondent on April 24, 2001. He did not file a grievance with the union at the time he was laid off because Carl King had told him he would be back in three days. Tr. Pages 69, 110 and 112.

15. Complainant returned to the union hall a few days later and was shown a no recall letter that Craig Harvey, the Laborers Local Business Manager, had received from

Respondent's Superintendent, Carl King. It was dated May 3, 2001 and informed the union that Respondent would not be recalling Complainant for employment because he was not dependable, reliable or trustworthy. It further accused Complainant of taking company material, that he was always wondering off the project, not completing his work and that the Foremen would always have to hunt for him. Yet, Complainant received his unemployment because Respondent reported it as a "good lay off" for a reduction in force. Tr. Pages 70, 116 and 117; Joint Exhibit No. 2, Tab 32.

16. The Respondent laid off two white employees from the union and sent no recall letters to Mr. Harvey as well. Laborer Terry Smith's was sent the same day, and cited his being undependable, i.e. not showing up for work. While David White's was dated August 28, 2001 and cited unsatisfactory work. Tr. Page 42; Joint Exhibit No. 2, Tab 35.

17. The Respondent has the right to select the most qualified workers to retain in a reduction in force. There is no seniority except for the shop steward as far as the union employees are concerned. Generally, however, the most qualified would be those with the most experience. Tr. Pages 26 and 27.

18. The Respondent employed sixteen African American union members at the John Amos plant on its projects. Other white workers were laid off in April 2001 who were never rehired. Of the sixteen African Americans who worked for Respondent at the John Amos plant, eight were rehired after lay offs. Only twenty some percent of the white employees were rehired subsequent to a lay off. None of the Laborers laid off between

January 1, 2001 and September 2001 was rehired. Respondent continued to request Laborers from the union subsequent to April 2001, however. An examination of the employment by trade and race by the Respondent at the John Amos plant shows that eight of the African Americans employed by Respondent there were employed as Laborers. Juanita Gore was employed there from June 21, 2001 through November 14, 2002. Arnold Mitchell was employed from August 20, 2001 until August 22, 2002. Other African American Laborers were employed there for periods ranging from just under a month to six or seven months. These numbers are comparable to those for white Laborers, some of whom had long employment at the site while others were there just a short time. Tr. Pages 50, 69, and 71-76; Joint Exhibit No. 2, Tab 11.

19. Complainant was never late for work, never missed a day, was never written up or disciplined for anything while he worked for Respondent at John Amos. Complainant was subsequently hired by PMI to work at the John Amos plant and made Foreman with ten people working under him there. Tr. Pages 117 and 118.

20. Subsequent to the receipt of the Human Rights Complaint, Respondent investigated the reasons for Complainant's termination. At that time the Ransons (Gary Ranson had recently replaced Carl King as Superintendent at John Amos for Respondent) called Cheryl Mallett and Marshall Bland in to sign a statement prepared by the Ransons relating to the alleged theft of the pliers from Marshall Bland. The documents found at Joint Exhibit No. 2, Tabs 18 and 19 were then created, but had never been presented to

Complainant, who had never been disciplined in any fashion for that incident. Tr. Pages 85-88, 115 and 116.

21. Rather than investigate Complainant's concerns regarding racial hostility at his work site, Respondent instead chose him as one of the initial lay-offs. Out of those four individuals who were laid off, two were further subjected to a no recall letter to the union. The white employee was given a no recall, because he was undependable in failing to report for work. The evidence of record is that Complainant never missed a day, showed up on time and in fact wanted as much overtime as he could get. The undersigned finds that the alleged theft of Marshall Bland's pliers was pretext for discrimination in laying off Complainant and subjecting him to a no recall letter. Pretext is demonstrated by the fact that the Respondent continued to employ the Complainant for two months following the allegation of theft of the pliers, while nothing was said after he explained to the union Steward and General Foreman, what he was doing with them, by the fact that the incident reports of the alleged theft and investigation only occurred following the filing of the Human Rights Act complaint with the West Virginia Human Rights Commission, as well as, by the fact that his lay off was a "good lay off" as reported to the unemployment office. Therefore, the undersigned finds as a matter of fact, that Complainant was laid off and given a no recall letter with the union because of his race.

