STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

TELEPHONE (304) 348-2616
FAX (304) 348-2248

GASTON CAPERTON
GOVERNOR

Quewanncoii C. Stephens
Executive Director

22 September 1993

James L. Snell
HC Box 10B
Thacker, WV 25694

Superior Electric Heating, Inc.
P.O. Box 566
Matewan, WV 25678

Joan G. Hill, Esq.
Crandall, Pyles & Haviland
P.O. Box 596
408 Main Street
Logan, WV 25601

James W. Gabehart, Esq.
Campbell, Woods, Bagley,
Emerson, McNeer & Herndon
Suite 1400 Chas. National Plaza
P.O. Box 2393
Charleston, WV 25328-2393

Re: James Snell v. Superior Electric Heating, Inc. and Barney Elliot
Docket No. EH-249-91

Dear Parties and Counsel:

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

Sincerely,

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

QCS
Enclosures
Certified Mail/Return
Receipt Requested
cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General
Civil Rights Division

NOTICE OF RIGHT TO APPEAL

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

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

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES SNELL,

Complainant,

v.

DOCKET NO. EH-249-91

SUPERIOR ELECTRIC HEATING, INC., and BARNEY ELLIOT,

Respondents.

FINAL ORDER

On June 28, 1993, this matter came on for public hearing before Administrative Law Judge Richard M. Riffe. The parties waived submission of proposed findings of fact and conclusions of law, electing instead to submit the above-styled claim for decision on the record.

On July 26, 1993, after consideration of the testimony and other evidence, the Administrative Law Judge issued his Final Decision. The decision found in favor of the complainant and ordered the respondents to pay the complainant back wages and lost benefits in the amount of $408.00, plus prejudgment interest in the amount of $122.00; incidental damages in the amount of $2,500.00; attorney fees in the amount of $6,121.00; and costs in the amount of $630.00. The respondents were also ordered to cease and desist from engaging in unlawful discriminatory practice.

No appeal having been filed pursuant to W. Va. Code § 5-11-8(d)(3) and § 77-2-10 of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission, the Final Decision of the Administrative Law Judge has been reviewed only as to whether

it is in excess of the statutory authority and jurisdiction of the Commission, in accordance with § 77-2-10.9. of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission. Other defects in said Final Decision, if there be any, have been waived. Finding no excess of statutory authority or jurisdiction, the Final Decision of the Administrative Law Judge attached hereto is hereby issued as the Final Order of the West Virginia Human Rights Commission.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 21st day of September, 1993 in Charleston, Kanawha County, West Virginia.

QUEWANNCOTT C. STEPHENS
EXECUTIVE DIRECTOR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES SNELL,

Complainant,

v.

DOCKET NUMBER: EH-249-91

SUPERIOR ELECTRIC HEATING, INC.
AND BARNEY ELLIOT,

Respondents.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

I.

BOILER PLATE

This matter came on for hearing on 28 June 1993 in Mingo County at the Mingo County Courthouse, Williamson, West Virginia. The complainant appeared in person and by his attorney Joan Hill; the respondent appeared in person and by its attorney James Gabehart.

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

II.

FACTUAL AND ANALYTICAL OVERVIEW

This is the first claim I have heard since the U.S. Supreme Court decided St. Mary's Honor Center v. Hicks, 61 U.S.L.W. 4782 (25 June 1993). In St. Mary's, the U.S. Supreme Court restructured the analysis that the federal courts will undertake in employment discrimination claims, holding that once a complainant proves a prima facie case, he does not automatically prevail by thereafter proving that respondent's articulated legitimate nondiscriminatory reason for the adverse action is pretextual. Rather, the U.S. Supreme Court now says, the complainant must not only prove that the employer lied about the reason for the adverse employment action, but also that the respondent was motivated by an illegal discriminatory motive when it fired the plaintiff. The U.S. High Court said that the fact finder could infer discriminatory intent from the proof of pretext, standing alone, but that a finding of pretext did not compel a finding of discriminatory intent. The essence of this holding, for the purpose of this case, is contained in the following language:

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.'" (Footnote and citations omitted; emphasis in original.) Id. at 4784.

The Court then goes on to rule, however, that even where the plaintiff does prove pretext, this is no longer sufficient to compel judgment in his favor. (Justice Scalia claims that, under prior case law, this never was sufficient to compel judgment for plaintiff; the dissent says that this claim is intellectually dishonest legerdemain.)

In these circumstances, I always have to attempt to divine whether our Court will follow the U.S. Supreme Court (it is not required to do so in this instance as the St. Mary's decision is not grounded in the Constitution). I predict that it will not. I think our Court will find the dissent's logic more persuasive, and I cannot restate their logic better than they. Indeed, the U.S. Congress may well abrogate the St. Mary's decision as it did prior anti-plaintiff cases in the Civil Rights [Restoration] Act of 1991.

Thus, I will hereinafter rule in complainant's favor on the grounds that he proved respondent's proffered legitimate nondiscriminatory reason to be pretextual. Moreover, I also conclude that there is sufficient evidence from which to infer discriminatory intent within the more restrictive framework of St. Mary's.

In this case, the complainant proved a prima facie case of disparate treatment discriminatory discharge due to handicap by proving that (1) he meets the definition of "handicapped" (he had throat cancer and a laryngectomy), (2) he is a "qualified handicapped person," and (3) he was discharged from his job. Morris Memorial v. Human Rights Commission and Mayes, WVSCA No. 21456 (21 May 1993), at Syllabus point 2. This shifted to the respondent the burden of

articulating a legitimate nondiscriminatory reason for Mr. Snell's discharge. It claimed that it discharged him both because it had sold an apartment complex that he had to oversee as part of his night watchman duties so his position was no longer needed and to reduce overhead. The complainant proved that these were pretextual reasons by demonstrating: (a) that these duties were but a minor portion of his overall job; (b) that his discharge was remote in time to the building's transfer; and (c) that the respondent was aware of and concerned about both complainant's health and its increasing group health insurance premiums. Additionally, and in Justice Scalia's words, my "disbelief is accompanied by a suspicion of mendacity."

Finally, I found marginal direct evidence of discriminatory intent. When Mr. Elliot was asked by counsel why he didn't move complainant to another available job when his position was eliminated, he said repeatedly that he didn't like his appearance, but that he couldn't say exactly what about it he didn't like. Later, the second time he testified, when asked if the complainant now looked like someone he might hire given his appearance at the hearing, he rather hastily replied in the affirmative, indicating that complainant looked "healthier" and "more robust" at the hearing than he had when he was receiving radiation therapy for his throat cancer. This further leads me to believe that respondents' actions were motivated by its knowledge of complainant's medical condition.

One other thing needs to be mentioned in this overview. The complainant spent considerable effort trying to prove, and the respondent to refute, that complainant was qualified to perform duties other than those to which he was assigned at Superior

Electric. The Rules Regarding Discrimination Against the Handicapped, Title 77, Series 1 (77 CSR 1) have not yet caught up with the Americans With Disabilities Act (though they must soon in order for this agency to retain its federal funding). The present regulations simply codify the already outdated holding in Coffman v. Board of Regents, 386 S.E.2d 1 (WV 1988). Rule 4.5.4.A. states: "Reasonable accommodation does not require an employer to...[i]nclude assignment to a new or different job; [or] [r]eassign the employee to another position in order to provide her/him with work s/he can perform." I cannot rewrite the law. Thus, if I concluded that respondent had eliminated complainant's position for the reasons it claimed, it would not have been required to create other employment for him and would be exonerated.