22. Craig Harvey testified that Complainant missed call outs with Cost Company, JHL and Williams Piping, after his lay off from Respondent, but that the missed call was

listed as a refusal to keep Complainant from dropping to the bottom of the list. Complainant went to work for Williams Piping on August 8, 2001 and worked 200 hours before being laid off. Complainant was unavailable for a call out with PMI due to a funeral, but subsequently took the job with PMI and was later laid off. Complainant was unavailable for call outs for G & R Masonry and Metro. Complainant next worked for Dick Corp. was laid off; missed a call out for Pioneer Piping, went back to work for Dick Corp, was laid off and then went back to work for Dick Corp again, and was discharged for a verbal altercation with another employee. Complainant then worked for Mountaineer Contractors and was laid off. Complainant was unavailable for a Williams Service Group call out, but later hired there. The eight call outs missed, included call outs for work which required scaffold safety class which Complainant did not posses and one was with a company that repeatedly shorted workers on hours and failed to pay into the pension and benefit funds. Tr. Pages 31-40, 135, 138 and 139; Joint Exhibit No. 2, Tab 37.

23. The undersigned finds as a matter of fact that Complainant has made reasonable efforts to mitigate his lost wages.

24. There is no indication that Respondent employed any Laborers at John Amos after December 1, 2002. Joint Exhibit No. 2, Tab 11.

25. Adjusting the figure of net lost wages and benefits for April 2001 to $534.79 (calculated to account for one seventh of the value of benefits for April approximating the percentage of lost wage for that month), the Complainant has sustained net lost back wages

and benefits from April 2001 through November 31, 2002 totaling $40,962.24. As set forth more fully in Exhibit A of Memorandum of Law of the West Virginia Human Rights Commission. Joint Exhibit No. 2, Tab 6.

26. The racial harassment made the Complainant feel really down, and ultimately led him to talk to Carl King. When Complainant was fired he was in the yard crying, because he felt wronged knowing he was doing the best job he could and was showing the other younger workers hired after him what to do, while they weren't laid off. Following his termination, Complaint lost his car and his apartment because he couldn't pay his bills, and he wasn't eating right. He was in bad shape. The Complainant has suffered humiliation, embarrassment, emotional distress and loss of personal dignity as a result of the unlawful racial discrimination by Respondent. Tr. Pages 109-111, 137 and 140.

27. The West Virginia Human Rights Commission has incurred reasonable expenses of $305.25 in the prosecution of this case as set forth more fully at Exhibit B of Memorandum of Law of the West Virginia Human Rights Commission.

B.

DISCUSSION

West Virginia 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 . . . [or] age." 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 and/or age, the complainant must prove as prima facie case, that:

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 v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the Respondent. The Complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); 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 (1983). 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.

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 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986). 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 (1995). Although, discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

The establishment of a prima facie case creates a "presumption that the employer unlawfully discriminated against" the Complainant. Barefoot, 193 W. Va. 475, 457 S.E.2d 152 (1995); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Shepherdstown Volunteer Fire Dep't, 172 W. Va. 627, 309 S.E.2d 342.

Once the Complainant and the Commission establish a prima facie case, the Respondent may still avoid liability if it articulates a legitimate, nondiscriminatory defense. "[T]he burden then shift[s] to the defendant . . . to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254.

Though the burden on Respondent under this test is only one of production, not persuasion, to accomplish it a Respondent "must clearly set forth through the introduction of admissible evidence the reason for the [Complainant's] rejection." Id. at 254. The employer's stated reason should "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Id. at 255-256. The explanation provided "must be clearly and reasonably specific," Id. at 258, "must be legally sufficient to justify a judgment for the defendant," and it must be both legitimate and nondiscriminatory. Id. at 254.