An argument could be made that since respondent often ignored the duties for which it initially hired employees and in practice used them to do whatever needed done, what it really had, in effect, was a pool of general laborers of which complainant was simply one. The duties of the various employees were, however, sufficiently compartmentalized to support my conclusion that complainant was hired as a nightwatchman and his (and other employees') performance of additional duties neither rendered the distinction among jobs meaningless nor would have required respondent to offer him alternative employment. However, I am persuaded that the respondent was motivated by an intent to shed itself of Mr. Snell because of his handicap when it eliminated his position. Inasmuch as he has alternative employment and does not seek reinstatement, neither

"reconstitution" of the nightwatchman's position nor front pay are indicated.

The debate surrounding complainant's qualification to fill these other positions was nevertheless interesting and relevant to the extent that it demonstrated the respondent's willingness to attempt to recast the facts into the mold he apparently believed they needed to fit in order for him to prevail; it provided another piece in the mosaic of his lack of candor. Thus, I do make findings relative to whether complainant was qualified to perform various of the other jobs at Superior Electric, but the reader must remember that I do so to shed light on respondent's credibility and not because I labor under a mistaken belief that respondent was required to offer complainant one of these positions. I suppose, too, that it has some relevance in refuting the myth that respondent tried to sell at one point where he portrayed himself as a sort of benevolent father retaining this useless son far longer than he actually needed him so that he could enjoy the benefit of insurance coverage through the completion of his radiation treatment.

Finally, the fact that respondent did not fill the nightwatchman's position after it discharged complainant is not lost on me. I have concluded, nonetheless, that it released complainant (thereby "eliminating" the nightwatchman's position from its "table of organization," so to speak) with the specific intent of getting rid of Mr. Snell due to his handicap.

III.

FINDINGS OF FACT

1. Complainant is handicapped within the meaning of the Human Rights Act. (Stipulation at transcript page 9, hereinafter designated T. 9.) He had throat cancer and a laryngectomy while in the respondent's employ. He speaks with the aid of a device which he holds to his throat which picks up the vibrations in his throat, amplifies them and broadcasts them to create an artificial voice. He is quite adept at it and is easy to understand.

2. The complainant appeared neatly attired in a sports shirt and new acid washed black jeans. He was a big, healthy looking fellow; polite and responsive, he was a bit shy.

3. The onset of the complainant's throat problems was rather sudden. He was in the emergency room one day, saw a specialist a couple of days later, and had surgery a couple of days later on 16 March 1989. He returned to work following surgery on 2 April 1989 without restrictions.

4. Complainant had begun employment as a nightwatchman with respondent on 2 April 1988 and was subsequently discharged on 31 August 1990. Thus, he worked there over the course of three summers.

5. The complainant performed his work satisfactorily. (Complainant's exhibit 3.)

6. The respondent Superior Electric Company operates a retail sales business in Matewan selling (and sometimes installing) appliances, lumber, building supplies and similar home improvement

type items. (T. 121) The respondent's inventory might be described as a "multiple line inventory" and includes other things like sporting goods, pumps, well supplies and so on. Respondent Barney Elliot is the owner and operator of Superior Electric Company.

7. Complainant's and respondent's credibility is discussed in the substantive findings, infra.

8. Mr. Elliot is an active manager and he decides who is hired, who is fired and what types of duties they will perform. (T. 365, 218.)

9. The respondent does not maintain a rigid job classification and many of its employees perform duties outside of their principal job function. The salesmen are the most intellectually sophisticated of Superior Electric's employees. They are spared most of the heavy labor that other employees are required to do, but many of them did testify that they had been called on from time to time to do some of the more menial tasks around the workplace, including cutting weeds. The remainder of Superior Electric's employees performed more menial tasks. There were employees who performed primarily (if not exclusively) the duties of a "stockman." These duties did not require significant customer contact and the employees who performed this function were neither as sharp as nor required to present as neat and clean an appearance as the salespeople were. Superior Electric also had at least a few other employees whose menial tasks were similarly compartmentalized. Shortly following complainant's discharge, respondent hired a menial laborer as a "fence installer" and another as a "cleaning woman." Finally, the respondent had a class of menial laborers known as yard workers or yardmen who worked

out in the lumber yard. I gathered that their positions required the least intellect and the greatest physical strength and stamina.

10. Numerous of the respondent's sales people testified on respondent's behalf. What I conclude principally from their testimony is that the sales people were fairly sophisticated individuals with above average intellect and, in many instances, prior sales experience. Whether the complainant was possessed of sufficient acumen to perform the duties of a sales person at Superior Electric is irrelevant, as the Commission's Rules Regarding Discrimination Against the Handicapped do not required an employer to offer alternative employment to a handicapped employee who becomes unable to perform his regular duties. However, I think complainant did lack the sophistication needed to perform sales duties.

11. My notes reflect that respondent's witness Thomas Joseph Mann, one of respondent's salesmen, was "very neat and clean" and that he "seems credible." I wrote "this guy seems sharper" than other witnesses who had testified. Mr. Corbett, another of respondent's sales people was also "pretty sharp," according to my notes. During his testimony I wrote, "These sales people are a bit out of plaintiff's league."

12. I found the complainant very credible, sincere and forthcoming. Much of his testimony was corroborated. One of the reasons that I found complainant to be so credible was his obvious candor when admitting his limitations. In fact, I felt that he admitted to greater limitations than he was possessed of. (See, T. 192, 193, 208.)

13. Elliot described the duties of a stock-boy as simply "bringing the materials out of the warehouse" and being "able to go places for me" as well as "whatever I need for him to do." The skills required for that position are minimal and I would categorize it as one of menial labor. Christopher Browning, an employee hired about a month after complainant was discharged, confirmed that the duties of a stock-man were consistent with Mr. Elliot's description. (T. 443-453.)

14. Mr. Browning's description of his duties as a stockman makes it clear that only rudimentary reading skills are necessary to effectively perform the job of a stockman and that it involves very little customer contact. (T. 443-450.)

15. During the first month or so following complainant's discharge, the respondent hired several employees to perform menial labor, including Delores Hatfield, Christopher Browning and James Hamilton. They performed menial duties that were not necessarily restricted to the jobs they were hired to perform.

16. The complainant was paid minimum wage at all relevant times. (T. 64.) Hamilton, Browning and Hatfield were all paid minimum wage. (T. 65.)

17. The new employees were hired to clean, to install fences, to stock and to perform sales. Although I find that the complainant was well qualified to perform any of these duties (except the sales positions), the respondent would not have been required to offer these position to complainant, given the present state of the law.

18. Delores Hatfield was hired on 16 October 1990 as a cleaning lady. (T. 53.)

19. Although the respondent indicated in discovery documents that he had initially hired Mr. Hamilton to be a fence installer, he testified that he actually used him as a stockman. (T. 420.)

20. Mr. Browning ceased his employment with the Williamson Superior Electric Store on or about 6 October 1990 and contemporaneously began working as a stockperson at the Superior Electric Matewan Store; Mr. Elliot equivocated about whether his reassignment was a transfer or a new hire. (See, infra at finding of fact no. 37.) In any event, Browning had no experience as a stock-person prior to his employment with Superior Electric. His duties at both stores consisted solely of stocking shelves. Browning appeared disheveled and it was evident that he had below average intellect. Mr. Elliot testified in surrebuttal that Browning was slothful, but did not dispute that his duties were confined to stocking.

21. Mr. Elliot and a business partner owned an apartment building in Matewan out of which they rented apartments and, apparently, commercial space. This building was heated by a coal furnace and one of the nightwatchman's duties was to rattle the locks on the apartment building and, during the winter, to make sure that the coal furnace was filled with coal and that the ashes were removed as needed. On a few very cold nights the furnace would be refilled twice during a shift but on most nights it only required filling once.

22. The nightwatchman's duties included watching two lumber yards, a warehouse downtown, the apartment building (including loading the furnace with coal during the winter), a building on old

Route 49, the store itself, the respondent's home and generally policing and cleaning the store area between runs on the security route. (T. 48.)

23. In between his runs the complainant would stay busy cleaning up around the store and lumber yard. (T. 135, 136.)

24. Respondent claimed that it was not part of the complainant's responsibilities to check the respondent's personal home each evening (T. 46) despite that complainant testified that this was one of his duties and that he had been so trained. (T. 131) Although the fellow that preceded complainant as nightwatchman (and trained him to perform his nightwatchman duties), Neil Sipple, was called as a witness, he was not called upon to dispute complainant's testimony that he was trained to watch respondent's home.

25. While working as a nightwatchman, the complainant varied the hours he worked and the routes that he would follow when checking the security of the various facilities which he watched so as to avoid establishing a predictable pattern which potential thieves could observe. (T. 127, 128.)

26. The complainant kept his own hours rather than using the time clock the other hourly employees used. He worked 40 hours per week and, if he was called in during the day to cut weeds, he reduced his evening hours proportionally so as to amass a total of 40 hours work by the end of the week.

27. During a typical evening shift, the complainant would make a run about once an hour. The run would take about a half hour to make. On the last run of the evening during the winter, the complainant would spend about 20 minutes checking the furnace in the

apartment building, filling the coal bin up and taking the ashes out. Ordinarily, this happened once per shift but, on a few very cold nights, it would happen twice per shift. (T. 132-134.)

28. Sipple testified that when he was the nightwatchman he would spend a total of about 45 minutes out of an entire shift at the apartment building.

29. Both Mr. and Mrs. Elliot were intelligent, successful and sophisticated business people.

30. In order to obtain the benefit of certain tax credits, Mr. Elliot and the other co-owner of the apartment building decided to create E & M Real Estate. They, (and their wives) transferred their personal interests in the apartment building to the partnership, E & M Real Estate. That partnership then entered into a partnership agreement with the Matewan Development Center, Inc. for the purpose of providing low and moderate income housing. Pursuant to the agreement, Matewan Development Center was a general partner and E & M Real Estate a limited partner as is set forth in hearing examiner's exhibit 2. As a result of the agreement, E & M Real Estate turned management of the apartment building over to Matewan Development Center on or about 28 February 1990. (T. 234, 249.)

31. The partnership agreement between E & M Real Estate and Matewan Development was entered during September of 1989. The partnership between E & M Real Estate and Matewan Development Center was called the G. W. Hatfield Building Limited Partnership.

32. During late February or, more likely, March of 1990, the partnership allowed a contractor to enter the building and begin extensive renovation of it. They replaced the coal furnace with heat

pumps and the coal furnace was not used again after February or March of 1990. (T. 236.)

33. The contractor who was renovating the building had control of it and was responsible for its maintenance from about February of 1990 through late December of 1990 or January of 1991, at which point it turned that responsibility back over to the Development Center and the Development Center began to lease out apartments. (T. 240.)

34. The relative insignificance of the complainant's duty of tending the furnace relative to his other duties is illustrated by the fact that respondent never told him to stop watching the apartment or tending to the furnace after the contractor began renovations, despite that it was neither E & M Real Estate's nor Superior Electric's contractual responsibility to provide security for the building.

35. This case turns primarily on the respondent's profound lack of credibility. The sum total of his testimony reveals that he was dishonest, evasive and manipulative. This did not come through at first but became more evident as the hearing progressed and was very clearly obvious by the conclusion of the hearing. I sat about six or eight feet away from him, but he spoke so quietly that I was frequently unable to hear his testimony. My contemporaneously recorded notes indicate initially that he was "nervous and evasive," that he was "laughing inappropriately," that he was "jittery-shifting postures, leaning back with hands behind head--jerks forward--glances around a lot. Grimacing or smiling..." Mr. Elliot testified three times: as complainant's first witness, during respondent's case-in-chief and as a surrebuttal witness. His credibility

deteriorated each time he testified. By the second time he testified his disingenuousness was patently obvious. He even attempted to claim that documents before him did not say what they said. I found him totally lacking in credibility and entirely self-serving.

36. The respondent claimed repeatedly not to remember events which were memorialized in the record and which any businessman of his sophistication would remember. He claimed that he did not know if, in preparation for this hearing, he had given records to his lawyer related to the transfer of the apartment building that was supposedly the entire reason complainant was employed. He claimed that he did not know what date he transferred ownership of the apartment building to Matewan Development (the event which supposedly precipitated complainant's discharge). He claimed he did not know if a deed had been prepared and signed to effect the transfer of the building. (These claims were all made despite the fact that the partnership agreement and the deed had been produced during discovery, were discussed in his presence prior to the hearing and were admitted into evidence.) He claimed that he did not know when he sold the apartment building. He claimed that he did not know when he made the decision to the lay the complainant off. (T. 49.) He claimed that he did not know when he discharged the complainant relative to the date of the sale of the apartment building. (T. 38-42.) He claimed that he did not know what the complainant's duties were. (T. 45.) Mr. Elliot claimed not to understand the "specific purpose" of the limited partnership agreement and deed which effected the transfer of ownership of the apartment building he owned. (T. 384, 385.) He claimed that he did not know that he had

hired Chris Browning on 6 October 1990 nor that he had hired James Hamilton on 1 October 1990 (T. 52.) despite the fact that their names appeared on a document which respondent prepared and produced during discovery and which was admitted as complainant's exhibit number 2.

37. An example of Mr. Elliot's evasiveness appears at T. 52 and 53. Counsel asked if Browning was transferred from the South Williamson Store to the Matewan Store on 6 October 1990. Respondent answered, "I don't know that." Counsel tried again, "Well, let me not question you then about the date, but was Chris Browning transferred from your Williamson Store to the Matewan Store?" Respondent's answer: "No, he wasn't transferred." Counsel again sought to learn how it was that Chris Browning came to be employed at the Matewan Store. Respondent replied, "They just didn't want him over here at this store anymore, South Williamson Store, and I took him." Thinking she might have an answer now, counsel asked, "So, was it more or less, instead of a transfer, he was, like, terminated at Williamson and you hired him at Matewan?" Respondent answered, "I wouldn't even say that exactly. I don't remember that." Counsel then asked, "How would you say it then, sir?" The respondent's answer: "I wouldn't say it."

38. By the time the hearing had progressed to the point reflected at page 402 of the transcript, Mr. Elliot, who was present during the entire proceedings, had heard the date that he had sold his apartment building stated no fewer than a half dozen times and had seen the partnership agreement and deed that effected the transfer admitted into evidence, and yet, he still claimed "I don't know when it was sold."

39. In an affidavit signed by Mr. Elliot and submitted to the Human Rights Commission during the investigative stage of this proceeding, Mr. Elliot indicated that, "Mr. Snell's primary duty was to night watch the store building and lumber yards of Superior Electric. An additional duty included checking the doors of an apartment building owned by E & M Real Estate and firing a coal furnace at the building." (Complainant's exhibit 8) Perhaps the most obvious example of Mr. Elliot's casual and nonchalant mendacity relates to this document and appears at pages 397-401 of the transcript. At first he claimed that he had not said that Snell's primary duty was nightwatching. Then, when confronted with the affidavit, he tried to say that the affidavit did not say what it said. Finally, he fell back to a position that he did not prepare the document, stating explicitly that it was incorrect and implying that perhaps he had not read it before attesting to the veracity of its contents.

40. Mr. Elliot claimed repeatedly that a principal reason that he didn't retain complainant in one of his menial labor positions is that he could not read or write. (See, for example, T. 26, 35.) (Remember, he wouldn't have been required to retain him if the elimination of his job had been legitimate.) He claimed that the complainant had specifically admitted this to him. (T. 55) However, the complainant was able to write the phrase "Now is the time for all good men to come to the aid of their country" when I asked him to do so (hearing examiner's exhibit 1). I then handed the complainant the most recent order I had entered in the case (dated 23 June 1993) and

asked him to read it aloud beginning with the first paragraph. The order actually read as follows:

> "I am in receipt of respondent's motion to dismiss dated 15 June 1993 and complainant's opposition thereto. It appears that the gravamen of the complainant's allegations surround what he claims is the respondent's unlawful discriminatory discharge of and failure to rehire him. It further appears that complainant now at least comes close to admitting that his insurance co-payments were not unlike his peers'."

The complainant read this excerpt into the record as follows:

> "I am in receipt of respondent's motion to dismiss dated 15 June 1993, and complainant's opposition thereto. It appeared that the agreement of this complaint alleges and surrounds what the claim is, the respondent's unlawful non-- discharge of a failure to rehire him. It further appeared that the complainant is now at least coming closer to admitting that his insurance co-payments were not unlike his peers..." (T. 171).

Complainant hung on the words "gravamen" and "discriminatory." It was plainly evident, however, that he could read, and the respondent's claim that he said he could not is incredible, especially in light of the fact that the complainant and his wife indicate that he reads just fine. Further, respondent's claim (at T. 27.) that he administered an ad hoc "test" to the complainant and that he could not read the ticket that was presented to him is similarly incredible.

41. The complainant specifically denies that the respondent ever asked him to read tickets or orders. (T. 160.)

42. The respondent claimed that the complainant had not completed his application for employment completely (T. 27, 28.), yet, it appeared complete to me. (See complainant's exhibit no. 1.) (Respondent quibbled that he wasn't sure if complainant himself had

filled the application out because he had not seen him do so and further claimed that it was "incomplete" because he had left a blank under the section asking if he had dependents other than his wife or children. He had left it blank because he had no dependents!)

43. The complainant filled out his own employment application. (T. 124.)

44. The respondent claimed that the complainant refused to make trips for him, supposedly citing his inability to read road signs. This claim was demonstrated to be false by the fact that the complainant testified that he did indeed make the two trips for the respondent, as requested, and that he did so in the company of Allen Cantrell. The respondent called Cantrell as a witness, but he was not asked to dispute that he had ridden with the complainant while he drove to Nitro on one occasion and to Huntington on another at Mr. Elliot's request. (T. 158, 159, 315-320.)

45. My notes reflect that respondent's witness Allen Cantrell was "very sincere" and "credible."

46. The complainant specifically denies refusing to make trips for the respondent. (T. 159.)

47. The complainant's wife testified that he has driven extensively about the area and uses a road map competently. He has driven to Lexington, Kentucky, to Huntington and to Charleston. (T. 78, 79.)

48. The complainant regularly reads at home. He reads the Bible "a lot," he reads the newspaper daily and he filled out his own job application. (T. 79; complainant's exhibit no. 1.)

49. Although Rule 610 of the Rules of Evidence prohibits the use of religious beliefs to bolster or detract from a witness' credibility (and, indeed, complainant did not offer this testimony for that purpose), I nevertheless found both Mr. and Mrs. Snell to be of that type of simple, quiet, spiritually centered persons who take oaths seriously and simply do not lie. I should hasten to add that my life experiences tend to make me more suspicious of mendacity when people wear their religiosity and piety as a prominent and flashy badge. Ordinarily, the more religion that's touted, the greater my suspicion, with Southern , evangelizing, fundamentalist lay preachers rising to the top of my list of suspects. But for each of them, there are two like Mr. and Mrs. Snell who live their values rather than proclaiming them. I found them both very credible.

50. At the time of his discharge, the complainant was told by Mr. Elliot that his discharge was due to the sale of the apartment building. Elliot told complainant to get in touch with the purchasers of the building to see if they needed to hire a nightwatchman. He contacted Christopher McCallister, one of the principals in Matewan Development, but they had no need for a nightwatchman. Respondent's witness McCallister corroborated this testimony. (T. 161-163, 205.)

51. The complainant introduced evidence which suggested that the respondent hired an elderly gentlemen to replace him as nightwatchman shortly after his discharge, but no one could corroborate the complainant's witness' testimony to this effect and numerous witnesses specifically disputed it. I tend to think that the complainant's witness who testified to this effect, Tommy

Pennington, was simply mistaken about the time frame during which he observed someone performing nightwatchman duties. It is possible, too, that he lied to the complainant (and to us during the hearing) out of some misguided intention of helping the complainant prove his case. It is possible that someone did replace the complainant as nightwatchman but I am not convinced of it by a preponderance of the evidence.

52. My notes indicate (twice) that complainant's witness Tommy Pennington was nervous as he testified (and that he was "not very bright"). His appearance was unkempt, and he had homemade tattoos on his arms.

53. The complainant attempted to independently confirm Pennington's report that there was a nightwatchman who had replaced him by driving out to the work site and looking around, but he candidly admitted that he had never seen such a person during any of these trips. This candor buttressed complainant's credibility.

54. The complainant was frequently called in to work during the day to perform tasks that needed to be done around the lumber yard including the cutting of weeds at various locations. (T. 137, 138.)

55. One of complainant's chief contentions was that respondent tried to get him to quit by making him cut weeds in the hot sun. Mr. Elliot minimized this, claiming that he "told him to cut the weeds one time" when the proof made it clear that respondent had directed complainant to cut weeds on many, many occasions.

56. The complainant testified that Mr. Elliot began to require him to come in during the day more and more frequently and assigned him heavier and heavier tasks to perform. He says that Mr. Elliot

specifically required him to work in a heavily overgrown area known as the "bottom" during the hottest part of the day, stating that the summer sun would cause the weeds he was cutting to die more quickly. (T. 142-155.)

57. The complainant testified credibly that working in the heat of the sun was extremely uncomfortable but that he could not quit his employment because he needed the insurance for his cancer treatment. During his radiation therapy, he had the typical "target" that persons receiving radiation therapy have painted on his throat; it was readily visible to all at the worksite. (T. 154.)

58. Many former and present employees testified, however, that they, too, were required to cut weeds. Many of them also had to cut weeds and/or brush in the bottom. Even Mr. Snell's predecessor, Barry Neil Sipple, had been required to cut weeds and brush during his tenure with the respondent, including cutting in the bottom. I do believe that complainant believes that respondent was attempting to force him to quit by causing him to come in during the day and cut brush in the hot sun; however, I am not convinced by a preponderance of the evidence that that was the respondent's intent. I could be wrong. It is plain that the complainant was required to cut weeds on numerous occasions and that this was hot and unpleasant work; however, a number of other employees were treated at least similarly. I am suspicious that respondent <u>may</u> have been attempting to force the complainant to leave his employment, but I am not convinced of it by a preponderance of the evidence and therefore do not make such a finding.

59. In fact, one witness, Allen Cantrell, testified that he had cleared the bottom some time ago with an endloader. (T. 320.) He did confirm that the complainant had been working out in the bottom a lot, and, possibly, a disproportionate amount as compared to other employees. (T. 325.)

60. Respondent's witness Theodore Bartrum confirmed that many employees had been required to cut weeds in the bottom. (T. 340.)

61. My notes reflect that Bartrum was very nervous as he testified, but I did not write that he lacked credibility. I must have attributed his nervousness to performance anxiety.

62. Mr. Elliot was asked to explain why he did not offer Mr. Snell the alternative job of a stockperson rather than discharging him. He stated, "I can't lay my finger on it." He claimed that it required reading ability but the complainant was clearly capable of reading well enough to be a stockperson. He claimed that the complainant's personal appearance was not adequate, but the complainant clearly presented a neat and clean personal appearance and was an attractive man. He resorted to the position that he "never thought of him in them terms." He claimed that the complainant told him that he did not possess the physical abilities to be a stockperson. It appeared that he realized how ridiculous this claim was and he changed the subject in the middle of his answer. That colloquy went as follows:

> Q. "Would you agree with me that he possesses the physical capability of taking materials from the warehouse and stocking them?"
>
> A. "He told me that he did not. That's all I know."
>
> Q. When did he tell you this?

A. "Sometime after he had been employed there about a year. I asked him to go someplace for me and he told me he couldn't read the road signs." (T. 24-28.)

Thereafter, the respondent agreed that the complainant was capable of performing strenuous work. (T. 61.) Even though the respondent wouldn't have been required to offer Snell alternative employment, this testimony revealed respondent's capacity for deceit.

63. Mr. Elliot admitted that he had stated in an affidavit to the Human Rights Commission that one reason he discharged the complainant was to reduce his overhead cost. (T. 42.) After Mr. Elliot eventually conceded that he had hired Mssrs. Hamilton and Browning and Ms. Delores Hatfield to perform menial labor jobs during the weeks following complainant's discharge, and that they were compensated at the same minimum wage rate that complainant had been compensated, counsel asked how he could square his claim of an attempt to reduce overhead with the fact that he had hired others to perform menial tasks in the weeks following complainant's discharge. Mr. Elliot replied, "I didn't say I saved anything." (T. 68)

64. On 1 September 1989 Mr. Snell wrote a letter to the Insurance Commissioner protesting the increasing cost of his insurance premiums. (Complainant's exhibit no. 10.) Likewise, he testified that he had called the Insurance Commissioner and the insurance company about the rates going up. (T. 308.)

65. It was the complainant's perception that the respondent or his wife were "always bringing up the subject about my insurance." (T. 141.) The complainant testified:

"Well, it seemed it happened every time I was around him, he would bring up about the insurance, it would either be going up or some

> remark about, 'they're thinking about cancelling you out,' or 'cancelling us out.' You know, it was always something in that line." (T. 176.)

66. Mr. Elliot (and his wife) tried to claim that they had no idea that Superior Electric's group health insurance premium rates were based upon the claims filed by their employees. Complainant's exhibit 6 and complainant's 7, both letters from Blue Cross/Blue Shield, contain the statement "This level is determined by your group's claims experience and the claims experience of the entire pool." They even claimed at the hearing to still not understand the letters to mean what they said.

67. Ms. Snell testified, "No indication from anything that I ever received from Blue Cross indicated they raised our rates because of his illness." (T. 281.) At page 293 of the transcript, Ms. Elliot specifically pretends not to understand the letters from Blue Cross/Blue Shield which state that the premium level was determined by her group's claims experience as well as the claims experience of the entire pool.

68. I found this testimony so incredible that I was unable to contain myself and said to her:

> "You're obviously a sharp businesswoman. That's plain. It seems to me unfathomable that you wouldn't understand this letter. 'This level is determined by your group's claims experience and the claims experience of the entire pool.' Are you telling me that you didn't take that to mean that your insurance premiums were based on the loss experience, in other words, the amount of claims that people that worked for you?"

Despite my prodding, Ms. Snell maintained that she did not understand the plain import of the letters. The fact that they lied about knowing that Mr. Snell's treatment costs were raising their insurance

rates leads me to conclude that this is precisely why they discharged him.

69. The increasing insurance costs caused respondent to change its employee insurance plan. It now will pay 50% of its employee's privately obtained health insurance premiums up to $100.00 per month.

70. The complainant asked the respondent to give him a letter of recommendation and a layoff slip. The respondent complied. (T. 166.)

71. Mr. Elliot contended that the letter which he provided to the complainant (complainant's exhibit no. 3) was not a letter of recommendation (T. 72.) despite that the letter stated that Snell had been employed by him for two years and had performed satisfactorily.

72. Mrs. Snell testified that Mr. Elliot told the complainant, "Jim, I'm giving you a good letter of recommendation here." (T. 82.) Mrs. Snell was a credible witness.

73. The respondent claimed that he did not tell the complainant he would call him during the months following his discharge if he had an opening (T. 74, 388, 399), despite that complainant and his wife both testified credibly that Mr. Elliot had made this statement.

74. Mrs. Snell testified that Mr. Elliot told the complainant, "I may have something coming open in two or three weeks. I'll give you a call." (T. 82.) (Again, respondent would have had no such obligation if his discharge of complainant had been legitimate. This is relevant only to show his mendacity.)

75. During the investigative stage of this claim, the respondent had submitted answers to investigative interrogatories propounded by the Human Rights Commission's investigator. It

indicated that "the general duties of a nightwatchman would include providing security for various business properties in certain after business hours. However, at my discretion, other duties would occasionally be assigned to Mr. Snell." This document was signed by Mr. Elliot. During the hearing Mr. Elliot, denying reality, attempted to "rewrite" this document claiming that the general duties of the nightwatchman was to fire the coal furnace in the apartment building. (T. 405, 406; complainant's exhibit no. 9.)

76. The respondent even claimed on multiple occasions that, during the month of July, he had had a heating fire in the furnace of the apartment building which complainant watched. (See, for example, T. 37, 379.) (I asked if the coal-fired furnace was for hot water or just for heating, and the respondent confirmed that it was just for heating.) I find the July heating fire claim incredible.

77. There was never a fire in the furnace during the summer while complainant was working there. The furnace was shut down in May and refired in September. (T. 133, 134.) Although he was called as a witness by the respondent, the complainant's predecessor, Neil Sipple, was not asked by respondent to confirm the presence of a heating fire in Mingo County during July.

78. The respondent claimed that the complainant could speak better with his voice aid after he had his voice box removed than prior to having it removed despite credible testimony to the contrary (and the immediately apparent lack of credibility of such an assertion). He speaks well with the device, but it's far more unusual and distracting than any human voice I've ever heard (including those of Marine Corps drill instructors I knew who had

permanently strained vocal cords and the resultant "Popeye voice" that sometimes befalls these men).

79. The complainant's nephew, Robert A. Miller, testified that the complainant's voice sounded normal and he communicated adequately during the period immediately prior to his surgery. (T. 435, 438.)

80. The respondent got confused as to the date of complainant's surgery (summer of 1989) and the date of his discharge (summer of 1990) and then claimed that he actually encouraged the complainant to hurry up and get medical treatment for his throat condition so that he would have it completed by the time that respondent wanted to discharge him. Respondent attempted to create the impression that he retained complainant out of his beneficence and concern and then discharged him as soon as his treatment was completed. (See T. 382-387.) This attempt at deceit culminated at page 387 of the transcript when defense counsel was pressing for an explanation of why respondent discharged complainant when he did. That colloquy went as follows:

> Mr. Elliot: "I'll just tell you why I kept him as long as I did, is because of his insurance. Because I kept asking him about how soon he would be through with therapy treatment and so on."
>
> Defense counsel: "You're saying that you didn't really need him as long as you kept him?"
>
> Mr. Elliot: "No, I didn't."
>
> Defense counsel: "But you kept him because you were concerned about him getting his treatment?"
>
> Mr. Elliot: "Yes, that's it exactly."

Mr. Elliot had his dates mixed up. Complainant completed his treatment in July of 1989 and was not discharged until 31 August 1990.

81. Mr. Elliot testified, "So whenever I transferred the building off and I kept him another month or so that they reimbursed me for, and I told him that I would no longer need his services...." (T. 36.) Complainant was retained for over six months after the building was sold.

82. The respondent claims that Matewan Development reimbursed Superior Electric one month's salary for the complainant's nightwatchman's duties during the first month after it had taken possession of the apartment building, but this claim was not supported by documents. (T. 36, 38, 39, 40.) This testimony felt casually manufactured, but it may have been true.

83. Mr. Elliot initially testified that he does not recall having talked to the complainant about what his duties would be, but then immediately claimed that he told him that "he would be the nightwatch, to keep all the locks checked on all the buildings and so on, and to fire that furnace in that building. That's why he was hired."

84. Mr. Elliot became so fixated on his pretextual reason for discharging the complainant that his testimony surrounding the need to fire the coal furnace began to sound like a mantra by the later stages of the hearing. By that point he claimed that he wouldn't even care if the complainant was honest about his hours so long as he "fired that furnace". He even claimed that he would expect the complainant to spend the majority of his time on any given shift

"firing that coal furnace" despite that even the testimony most favorable to the respondent indicated that no more than about forty-five minutes of any nightwatchman's shift would have been spent tending to the apartment building where the furnace was located. (See T. 426-428.)

85. Mr. Elliot's inability to create a logical and believable nexus between the transfer of the apartment building to the partnerships between September of 1989 and February of 1990 and the discharge of the complainant in August of 1990 is illustrated by complainant's counsel's cross-examination of him appearing between pages 394 and 403 and at page 417 of the transcript.

86. The lack of a logical nexus between the sale of the apartment building and complainant's discharge is demonstrated by the fact that nothing of legal significance took place between the date the contractor beginning to renovate the apartment building (March 1990) and the date of complainant's discharge (31 August 1990).

87. Further, Mr. Elliot did not instruct the complainant to stop checking the locks at the apartment building when it was sold and he continued to include it on his security rounds even after renovations had begun upon it and continued to do so right up through the date of his discharge. (T. 136, 137.)

88. By the time that Mr. Elliot had concluded his second go at testifying my contemporaneously recorded notes became much more direct and blunt. By then, I wrote "He's lying again now..." and "All this emphasis on firing the furnace!"

89. The respondent testified that the complainant looked sickly when he worked for him and that is one reason why he did not offer

him another position when he eliminated the nightwatch position. (T. 414.) He testified that the appearance he presented at the hearing was "healthier" and "more robust." (T. 392.)

90. The inference I draw, by a preponderance of the evidence and based upon the foregoing findings, is that respondent Superior Electric, by and through respondent Barney Elliot, eliminated complainant's position with the specific intent of getting shed of a handicapped employee, most likely because he had caused their group insurance rates to rise, but possibly also because he had looked "sickly" and sounded strange when he talked with his voice aid.

91. Both the complainant and the complainant's wife testified credibly that the discharge caused him extreme emotional distress. (T. 86, 201.)

92. The complainant obtained employment almost immediately after he was discharged from the respondent's employ. He became a substitute custodian for the Mingo County Board of Education on 18 September 1990. Although his initial employment was on a substitute basis, he earned as much as he would have working for respondent. His position with the Board became permanent on 26 May 1991 and he works there to this day. (T. 87, 88, 91.)

IV.

DISCUSSION

The Human Rights Act makes it unlawful "...to discriminate against an individual with respect to compensation...terms, conditions or privileges of employment...." Code §5-11-9(a).

"Discriminate" means to "...to exclude from, or fail or refuse to extend to, a person equal opportunities because of" their protected class status. Code §5-11-3(h). The U.S. Supreme Court interpreted the words "because of" as used above and in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., to mean that a person's protected class status "must be irrelevant to employment decisions." Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989).

McDonnell Douglas v. Green, 411 U.S. 792 (1973) is the seminal case which established the inferential proof scheme that is employed in most civil rights claims. The Supreme Court of Appeals adopted and incorporated the McDonnell Douglas proof scheme into the common law of West Virginia in Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.2d 342 (WV 1983), stating:

> "In an action to redress unlawful discriminatory practices in employment and access to place[s] of public accommodations under the West Virginia Human Rights Act, as amended, WV Code 5-11-1 et seq., the burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination, which burden may be carried by showing (1) that the complainant belongs to a protected group under the statute; (2) that he or she applied and was qualified for the position or opening; (3) that he or she was rejected despite his or her qualifications; and (4) that after the rejection the respondent continued to accept the applications of similarly qualified persons. If the complainant is successful in creating this rebuttable presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason for the rejections. Should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination." Id., at Syllabus pt. 3.

For several years thereafter the Supreme Court of Appeals, along with the majority of jurisdictions in the country, simply followed the various tests that courts had evolved under the McDonnell Douglas formulation to fit the varying fact patterns and claims that arose. Then, in 1986, our Court decided to create a generic test for assessing whether a complainant has presented a prima facie case. Conaway v. Eastern Assoc. Coal, 358 S.E.2d 423, Syll. pt. 3 (WV 1986).

The Supreme Court of Appeals' explicit intention in deriving a generic test was to simplify analysis for trial courts because it felt that the McDonnell Douglas tests were "too narrow". While this intention is certainly admirable, the effect of the decision, if taken literally, is to further narrow the avenue plaintiff's must walk. The Conaway test is stated as follows:

> "In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, WV Code §5-11-1 et seq. (1979), the plaintiff must offer proof of the following:
>
> (1) That the plaintiff is a member of the protected class;
>
> (2) That the employer made an adverse decision concerning the plaintiff;
>
> (3) But for the plaintiff's protected status, the adverse decision would not have been made."
>
> Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423, 430, syll. pt. 3 (1986); Kanawha Valley Regional Transportation Authority v. West Virginia Human Rights Commission, 383 S.E.2d 857, 860 (WV 1989).

As justification for this test, the Supreme Court of Appeals cited and misapplied dicta from a U.S. Supreme Court case; that

dicta has since been expressly repudiated by the U.S. Supreme Court. In footnote 5 of Conaway the Court wrote, "The third element, the 'but for' causation, has been accepted by the United States Supreme Court in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282 n. 10 (1976)."

It is absolutely, undeniably clear that the U.S. Supreme Court was referring to the plaintiff's ultimate burden, not his burden at the prima facie case stage, when it said in footnote 10 of McDonald that "no more is required to be shown than that race was a 'but for' cause." In other words, the U.S. Supreme Court was saying (in obiter dictum) that after one considers the plaintiff's prima facie case, and after one considers the employer's articulated nondiscriminatory reason, and after one considers the plaintiff's evidence of pretext, then "no more is required to be shown than that race was a 'but for' cause."

What is even worse than the fact that the Supreme Court of Appeals confused the plaintiff's ultimate burden with her burden at the prima facie case stage, is that the U.S. Supreme Court has now explicitly rejected the dicta in McDonald v. Sante Fe that implied that a plaintiff must show but-for causation even as an ultimate burden (much less as her burden at the prima facie case stage). Leaving no doubt that the "but for" language of footnote 10 in McDonald was dicta, the U.S. High Court wrote, "To construe the words 'because of' as colloquial shorthand for 'but-for causation,' ...is to misunderstand them." Price Waterhouse v. Hopkins,

supra. It doesn't get much plainer than that.[1/] (The phrase "because of" is used identically in Title VII and in the Human Rights Act.)

Of course the Supreme Court of Appeals would be free to fashion a more conservative test than the U.S. Supreme Court if it wanted to (although this agency would lose its federal funds if it did), but that plainly does not appear to be the State Court's intent. It has been backing away from a literal application of Conaway ever since it was written. For example, In Heston v. Marion County, 381 S.E.2d 253 (WV 1989) the Supreme Court of Appeals (insuring this agency's continued federal funding, by the way) wrote that: "The evidentiary standards for unlawful discrimination under Title VII and the West Virginia Human Rights Act are identical."

Obviously, the statement in Heston that Title VII and the Human Rights Act have identical standards of proof is irreconcilable with the State Court's continued use of the but-for test of a prima facie case when the U.S. Supreme Court has said that but-for causation is not only too strict of a standard of proof at the prima facie case stage--it's even too strict of a standard at the ultimate proof stage. This is so unless one realizes that, in the context of a West Virginia employment discrimination claim, "but-for" doesn't

---

[1/] The Congress liberalized the plaintiff's burden even more than the U.S. Supreme Court had in Price Waterhouse when it enacted the Civil Rights Act of 1991. It provided that once a complainant proves that a prohibited factor influenced an employment decision an employer would be held liable even if it "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor", but limiting the complainant's recovery in such instance to equitable relief and attorney fees. 42 U.S.C. §§2000e-2(m), 2000e(g)(2)(B).

mean the same thing it does anywhere else. As remarkable as that sounds, that is exactly the state of the law in this jurisdiction.

Although the Supreme Court of Appeals continues to use the Conaway test, one must read subsequent cases to see that Conaway doesn't really mean what it appears that it might:

> "However, it is clear that our formulation in Conaway was not intended to created a more narrow standard of analysis in discrimination cases than is undertaken in the federal courts. This is manifested by our reliance on applicable federal cases as illustrated by WV Institute of Technology v. WV Human Rights Commission, 181 WV 525, 383 S.E.2d 490, 495 (1989), where we cited a number of federal cases and described the type of evidence required to make a Conaway prima facie case:
>
> '[B]ecause discrimination is essentially an element of the mind, there will normally be very little, if any, direct evidence available. What is required of the complainant is to show some circumstantial evidence which would sufficiently link the employer's decision and the complainant's status as a member of a protected class so as to give rise to an inference that the employment related decision was based upon an unlawful discriminatory criterion.' "
>
> Kanawha Valley Regional Transportation Authority v. WV Human Rights Commission, 383 S.E.2d 857 (WV 1989); See also, Holbrook v. Poole Associates, Inc., 400 S.E.2d 863 (WV 1990); WV Institute of Technology v. WV Human Rights Commission, 383 S.E.2d 490, 494-495 (WV 1989).

In essence the Conaway standard, the Court now says, subsumes the various tests that have evolved under McDonnell Douglas v. Green, supra, and then some. The complainant may prove a prima facie case by presenting circumstantial evidence which, if left unrebutted, would link the adverse employment action to the complainant's protected status. See, Powell v. Wyoming Cabelvision, 403 S.E.2d 717 (WV 1991) for a discussion of the type

of circumstantial evidence a complainant may produce to create an inference of discrimination at the prima facie stage.

In practice, what Conaway has done is make my orders much longer and more difficult for those who don't practice regularly in this field to understand. I'm sure that lay litigants who read these orders are left wondering whether the law really doesn't mean what it appears to and whether this has affected the outcome of their case. Maybe the Conaway test really does help circuit courts. It usually just causes me to show separately my analysis under both the McDonnell Douglas and Conaway formulations.[2/]

In the instant case, as alluded to in the Overview, supra, the fact specific test of Morris Memorial v. Mayes applies to determine whether complainant has stated a prima facie case. The respondent stipulated that he meets the first element; clearly he is handicapped. There is no dispute that he meets the third element; he was discharged. All that remains, then, of the complainant's prima facie case, is a determination of whether he is a "qualified handicapped person" within the meaning of the Human Rights Act.

"A 'qualified handicapped person' under the West Virginia Human Rights Act is one who is able and competent, with reasonable accommodation, to perform the essential functions of the job in

---

[2/] So that I will not be accused of criticizing without offering a solution, if the Supreme Court of Appeals feels that a generic test is needed, it should drop the language "(3) But for...decision would not have been made." from Syllabus point 3 of Conaway and insert in its stead, "Then the plaintiff must offer some evidence which would sufficiently link the employer's decision with the plaintiff's protected class status so as to give rise to an inference that the decision was the product of an unlawful discriminatory motive."

question." Id. at Syll. pt. 3, citing Coffman v. Board of Regents, 386 S.E.2d 1 (WV 1988) (emphasis in original). In this case, it is almost undisputed that complainant was competent to perform the duties of nightwatchman, the job to which he was assigned at all times prior to the date of his discharge. The few criticisms that were leveled at him were nitpicking and/or pretextual. The respondent essentially conceded that he performed adequately.

Inasmuch as I have concluded that the respondent eliminated his position as a pretext for shedding itself of an unwanted handicapped employee, this is obviously sufficient to sustain a ruling that complainant stated a prima facie case.

"[T]he burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason for the" complainant's discharge. Conaway, Syll. pt. 3. This the respondent did by stating that it discharged the complainant because it no longer needed a nightwatchman and that it discharged him to reduce its overhead.

Thus, the respondent succeeded in rebutting the presumption of discrimination, and the complainant had "the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for...unlawful discrimination." Id. The complainant demonstrated pretext in several ways, as set out in the Overview section, supra.

Respondent, Barney Elliot, was complainant's best witness. He may well have lied more than he told the truth, even on immaterial and incidental matters. Thus, the finding of pretext is accompanied

by a finding of mendacity within the meaning of St. Mary's Honor Center, supra.

Complainant also proved that respondent was preoccupied with his rising group health insurance premiums, and that he mentioned it frequently when he saw complainant. This "connects" the discharge decision to the complainant's health status more clearly.

Finally, the respondent slipped and said that the complainant now looked like an employee he would be inclined to have in his work force because he now looked more robust and healthy. He even acknowledged that he felt the complainant looked sickly while he was receiving his radiation treatments. This further established a link between complainant's handicap and his discharge.

V.

DAMAGES

A. Incidental Damages

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

Here, Mr. Snell, under the "make-whole" rule, is entitled to back pay, with prejudgment interest, attorney fees, costs and incidental damages. Frank's Shoe Store v. West Virginia Human Rights Commission, 365 S.E.2d 251 (1986). In addition, the

respondent will be ordered to cease and desist from discriminatory conduct. Inasmuch as complainant has obtained other employment and therefore does not seek reinstatement, it will not be ordered.

The complainant diligently mitigated his damages, both special and incidental (or general). The procurement of suitable (indeed preferable) replacement employment not only terminated the accrual of lost wages and benefits, but doubtlessly truncated the distress, anxiety, embarrassment and humiliation complainant felt at being discharged. Since I was not convinced by a preponderance of the evidence that respondent was trying to force complainant to quit by working him in the hot summer sun (and I concede that I could be wrong on that), I cannot award any incidental damages relative to that perceived (by complainant) discriminatory treatment. Nor do I think the law permits an award of incidental damages for the extraordinary stress associated with being a litigant. If it did, I would assess the complainant's incidental damages related to being forced to litigate this claim at $5,000.00.[3/] Neither am I permitted to "punish" respondent for lying by disguising what would be punitive damages under the rubric of incidental damages.

Thus, complainant's damages, both out-of-pocket and incidental, are limited to the time period between his illegal discharge, on 31

3/ I have recently had the misfortune of becoming a plaintiff in two civil actions, one relating to defects in my home, the other to a dispute about medical bills. I could not have previously imagined the amount of disruption to my life this was going to occasion or the number of sleepless nights that would ensue. I now agree with Judge Learned Hand's assessment that being a litigant is an experience surpassed in trauma by few other events in life (and we haven't even gone to trial yet).

August 1990, and the date he obtained mitigation employment on 18 September 1990. I estimate the complainant's incidental damages during this approximately two week period of time to be $1,000.00 per week, or $2,000.00 total. I'm sure he still suffered some residual humiliation in the weeks that followed as he recovered from the emotional impact of his discharge, and I assess those incidental damages at $500.00 for a total incidental damages award of $2,500.00.

B. Attorney Fees

Rule 7.37.2. states:

> "During the time period specified by the hearing examiner for submission of the parties' recommended decision as set forth above, the parties shall be permitted to file by affidavit an itemized statement of reasonable attorney fees and costs, clearly setting forth the hourly rate and total amount, and any argument in support thereof. A party shall be given fifteen (15) days during which to file exceptions to the attorney(s) fee affidavit filed by any other party or as recommended (sic) by the hearing examiner."[4/]

Our Court has written about attorney fees in Human Rights Commission cases several times. In Casteel v. Consolidation Coal Co., 383 S.E.2d 305 (WV 1989) the Court wrote:

> "When the relief sought in a human rights action is primarily equitable, 'reasonable attorneys' fees' should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate--the lodestar calculation--and (2) allowing, if appropriate, a contingency enhancement. The general factors outlines in Syllabus Point 4, Aetna Cas. & Sur. Co. v. Pitrolo, 342 S.E.2d

---

4/ The word "recommended" has been erroneously left in the Rules at several places. (See e.g. Rules 7.15.6 and 7.27.41. It is a holdover from the days when hearing examiners issued recommended decisions versus final appealable orders.

156 (1986) should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and, (2) the allowance and amount of a contingency enhancement." Id at Syll. Pt. 6.

The factors referred to in Casteel, supra, were quoted in Bishop Coal Co. v. Salyers, 380 S.E.2d 238 (WV 1989):

> "The reasonableness of attorney's fees is generally based on...factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." Id. at 248, citing Aetna, supra, and Johnson v. Georgia Highway, 488 F.2d 714 (5th Cir. 1974).

I find complainant's counsel's motion persuasive in all respects, and I will not now engage in the needless generation of paper by rewriting what she has written in her motion. I will add this, though. This was an undesirable case. There were no special damages to speak of. Further, it would have been a much weaker case if Mr. Elliot hadn't been such a blatant liar. Obviously, Ms. Hill couldn't Have known that he would make her case this strong when she took it. She (and her firm) are well known for taking close and difficult cases. (See, e.g. Cervi v. May's Dept. Store, HRC No.

EH-58-92 and Gaither v. Legacy One, HRC No. ER-270-87.[5/]) Also, she did an outstanding job of prosecuting this claim. Society is benefited when lawyers of Ms. Hill's caliber are willing to take claims such as this, and she should be encouraged to do so in the future. Accordingly, I hereinafter award complainant a 25% contingency enhancement of his attorney fees.

The U.S. Supreme Court has taken another decidedly conservative bent recently, reversing its course on contingency enhancements in the case of City of Burlington v. Dague, 112 S.Ct. 2638 (1992). As noted by Justice Blackmun, the majority opinion in City of Burlington v. Dague, "violates the principles we have applied consistently in prior cases and will seriously weaken the enforcement of those statutes for which Congress has authorized fee awards--notably, many of our Nation's civil rights laws and environmental laws." Our Court has considered and rejected the arguments advanced by the respondents in City of Burlington. In Bishop v. Salyers, supra, Justice Neely acknowledged the concern that animated Justice Scalia's opinion, stating that contingency enhancements have the effect of "subsidizing the lawyers engaged in unsuccessful litigation against winning defendants." The Court nevertheless approved the contingency enhancement and continues to follow its old line of cases. Marshall v. Fair, 416 S.E.2d 67 (WV 1992).

5/ Both Cervi and Gaither were close losing cases, although they may yet prevail on appeal.

Although the U.S. Supreme Court may be backing away from contingency enhancements, I don't think our Supreme Court of Appeals will. (As the U.S. Supreme Court becomes more and more conservative, it seems to be less and less relevant to how our Court rules. Further, many of its decisions are being abrogated rather quickly by the Congress.) I think that our Court will continue to favor contingency enhancement. I think they want top quality lawyers working both sides of the fence. (Respondent was certainly well represented in this claim.) I believe they want plaintiff's attorneys to continue to pursue close cases seeking equitable relief and novel theories to keep the law apace of a rapidly evolving culture. (For example, the Supreme Court of Appeals will need to overrule Coffman at some future point to jibe with the A.D.A. Although our already outdated regulations will probably prohibit it from doing so in this claim, another reason I have made findings relative to complainant's ability to perform other jobs at Superior Electric is just in case the Supreme Court of Appeals wants to use this claim to overrule Coffman.)

Based upon the foregoing, I calculate complainant's attorney fees as follows: 2 hours x $85.00 = $170.00, plus 37.5 hours x $110.00 = $4,125.00 equals $4,295.00; plus a 25% contingency enhancement of $1,074.00 equals $5,369.00. Attorney fees, with enhancement, plus 18.8 hours of paralegal time x $40.00 (or $752.00) equals $6,121.00 total attorney fee award.

C. Costs and Expenses

Based upon complainant's counsel's affidavits, complainant's expenses and costs amount to $630.00; I find that reasonable.

D. Back Wages and Interest

Mr. Snell worked 40 hours per week at $4.00 per hour. He lost two weeks wages due to his discharge by respondent, or $320. His insurance premiums were $43.99 per week, or $87.98 for two weeks (T. 278.) Thus, his lost wages and benefits were worth $408.00. He was discharged on 31 August 1990, so he is entitled to two years, eleven months and 26 days of prejudgment interest at 10% per annum. This amounts to $121.86 on the date of this order bringing the total backpay and interest figure to $530.00.

VI.

CONCLUSIONS OF LAW

1. Respondent is an "employer" within the meaning of the West Virginia Human Rights Act.

2. Complainant brought a timely claim of unlawful discriminatory discharge because of handicap against respondent, and the claim was properly joined for hearing.

3. Complainant presented a prima facie case of unlawful discrimination.

4. Respondent articulated a legitimate nondiscriminatory reason for the adverse employment action.

5. Complainant demonstrated the articulated reason to be a pretext or sham to hide its discriminatory motive.

6. Complainant is entitled to a make-whole remedy including back wages, prejudgment interest, a cease and desist order and attorney fees and costs.

VII.

CONCLUSION

WHEREFORE it is **ORDERED** that respondent pay unto the complainant back wages and lost benefits in the amount of $408.00, plus prejudgment interest of $122.00; general or incidental damages in the amount of $2,500.00; attorney fees in the amount of $6,121.00; and costs in the amount of $630.00. It is further **ORDERED** that respondent cease and desist from engaging in unlawful discriminatory practices.

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

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

WV HUMAN RIGHTS COMMISSION

ENTER: 26 July 1993

BY: _____
RICHARD M. RIFFE
ADMINISTRATIVE LAW JUDGE

EXHIBIT A

APPEAL TO THE COMMISSION

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the hearing examiner'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 examiner, 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 hearing examiner shall not operate as a stay of the decision of the hearing examiner 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 hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, 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 hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner'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 hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the examiner'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."

CERTIFICATE OF SERVICE

I, Richard M. Riffe, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing ADMINISTRATIVE LAW JUDGE'S FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 26th day of July, 1993, to the following:

James L. Snell
HC Box 10B
Thacker, WV 25694

Superior Electric Heating, Inc.
PO Box 566
Matewan, WV 25678.

Joan Hill, Esq.
Crandall & Pyles
408 Main St.
PO Box 596
Logan, WV 25601

James W. Gabehart, Esq.
Campbell, Wood, Bagley, Emerson
McNeer and Herndon
Suite 1400, Charleston Nat'l Plaza
PO Box 2393
Charleston, WV 25328-2393

RICHARD M. RIFFE
ADMINISTRATIVE LAW JUDGE