Courts are skeptical of alleged reasons which are not asserted until the latter stages of a discrimination dispute. Gallo v. John Powell Chevrolet, Inc., 61 Fair Empl. Prac. Cas. 1121, 1129 (M.D. Pa. 1991) (the fact that employer's alleged reasons were not asserted until the hearing "casts doubt on their authenticity and suggests that they were fabricated after the fact to justify a decision made on other grounds"); Foster v. Simon, 467 F. Supp. 533 (W.D. N.C. 1979); Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. Pa. 1973). Shifting reasons or defenses between the time of the adverse action and the time of the hearing is strong evidence of pretext. Smith v. American Service Co., 611 F. Supp. 321, 328 (N.D. Ga. 1984); Townsend v. Grey Line Bus Co., 597 F. Supp. 1287 (D. Mass. 1984), aff'd, 767 F.2d 11 (1st Cir. 1985).

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 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.

The Complainant and the Commission have proven a prima facia case of race discrimination by the Respondent in selecting the Complainant for lay off in the reduction in force and the subsequent letter to the union informing them that the Respondent would not recall Complainant. The Complainant is a member of a protected class under the West Virginia Human Rights Act, in that he is African American. An adverse action was taken against him when he was selected for lay off in the initial reduction in force and Respondent informed the union that Respondent would refuse to recall him. Other white employees with less time on that job, less experience with doing clean up work at the John Amos plant, and, whom he had shown what needed to be done at this site, were retained. Although one of the other white employees laid off was also given a no recall, that individual was absent frequently, while Complainant showed up on time every day.

The Respondent has articulated various legitimate, non discriminatory reasons for these actions. That he was laid off as part of a legitimate reduction in work force and that he was not subject to recall because he was not dependable, reliable or trustworthy. It further accused Complainant of taking company material, that he was always wondering off the project, not completing his work and that the Foremen would always have to hunt for him. Rather than investigate Complainant's concerns regarding racial hostility at his work site, Respondent instead chose him as one of the initial lay-offs. Out of those four individuals who were laid off, two were further subjected to a no recall letter to the union. The white employee was given a no recall, because he was undependable in failing to report for work. The evidence of record is that Complainant never missed a day, showed up on time and in fact wanted as much overtime as he could get. The undersigned finds that the alleged theft of Marshall Bland's pliers was pretext for discrimination in laying off Complainant and subjecting him to a no recall letter. Pretext is demonstrated by the fact that the Respondent continued to employ the Complainant for two months following the allegation of theft of the pliers, while nothing was said after he explained to the union Steward and General Foreman, what he was doing with them, by the fact that the incident reports of the alleged theft and investigation only occurred following the filing of the Human Rights Act complaint with the West Virginia Human Rights Commission, as well as, by the fact that his lay off was a "good lay off" as reported to the unemployment office. Therefore, the undersigned finds as a matter of fact, that Complainant was laid off and given a no recall letter with the union

because of his race. There is no evidence in the record before the undersigned that the Respondent has discriminated on the basis of race in its employment of workers from the Laborer's Local on this John Amos project in the periods after the lay off of the Complainant and his subsequent filing of his Human Right's Act complaint. The Superintendent who made that decision was no longer working at that site and Respondent hired several African Americans thereafter beginning in June 2003, who appear to have worked comparable numbers of hours as white union Laborers.

The Human Rights Act imposes on an employer a duty to ensure, as best they can, that workplaces are free of harassment that creates a hostile or offensive working environment. Hanlon v. Chambers Syl. Pt. 8, 195 W.Va. 99, 464 S.E. 2nd 741 (1995); Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E. 2nd 801, at 809 (1996). To establish a hostile or abusive work environment claim, it must be established:

1) That the subject conduct was unwelcome;

2) It was based on the ancestry of the plaintiff;

3) It was sufficiently severe or pervasive to alter the plaintiff's condition of employment; and

4) It was imputable on some factual basis to the employer. Fairmont Specialty Services v. West Virginia Human Rights Commission, Syl. Pt. 2, 206 W.Va. 86, 522 S.E. 2nd 180 (1999).

"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." Ibid, and Syl. Pt. 3.

"Conduct such as use of the "N" word to describe an African American, . . . or other racial . . . pseudonyms 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. 2nd at 187-188, no. 8.

In just a two month period, Complainant was subjected to a derogatory racial slur, being called "lightning". He had to complain to the Superintendent to be given overtime work. He was intimidated by two large white co-workers, who threatened to "whip his ass", and threw things around the lunch room. This intimidation resulted in his fear to utilize the lunch room with his co-workers. When he went to complain to the Superintendent, Carl King, he was given the response that he didn't want to hear that black "s***" in his office.

Taken together, these incidents, were pervasive in that they occurred in such a short period of time. They were sufficiently severe to alter the conditions under which he worked, in that he was subjected to being referred to by a very demeaning stereotype, "Lightening", an Amos and Andy character, with negative Step'n'Fetchit associations; and, subject to physical intimidation by white co-workers, resulting in his inability to use the lunch room. This environment is imputable to the Respondent on the basis of the Superintendent's failure

to address Complainant's concerns about the racially hostile environment, and by the Superintendent's prior reluctance to schedule the Complainant for overtime while other white co-worker's were. The undersigned finds as a matter of fact and of law that the Complainant was subjected to a racially hostile work environment.

C.

CONCLUSIONS OF LAW

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

2. The Respondent, Davis & Burton Contractors, Inc., is a "person" and an "employer" as those terms are defined under 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 West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

5. The Complainant has established a prima facie case of race discrimination, regarding his lay off from Respondent and Respondent's subsequent issuance of the no recall letter dated May 3, 2001. Although Respondent articulated legitimate non discriminatory

reasons for these actions, the Complainant and Commission have established by a preponderance of the evidence that these reasons were pretext for unlawful discrimination on the basis of race.

6. The Complainant and Commission have established by a preponderance of the evidence, that Complainant was subjected to severe and/or pervasive racial discrimination which created a hostile work environment.

7. As a result of the Respondent's unlawful discriminatory conduct, Complainant is entitled to an award of $3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity.

8. As a result of the Respondent's unlawful discriminatory conduct, Complainant is entitled to net lost back wages and benefits from April 2001 through November 31, 2002 totaling $40,962.24. As set forth more fully in Exhibit A of Memorandum of Law of the West Virginia Human Rights Commission. Joint Exhibit No. 2, Tab 6.

9. The Commission is entitled to an award of its reasonable costs incurred in prosecution of this matter in the amount of $305.25 in the prosecution of this case as set forth more fully at Exhibit B of Memorandum of Law of the West Virginia Human Rights Commission.

D.

RELIEF AND ORDER

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

1. The above named Respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of the receipt of the undersigned's order, the Respondent shall pay the reasonable costs of the Commission incurred in the prosecution of this matter, in the amount of $305.25.

3. Within 31 days of receipt of the undersigned's order, the Respondent shall pay the Complainant incidental damages in the amount of $3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of Respondent's unlawful discrimination, plus post-judgment statutory simple interest of ten percent.

4. Within 31 days of receipt of the undersigned's order, the Respondent shall pay the Complainant net lost back wages and benefits from April 2001 through November 31, 2002 totaling $40,962.24; plus simple ten percent pre-judgment interest from the date of the lay off through March 24, 2004, of $7,851.08; and post judgment simple interest of ten percent thereafter until payment is tendered.

5. In the event of failure of the Respondent to perform any of the obligations

hereinbefore set forth, Complainant is directed to immediately so advise the West Virginia Human Rights Commission, William D. Mahan, Director of Compliance/Enforcement, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 24th day of March, 2004.

WV HUMAN RIGHTS COMMISSION

BY: _____

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE