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June 25, 1996

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Re: Shaffer v. Bentley's Luggage Corp.
Docket No. ES-33-92

Dear Parties and Counsel:

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

Sincerely,

HERMAN H. JONES
EXECUTIVE DIRECTOR

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

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

SAMANTHA K. SHAFFER,

Complainant,

v. DOCKET NO. ES-33-92

BENTLEY'S LUGGAGE CORP.,

Respondent.

FINAL ORDER

On June 13, 1996, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Mike Kelly. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petitions for appeal and answers filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision as its own, without modification or amendment.

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

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.

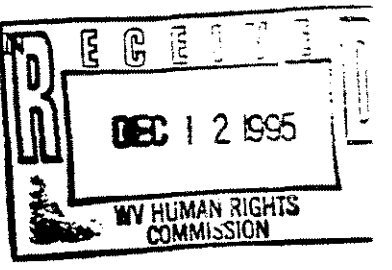
It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 25th day of June 1996, in Charleston, Kanawha County, West Virginia.

HERMAN H. JONES
EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION



SAMANTHA K. SHAFFER,

Complainant,

v. **Docket No. ES-33-92**

BENTLEY'S LUGGAGE CORP.,

Respondent.

FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

THIS MATTER matured for public hearing on 5 December 1994. By agreement of the parties, the hearing was held at the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, Kanawha County, West Virginia. The complainant appeared in person and her case was presented by the West Virginia Human Rights Commission and its counsel, Assistant Attorney General Leah Q. Griffin. The respondent appeared by its designated representative, Harold Kennedy, and by its counsel, Henry A. Platt and Schmeltzer, Aptaker & Shepard.

I. ISSUES TO BE DECIDED

A. Whether Bentley's Luggage Corp. is an "employer" as that term is defined by W.Va. Code §5-11-3(d).

B. Whether the Commission may amend the complaint to expressly include a charge of unlawful retaliation.

C. Whether respondent violated W.Va. Code §5-11-9(a) by failing or refusing to promote complainant in February 1991 because of her sex or pregnancy.

D. Whether respondent violated W.Va. Code §5-11-9(1) and engaged in unlawful sexual harassment by creating or tolerating a hostile work environment.

E. Whether respondent violated W.Va. Code §5-11-9(1) by failing or refusing to promote complainant in June 1991 because of her sex or pregnancy.

F. Whether respondent violated W.Va. Code §5-11-9(7)(A) or (C) by engaging in acts of reprisal or retaliation against complainant because she filed a complaint of unlawful discrimination against respondent with the West Virginia Human Rights Commission or because she otherwise opposed acts or practices forbidden by the West Virginia Human Rights Act (HRA).

II. JURISDICTIONAL ISSUES

A. Is Bentley's an Employer for Purposes of the West Virginia Human Rights Act?

W.Va. Code §5-11-9(1) makes it unlawful for "any employer to discriminate against an individual" on account of that individual's sex. (Emphasis added). The HRC defines the term

"employer" to mean "the state, or any political subdivision thereof, and any person employing twelve or more persons within the state: Provided, that such terms shall not be taken, understood or construed to include a private club." §5-11-3(d). (Emphasis added). The term "person" is, in turn, defined as "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." §5-11-3(a).

While the HRA's statutory framework regarding a covered "employer" appears simple and straightforward on its face, a lack of precision and formality leaves ample room for interpretation and disagreement, as is evident in this case. Unlike its federal equivalents, such as Title VII of the Civil Rights Act of 1964[1], the Age Discrimination in Employment Act[2], and the Americans with Disabilities Act[3], the HRA does not establish specific time-related parameters within which an entity must employ twelve or more persons in order to be considered an "employer" under the Act. Nor are there any legislative, procedural or interpretive regulations establishing or suggesting such time boundaries.

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[1] An employer subject to Title VII is "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . .". 42 U.S.C. §2000e(b).

[2] Under the ADEA, an employer is "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. §630(b).

[3] As of 26 July 1994, Title I of the ADA adopts the Title VII standard that an employer "means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person." 42 U.S.C. §12111(5)(A).

Knowing who to count and when to count them are important issues because an employing entity cannot be found liable in its role as an employer pursuant to W.Va. Code §5-11-9(1) if it does not meet the definition of employer set forth in §5-11-3(d). In other words, if Bentley's is not an employer as defined by §5-11-3(d) then the West Virginia Human Rights Commission has no jurisdiction to decide whether respondent violated §5-11-9(1). *Woodall v. International Bhd. of Elec. Wrkrs, Local 596*, 192 W.Va. 673, 453 S.E. 2d 656 (1994). Establishing that respondent is an "employer" under the Act is a jurisdictional prerequisite to proceedings brought pursuant to §5-11-9(1).

The positions of the parties in this case reflect the various ways in which §5-11-3(d) can be interpreted. For its part, Bentley's, which operates only one retail facility in West Virginia, argues that the use of the present tense in §5-11-3(d), specifically the term "employing twelve or more people," indicates that liability under the Act is triggered only if the employing entity has twelve or more employees on the day that the alleged discriminatory act occurred. (Tr. 17). For the purposes of this case, and since it does not extend liability to Bentley's anyway, respondent is willing to concede that a proper time frame may also be the payroll period within which the alleged discriminatory act occurred, which for this respondent is two weeks.

In plain terms, Bentley's argues that it can be held liable as an employer only if it had twelve or more employees in West Virginia either on the specific days that Ms. Shaffer was denied a promotion in February 1991 and June 1991, or on the specific day in October 1991 when she was allegedly constructively discharged. As a concession for purposes of argument, Bentley's also agrees

that jurisdiction is established if it had twelve or more employees on its payroll during the payroll period covering those specific days, even if it did not have twelve people at work on any one day. The parties agree that Bentley's did not have twelve employees in West Virginia on any of the specific days in question or during any of the specific pay periods.

The Commission, on the other hand, after offering various interpretations, finally settled at hearing on the position that an entity meets the definition of employer if it employed a total of twelve or more employees at any time during the year in which the alleged discriminatory act occurred or during the previous year. (Tr. 6). Under the Commission's argument, Bentley's will be considered an employer for purposes of this case if it had a cumulative total of twelve or more employees in West Virginia in 1991 (the year of the alleged discriminatory acts) or 1990 (the previous year). It is immaterial, says the Commission, that Bentley's did not have twelve or more employees on the specific days when the alleged discriminatory acts occurred or on any given, specific day or pay period in 1991 or 1990. By employing a total of twelve different "persons" in a year, the Commission argues, Bentley's has met the statutory standard and jurisdiction is proper.

Both parties reject simple adoption of the statutory timeframes articulated in federal law. Given the clear variations in the respective statutory language, I agree with the parties and find that it is not proper in this case to construe the Act to coincide with the very specific definitions of

"employer" set forth in Title VII, the ADEA and the ADA. *West Virginia Univ. v. Decker*, 191 W.Va. 567, 447 S.E. 2d 259 (1994).[4]

In developing a counting standard to be applied in this case, I am governed by the West Virginia Supreme Court of Appeals' directive that the "comprehensive definitions" in the HRA indicate a "legislative desire that they be broadly construed to maximize the Act's protection." *Hanlon v. Chambers, etc.*, ____ W.Va. ____, ____ S.E. 2d ____, (Slip opinion, 26 October 1995, p. 10). The Court has repeatedly emphasized that the Act should be liberally construed to accomplish its objective and purpose, *Skaff v. WVHRC*, 191 W.Va. 161, 444 S.E. 2d 39 (1994), *Paxton v. Crabtree*, 184 W.Va. 237, 400 S.E. 2d 245 (1990), and that a purpose of the Act is "to protect the rights of individuals," *Hanlon, supra*.

I am also mindful, of course, that despite the liberal construction to be applied to the Act, the legislature clearly did not intend all employers in West Virginia to be subjected to its requirements[5]. Thus, the twelve employee standard should not be interpreted in such a way that renders the limitation meaningless or which results in truly small, intimate, family-type businesses becoming ensnared in the Act's complexities.

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[4] It is not disputed that Bentley's is an "employer" under each of the federal statutes mentioned since those laws look to national employment figures and not employment "within" one state.

[5] It should be noted that other protective statutes define "employer" as including any person who employs "any employee", which, in effect, provides for universal coverage of the law's protections. See, for example, the Wage Payment and Collection Act, W.Va. Code §21-5-1(m).

Balancing these interests, I find that an employing entity is subject to the Act if it has employed a total of twelve or more different individuals within West Virginia during the 365 day period preceding the filing of an administrative complaint pursuant to W.Va. Code §5-11-10. Such an employer is covered by the Act so long as the cumulative total of employees working for the employer during the course of the 365 day period amounts to twelve or more, and regardless of whether or not twelve or more persons were employed on any one day or during any one pay period.[6]

This method of counting employees avoids the absurd results portended by respondent's position[7], while restricting the cast of the HRA's net to a time in close proximity to the alleged discriminatory act and leaving room for the truly small employer to go about its business relatively unimpeded.

Applying the selected method to the case at bar, it is clear from the undisputed facts that Bentley's is an employer within the meaning of W.Va. Code §5-11-3(d). In calendar year 1990,

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[6] A 365 day period for counting employees was chosen because that is the number of days given an individual to file an administrative complaint with the Commission. W.Va. Code §5-11-10.

[7] For example, Bentley's position would allow an employer who averages exactly twelve employees per work day to escape liability under the Act for blatant intentional discriminatory practices if it simply laid off an employee on the day or pay period before the discriminatory act, reducing the workforce to eleven. Similarly, under respondent's theory a high turnover employer who averages eleven employees per work day or pay period would not be covered by the Act even though it employed fifty or sixty individual employees during the course of a year and would not even remotely be considered a small, intimate, family-type business. It should also be noted that under federal law it is not necessary for an employer to have the required number of employees on either the day the alleged discriminatory act occurred or during that pay period.

Bentley's employed 20 different individuals in West Virginia.[8] In 1991, it employed 23 persons in West Virginia. In 1992, 22 persons. During the 365 day period prior to the filing of the complaint on 16 July 1991, Bentley's employed 22 people in West Virginia (Stipulated Joint Exhibits, pp. 103-117).

The Commission having met its burden of establishing jurisdiction over respondent, I find as fact that Bentley's is an "employer" as that term is defined by W.Va. Code §5-11-3(d) and respondent's motion to dismiss this case for lack of jurisdiction is DENIED.

B. May the Commission Amend the Complaint to Include a Charge of Unlawful Retaliation?

Ms. Shaffer filed an administrative complaint with the Commission on or about 16 July 1991. The complaint alleges that she was discriminated against because of her sex when she was twice denied promotion to the position of store manager and when she was subjected to sexual harassment in the form of offensive remarks and treatment by a supervisory employee. In addition, the complaint makes the following allegations:

* * *

[8] Bentley's concedes that parttime and seasonal workers may be counted. (Tr. 19). I did not, however, include within the count respondent's employees who oversee operation of its West Virginia store, but who primarily work out of corporate or regional headquarters in Florida and Georgia.

c. In December, 1990, I notified the Respondent that I was pregnant. Further, I submitted a physician statement which restricted me from heavy lifting and climbing. In March, 1990, I fell down while on duty. The physician recommended a two day rest. Thereafter, I have been subjected to threats of termination and harassment.

d. The Respondent alleged that I was not fulfilling my job responsibilities. Further, the Respondent told co-workers I would be terminated or forced to resign. I have been reassigned to perform clerical or management duties. As a result, the Respondent has informed me that my assignment of duties has affected my cost of sales and advised me that I am placed on probation until my sales improve. A male employee who requested a leave of absence has been reinstated in his position.

* * *

f. Due to the unfair treatment and sexual harassment, I have submitted formal objections to the Respondent and in response I was advised that I was not considered for the appointment as Manager.

(Emphasis added).

Four days after the filing of the complaint, Ms. Shaffer went on maternity leave and did not return to work until 9 September 1991. The complaint had been served on Bentley's by mail on 22 July 1991. In October 1991, she received two written reprimands which she believed were unwarranted. (See Jnt. Exhibits, pp. 490-91). She tendered her written resignation to respondent on 23 October 1991 and stated at that time:

> Since this event [second denial of promotion to store manager] I have filed a claim (grievance) with the WV Human Rights Commission and have been treated even worse. Also, I need to add that this claim is

> still being looked into. The Human Rights Commission has not come to any conclusions of yet.
>
> (Jnt. Exhibits, p. 423).

On 28 October 1994, over three years after the filing of the administrative complaint and Ms. Shaffer's subsequent resignation, the Commission filed a motion to amend the complaint to include an allegation that complainant was constructively discharged as a result of receiving the two written reprimands in October 1991 and that the reprimands were issued "because she filed a complaint with the West Virginia Human Rights Commission."[9]

The Commission rests its motion to amend on HRC Procedural Rule 3.10, which provides as follows:

> 3.10. Amending the Complaint.
>
> 3.10.1 The Commission or the complainant may amend a complaint or any part thereof to cure technical defects or omissions including, but not limited to, failure to verify the complaint, or to clarify and amplify allegations made therein, when such amendments relate back to the original filing date: **Provided, however**, That an amendment alleging additional acts constituting unlawful discriminatory practices which are not related to or growing out of the subject matter of the original complaint will be permitted only when as of the date of the amendment, the allegations could have been timely filed as a separate charge.

[9] The Commission also moved to amend the style of the complaint to reflect the respondent's true name, "Bentley's Luggage Corp.", which motion was granted without opposition.

3.10..2 A complaint may be amended any time prior to a finding of probable cause and thereafter for good cause shown at the discretion of the hearing examiner.

Since it is undisputed that the reprisal amendment is beyond the time limit for filing as a separate charge, W.Va. Code §5-11-10, the amendment is proper under Rule 3.10.1 only if it is "related to or growing out of the subject matter of the original complaint." I find that the Commission has shown that requisite connection.

Generally, claims of retaliation allegedly resulting from the filing of an administrative charge are considered "like or reasonably related to . . . and growing out of" the underlying allegations of discrimination. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989); *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992); *Gottlieb v. Tulane Univ. of Louisiana*, 809 F.2d 278 (5th Cir. 1987); *Wentz v. Maryland Casualty Co.*, 869 F.2d 1153 (8th Cir. 1989). Moreover, in this case the original complaint, while not referencing the subsequent discipline and alleged constructive discharge, clearly and explicitly raises the issues of threats, retaliation and reprisal and suggests a continuing pattern of retaliation. Under such circumstances, subsequent acts reasonably related to the alleged pattern may be considered encompassed within the original complaint. *Silver v. Mohasco Corp.*, 602 F.2d 1083 (2nd Cir. 1979), rev'd on other grounds, 447 U.S. 807 (1979); *Chung v. Pomona Valley Community Hospital*, 667 F.2d 788 (9th Cir. 1982).

While, at first blush, my conclusion appears to contradict the holding in *McJunkin Corp. v. WVHRC*, 179 W.Va. 417, 369 S.E. 2d 720 (1988), that case dealt with two distinct discriminatory

acts, an alleged illegal layoff and an alleged illegal failure to rehire. Unlike here, there was no evidence that the latter act was related to or grew out of the former. Most importantly, and again unlike here, the respondent in *McJunkin* was provided no notice that the failure to rehire was at issue until after the case was heard and the hearing examiner unexpectedly ruled in favor of the complainant on that aspect of the case.

The Commission's motion to amend the complaint is GRANTED.

III. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true:[10]

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[10] To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

A. Preliminary Facts

1. Complainant Samantha K. Shaffer is a white female under the age of 40 who filed a complaint in a proceeding under the West Virginia Human Rights Act, W.Va. Code §5-11-1 et seq. ("HRA") and is a person protected by the HRA. She resides in Elkview, Kanawha County, West Virginia.

2. Respondent Bentley's Luggage Corp. is a person and employer as those terms are defined by W.Va. Code §§ 5-11-3(a) and (d), respectively. During the 365 day period immediately prior to the filing of Ms. Shaffer's HRA administrative complaint, Bentley's employed a total of 22 different people within West Virginia.

3. Ms. Shaffer was employed by Bentley's from October 1989 until 2 November 1991. She tendered her written resignation on 23 October 1991, to be effective ten days later.

4. On 16 July 1991, Ms. Shaffer filed a complaint with the West Virginia Human Rights Commission alleging that she had been discriminated against because of her sex.

B. Ms. Shaffer's Work at Bentley's Prior to February 1991

5. In October 1989, Ms. Shaffer was hired by Mr. Terry Merrifield, the store manager of Bentley's sole business operation within the State of West Virginia. The operation, a retail outlet selling luggage and other travel/business related items, is located in the Charleston Town Center Mall. Ms. Shaffer was hired into the position of sales associate.

6. Mr. Merrifield was succeeded as store manager by Ms. Laura Elgin. In July 1990, Ms. Elgin promoted complainant to assistant manager. The promotion was approved by Mr. Harold Kennedy, Bentley's divisional vice president. Mr. Kennedy had also promoted Ms. Elgin to the position of store manager.

7. Mr. Kennedy resides in and works out of Georgia and oversees the operation of more than a dozen Bentley's stores. He oversaw operation of Bentley's West Virginia store throughout the duration of Ms. Shaffer's employment with respondent.

8. In May 1990, complainant obtained first-hand knowledge that Ms. Elgin had falsified a merchandise return and kept the cash proceeds. Ms. Shaffer did not inform Mr. Kennedy of the theft, claiming at hearing that she was intimidated by Ms. Elgin.

9. In either January or February 1991, after Ms. Elgin failed to pay complainant for her extra work on a window display, Ms. Shaffer called Mr. Kennedy and told him about the theft that she had observed in May 1990.

C. The First Promotion Denial

10. On 7 February 1991, Mr. Kennedy fired Laura Elgin based on the information provided by complainant. He also testified, and complainant denied, that Ms. Shaffer had told him in February 1991 that she (Ms. Shaffer) had participated in the misappropriation of store proceeds by placing IOUs in the register in return for cash. Such a practice was forbidden by the company. Mr. Kennedy testified credibly that he took no disciplinary action against complainant because she appeared remorseful and that he was thankful that she had reported Ms. Elgin.

11. Mr. Kennedy's first choice to replace Ms. Elgin was Ms. Rita Earhart, another female who was then working for Bentley's in Ohio. When Ms. Earhart declined the promotion, he placed an ad in the Charleston newspapers.

12. Respondent admits that Ms. Shaffer applied for the position of manager of the Charleston store and also assisted Mr. Kennedy in interviewing other applicants. Complainant admits that Mr. Kennedy never promised her the promotion to store manager. While Ms. Shaffer alleges that she believed that she was going to be promoted and that she was helping interview potential assistant

managers, Mr. Kennedy offered a different and credible explanation of her participation in the interview process:

> "When you bring in a manager over an assistant and the assistant is very knowledgeable of operations and the assistant has made you aware that they would like to be a manager, it's usually a very awkward situation. And what I look for is to see the chemistry, to see the mesh between the two. Also in doing that, I can view her in an interviewing capacity. If at anytime I was going to promote her into a manager, I had to be comfortable with her interviewing skills." (Tr. p. 410).

13. At the time of her application for the manager's position, Ms. Shaffer was pregnant and Mr. Kennedy knew of her pregnancy.

14. Mr. Kennedy hired George Topping to fill the position of store manager. Mr. Topping, unlike complainant, had a college degree in business administration. Mr. Kennedy also found Mr. Topping to be a "go getter" who exhibited leadership skills and had a background in retail sales. He found Mr. Topping to be better qualified than Ms. Shaffer despite the fact that he was unfamiliar with Bentley's internal workings.

15. Mr. Kennedy testified credibly that another reason he did not hire Ms. Shaffer as store manager was because of her lack of good judgment in not reporting Ms. Elgin until some eight months after the observed theft and only after Ms. Elgin had refused to pay Ms. Shaffer for work done. Mr. Kennedy is only present in the Charleston store four or five times per year and necessarily relied upon the manager to exercise good judgment and integrity in his absence.

16. Complainant alleges that when Mr. Kennedy informed her that he had chosen George Topping for the position, he told her that Mr. Topping could help her improve her sales. She testified that Mr. Kennedy also told her that "it's not because your pregnant, and it's not because of your age" that she was not hired as a manager. Complainant was then 21 years of age. Mr. Topping was 23 years of age in February 1991.

17. Viewing the evidence as a whole, and after assessing the credibility of the witnesses, I find that the Commission has failed to show that the reasons articulated by respondent for selecting Mr. Topping over Ms. Shaffer for the position of store manager are not the true reasons for the decision or are otherwise unworthy of belief. I further find that complainant's sex and pregnancy played no role in respondent's decision and that respondent was wholly motivated by a lack of confidence in complainant's good judgment and Mr. Topping's more impressive qualifications.

D. Discrimination During the Tenure of George Topping.

18. The Commission alleges that during Mr. Topping's tenure as store manager he sexually harassed Ms. Shaffer by creating and promoting a hostile work environment and otherwise discriminated against her because of her sex. The acts constituting discrimination, according to the Commission, include:

(a) On an unspecified number of occasions, he assigned complainant and other female employees the duty of giftwrapping items that he had sold, thus denying them the opportunity to be on the floor making sales;

(b) On an unspecified number of occasions, he had complainant do the store's "paperwork", again taking her away from the sales floor;

(c) On an unspecified number of occasions, he asked complainant to get him a drink of water;

(d) He told another female employee on one occasion that her job was to "do everything I say";

(e) He implied on one occasion that the fiancee of a female employee was sterile or impotent;

(f) On one occasion he had the following exchange with Ms. Shaffer after asking her to wrap a purchase for his customer:

Ms. Shaffer: "Put it (the package) on the floor. I do it better on the floor."

Mr. Topping: "I like my women like that.";

(g) On one occasion he commented upon a female employee's purported show of cleavage to a customer; and

(h) Mr. Topping hired and then gave favorable treatment to males with whom he had off the job friendships.

19. I find that all of the allegations set forth in finding 18 are true and should be credited as fact. I also find the following offerings of the Commission to be true:

(a) Mr. Topping was hostile to female employees in general and Ms. Shaffer in particular;

(b) Ms. Shaffer, who had been instructed by Mr. Kennedy to train Mr. Topping regarding Bentley's internal procedures, reported to Mr. Kennedy that the store manager failed to accept her training, did not want her help, and was not cooperating, to which Mr. Kennedy responded that she should keep trying;

(c) On one occasion during complainant's pregnancy she became very sick at the store, but Mr. Topping would not let her leave and go home;

(d) On one occasion another female employee, Lori Fitzgerald, was assigned by Mr. Topping to do paperwork and that Mr. Kennedy personally observed this incident; and

(e) Mr. Topping made statements to the effect that he intended to fire Ms. Shaffer and that he personally believed that women cannot be good managers.

20. Ms. Shaffer also testified that upon returning to work after an injury suffered when she slipped and fell in the store, Mr. Topping, after conferring with Mr. Kennedy, told her, "you can't clock in. We're putting you on disability leave." He ordered her to leave the premises. Ms. Shaffer promptly called Mr. Kennedy and, according to complainant, Mr. Kennedy said that, "I believe George must have misunderstood what I was telling him. Go on back to work." She returned to work and the matter was dropped.

21. I find the following offerings of respondent to be true:

(a) Managers are not prohibited from assigning paperwork duties to other employees, including sales associates;

(b) It was Mr. Kennedy's perception, based on numerous phone calls from Mr. Topping and Ms. Shaffer, that "there was a feud going on between them"; and

(c) That prior to June 1991 Mr. Kennedy was not aware of the inappropriate sexual comments made by Mr. Topping.

22. On 3 June 1991, complainant and two former co-workers, Lori Fitzgerald and Tim Fitzgerald (a married couple), wrote a four page single-spaced letter to Mr. Kennedy and his superiors outlining a litany of allegations against Mr. Topping, including charges listed above. (Jnt. Exhibit, pp. 409-12).

23. Upon receipt of the letter, Mr. Kennedy came to the Charleston store, confronted Mr. Topping about the allegations and, based upon the store manager's sudden "uneasiness about this whole subject," decided to fire him.

24. The Commission attempted to prove that Mr. Topping spoke with the approval of Mr. Kennedy when he harassed and threatened the female employees. While Mr. Topping may have alluded to such approval, the evidence linking Mr. Kennedy to such behavior did not go beyond that. There was no other credible evidence that Mr. Kennedy or his superiors were aware of, encouraged, endorsed, shared in or conspired to carry out Mr. Topping's harassment and threats. Moreover, the Commission's attempt to link Mr. Kennedy to Mr. Topping's actions is seriously undercut, if not demolished, by the undisputed fact that once Mr. Kennedy clearly became aware of the full nature of the store manager's behavior, he promptly came to Charleston and fired him.

E. The Second Promotion Denial.

25. After firing Mr. Topping, Mr. Kennedy hired Mr. Rodney Tomlin as the new store manager. Mr. Tomlin was then an experienced manager of a Bentley's store in the Atlanta area and Mr. Kennedy was familiar with the quality of his work. He began working in the Charleston store on 21 June 1991.

26. Ms. Shaffer was not completely sure at hearing whether or not she applied for the manager's position after Mr. Topping's dismissal. She acknowledged, however, that she had no problem with Mr. Tomlin's ability as a manager. Mr. Kennedy testified that when he told Ms. Shaffer that he had selected Mr. Tomlin that she became upset.

27. The Commission did not seriously pursue this issue at hearing and produced no evidence disputing respondent's position that Mr. Tomlin was better qualified than complainant for the position of manager. I find as fact that respondent did not discriminate against Ms. Shaffer because of her sex when it did not promote her to the position of store manager in June 1991.

F. Allegations of Retaliation and Constructive Discharge.

28. Rodney Tomlin began work as manager of Bentley's Charleston store on 21 June 1991. Ms. Shaffer made her first contact with the Human Rights Commission on 22 June 1991,

though her complaint was not formally filed until 16 July 1991. On 20 July 1991, Ms. Shaffer went into labor and gave birth to a daughter the next day. Shortly after 22 July 1991, Bentley's was served with a copy of the complaint by the HRC.

29. Ms. Shaffer and her former husband, Shawn, testified that in late June 1991 Rodney Tomlin took them to dinner. She alleged that Mr. Tomlin stated that he would help her become manager, but that in order to be successful she needed to drop her complaint with the HRC. When she said that she could not do that, Mr. Tomlin replied "Well, I did the best I could to help you . . . you basically just messed yourself up." It should be noted that in June 1991, Ms. Shaffer had not yet signed a formal complaint with the HRC and respondent had not yet been served.

30. Ms. Shaffer admitted that she never told Mr. Kennedy about her conversation with Mr. Tomlin even though two previous communications to him had resulted in two managers being fired. Neither is the conversation mentioned in the original complaint signed and filed with the Commission some 2 to 3 weeks after the dinner with Mr. Tomlin, nor in her resignation letter. Finally, in her letter to the HRC dated 11 October 1993, Ms. Shaffer is again silent regarding this meeting. (Tr. 419).

31. Ms. Shaffer was on maternity leave from 20 July 1991 to 9 September 1991, when she resumed her duties as assistant manager.

32. In late September 1991, Ms. Shaffer began looking for other work. She interviewed at Accordia, was hired, and began work there on 14 October 1991.

33. On 3 October 1991, after she had already started looking for other work, complainant was issued a "counseling statement" by Mr. Tomlin for allegedly failing to open the store at 9:30 a.m. as scheduled.

34. On 14 October 1991, the same day she began her new job at Accordia, complainant received a second "counseling statement", this one accusing her of selling merchandise that had been ordered for another customer. She was accused by Ms. Laura Arbaugh, the other assistant manager.

35. Respondent produced evidence that in March 1991 a male employee was given a one week suspension, not just a counseling statement, for failing to open the store on time. (Resp. Exhibit B).

36. Ms. Shaffer never discussed either of the counseling statements with Mr. Kennedy or communicated to him in any way that the statements were unjustified or unfair.

37. On 23 October 1991, Ms. Shaffer resigned her employment with Bentley's. She testified that she was sure that she probably told Mr. Tomlin about her intent to resign prior to 14 October since she started at Accordia on that date and had restricted her hours at Bentley's to evenings only.

38. I find as fact that Ms. Shaffer left Bentley's employment because she was twice denied a promotion to store manager and not because of the two October 1991 counseling statements. This finding is based on the following:

(a) Ms. Shaffer began looking for other work shortly after her return from maternity leave and prior to the issuance of the first counseling statement; and

(b) Ms. Shaffer had already secured other full time employment prior to the issuance of the second counseling statement and had begun training for the new job.

39. I find as fact that Ms. Shaffer was not constructively discharged from her position at Bentley's and that conditions there were not so intolerable at the time she began looking for other work that a reasonable person would have quit.

IV. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

A. Failure to Promote

This case having been heard in its entirety, with all evidence submitted and considered, it is not necessary to address whether the Commission established a *prima facie* case. Once all the evidence has been heard, and the "defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether plaintiff really did so is no longer relevant." *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482 (1983). The job

of the factfinder, after taking all of the evidence, is to address "the ultimate question of discrimination *vel non*." 103 S.Ct. at 1481.[11]

In other words, the factfinder must now determine, on the basis of all of the evidence, whether the Commission has proven by a preponderance of the evidence that the proffered reasons for respondent's failure to promote Ms. Shaffer to the position of store manager in February 1991 and/or June 1991 are not the true reasons that she was not promoted, but are mere pretexts for unlawful discrimination, or that her sex or pregnancy was a motivating reason for respondent's decisions.

As stated in the findings of fact, I have determined that the Commission has not met its burden of proof on the failure to promote counts. Regarding the February 1991 promotion, it would defy common sense for a divisional officer who visits a retail store only four or five times per year to promote to store manger an assistant manager who admitted that she withheld knowledge of a theft for eight months and reported it only after being cheated herself by that same thief. Even Ms. Shaffer's own witnesses conceded that she had a duty to promptly report the theft. Having not done so, Mr. Kennedy's lack of confidence in her judgment was justified.

The June 1991 promotion denial cannot be seriously considered. Mr. Tomlin was an experienced and proven manager who was thoroughly familiar with Bentley's. Given the store's troubled history in 1991, it makes sense for Mr. Kennedy to hire a known and seasoned manager.

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[11] The *Aikens* standard for assessing evidence was recently adopted by the West Virginia Supreme Court of Appeals for application in cases brought under the HRA. *Barefoot v. Sundale Nursing Home*, ____ W.Va. ____, 457 S.E. 2d 152 (1995).

The fact that Mr. Tomlin was clearly better qualified than Ms. Shaffer makes his selection lawful beyond any reasonable doubt.

B. Sexual Harassment.[12]

In *Hamlin v. Chambers, etc.*, ____ W.Va. ____, ____ S.E. 2d ____ (Slip opinion, 26 October 1995), the West Virginia Supreme Court of Appeals held that:

> To establish a claim for sexual harassment based upon a hostile or abusive work environment under the Human Rights Act, a plaintiff-employee must prove that (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was "' sufficiently severe or pervasive to alter the . . . [complainant's] conditions of employment and create an abusive work environment'"; and (4) it was imputable on some factual basis to the employer. *Harris v. Forklift Systems, Inc.*, ____ U.S. ____, _____, 114 S. Ct. 367, 370, 126 L.Ed 2d 295, 301-02 (1993).
>
> (p. 9).

The key issue in this case is whether the conduct of Mr. Topping was "sufficiently severe or pervasive" to alter the conditions of Ms. Shaffer's employment. In making a determination on this issue, I am governed by the HRC regulations on sexual harassment, and particularly 6 W.Va. C.S.R. §77-4-2.4, which provides that:

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[12] At hearing, I entered a directed verdict for respondent on the sexual harassment count. The Commission properly objected. At the conclusion of the hearing, I informed the parties that they were free to address this area in their post-hearing submissions, despite my ruling, since a review of the entire written record might cause me to reconsider. It did. (Tr. 520-21).

2.4 In determining whether alleged sexual harassment in a particular case is sufficiently severe or pervasive, the Commission will consider:

2.4.1. Whether it involved unwelcome physical touching;

2.4.2. Whether it involved verbal abuse of an offensive or threatening nature;

2.4.3. Whether it involved unwelcome and consistent sexual innuendo or physical contact; and

2.4.4. The frequency of the unwelcome and offensive encounters.

2.4.5. A person who has been harassed on an isolated basis may offer evidence of harassment suffered by other employees as proof that the harassment was pervasive or severe.

I must also recognize that, as the U.S. Supreme Court made clear in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986), and *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), the civil rights laws were not intended to make unlawful words or conduct which merely generate hurt or offended feelings. To be actionable, the harassment must affect the terms or conditions of employment, or, in other words, must be "severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive." *Harris*, at 370.

Applying the law to the facts at bar, I conclude that Mr. Topping's comments and innuendos of a sexual nature, standing alone, were not so severe or pervasive as to alter Ms. Shaffer's conditions of employment. His conduct, while unwelcome, did not involve any physical contact, nor were his

offensive verbal comments consistent or frequent. His behavior is best described as the "occasional vulgar banter, tinged with sexual innuendo, of [a] coarse or boorish" person. *Baskerville v. Culligan Co.*, 50 F.3d 428, 430 (1995). Here, as in *Baskerville*, Mr. Topping "never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him, or to go out on a date with him. He made no threats. He did not expose himself, or show her dirty pictures. He never said anything that could not be repeated on primetime television." At 431.

However, as noted by 6 W.Va. C.S.R. §77-4-2.5:

> Harassment is not necessarily confined to unwanted sexual conduct. Hostile or physically aggressive behavior may also constitute sexual harassment, as long as the disparate treatment is based on gender.

That hostile, albeit not overtly sexual, conduct directed to a person because of her gender may constitute a valid cause of action has long been recognized under Title VII. In the leading case on point, *McKinney v. Dole*, 765 F. 2d 1129 (D.C. Cir. 1985), the circuit court held that in cases involving harassment because of sex:

> The relevant legal question is whether such harassment comprised a "condition of employment." If it does -- that is, if it is sufficiently patterned or pervasive to comprise a condition [citation omitted] . . . and if it is apparently caused by the sex of the harassed employee -- that is, if "but for her womanhood" [citation omitted] the harassment would not have occurred, then such harassment violates Title VII.
>
> 765 F.2d at 1138.

In order for the harassment or unequal treatment to be illegal, said the *McKinney* court, it need not "take the form of sexual advances or other incidents with clearly sexual overtones . . . Rather, we hold that any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII." Ibid.

The *McKinney* definition of sexual harassment as including "any disparate treatment" based on sex, whether sexual or not, 765 F.2d 1139, has been adopted by the Eight Circuit (*Hall v. Gus Construction Co.*, 842 F.2d 1010 (1988)), the Tenth Circuit (*Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (1987)), and the Eleventh Circuit (*Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497 (1985)).

As succinctly stated in *Hall*, under the *McKinney* definition, "predicate acts underlying a sexual harassment claim need not be clearly sexual in nature." 842 F.2d at 1014. "Intimidation and hostility toward women because they are women," said the court "can obviously result from conduct other than explicit sexual advances." Ibid. Since Title VII "evinces a congressional intention to define discrimination in the broadest possible terms" [citations omitted]; non-sexual conduct which is "sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment" gives an employee a cause of action for unlawful sex discrimination. 842 F.2d 1014-1015.

In *Bell v. Crackin Good*, the Eleventh Circuit outlined the five elements needed to establish a Title VII violation based upon a hostile working environment: (1) the employee belongs to a

protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

An employee is "under no obligation," said the *Bell* court, "to adduce proof of sexual advances, requests for sexual favors [or] other verbal or physical conduct of a sexual nature." 777 F.2d at 1503. Harassment is actionable if the objectionable conduct consists of "threatening, bellicose, demeaning, hostile or offensive conduct by a supervisor in the workplace because of the sex of the victim of such conduct." Ibid.

Here, the non-sexual conduct of Mr. Topping which could be considered threatening, demeaning and hostile include his order that Ms. Shaffer leave the work premises because of her "disability" (i.e. her pregnancy), his insistence that the female employees, who were also working on commission, leave the sales floor to wrap items he had sold or to get him a glass of water, his refusal to let Ms. Shaffer go home when she was sick, his consistent statements to Mr. Fitzgerald, which were relayed to plaintiff, that he was building a file on complainant and was going to fire her or not let her return from maternity leave, and, finally, his articulated general hostility to women and abusive treatment of them as reflected in the letter sent by complainant to Bentley's in June 1991.

Viewing Mr. Topping's conduct "as a whole, and at the totality of the circumstances . . . and the context in which the alleged incidents occurred," 6 W.Va. C.S.R. §77-4-2.3, I find that under the

particular facts of this case, Ms. Shaffer was subjected to an abusive work environment because of her sex.

Given that Bentley's entrusted Mr. Topping with management and supervision of its Charleston operation, it is liable for his actions despite the circumstances of his ultimate discharge. 6 W.Va. C.S.R. §77-4-3.1; *Hanlon, supra* (Slip opinion, p. 14).

C. Retaliation and Constructive Discharge

The Commission alleges that Ms. Shaffer was constructively discharged as a result of unlawful retaliatory action on the part of Bentley's, i.e. the issuance of two counseling statements in October 1991. Respondent alleges that Ms. Shaffer quit her employment because she was not promoted to store manager.

W.Va. Code §5-11-9(7) "prohibits an employer or other person from retaliating against any individual for expressing opposition to a practice that he or she reasonably and in good faith believes violates the provisions of the Human Rights Act." *Hanlon , supra* (Slip opinion, p. 25). Here, there is no question but that Ms. Shaffer's filing of a formal complaint with the HRC was done in good faith and that Bentley's was prohibited from retaliating against her because of such filing.

In making out a case of unlawful reprisal arising out of a prior complaint of discrimination filed with the HRC, it is not necessary for the Commission to litigate or prove the merits of the original claim. *Davis v. State University of New York*, 802 F.2d 638 (2nd Cir. 1986); *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1043, (7th Cir. 1980); *Rogers v. McCall*, 488 F. Supp. 689, 697, (D. D.C. 1980); *Slotkin v. Human Dev. Corp.*, 454 F. Supp. 250, 257, (E.D. Mo. 1978). The ultimate burden on the Commission in a reprisal case, after the evidentiary framework has fallen to the wayside, is to prove by a preponderance of the evidence that a retaliatory motive played a part in an employment decision adverse to the complaint. *Davis, supra; Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980), cert. den. 101 S.Ct. 1513 (1981). *Mitchell v. Visser*, 529 F.Supp. 1034 (D. Kan. 1981). As the Second Circuit stated in *Davis*, an anti-reprisal provision is "violated if a retaliatory motive played a part in the adverse employment actions . . . even if it was not the sole cause." 802 F.2d at 642.

In other words, the HRA is violated if a retaliatory motive played any role at all in an adverse employment decision, even if it is ultimately shown that the underlying complaint, while filed in good faith, was devoid of merit.

In order to prove a constructive discharge, the Commission is required to establish that working conditions for Ms. Shaffer were so intolerable that a reasonable person would have been compelled to quit. In addition, the Commission must show that the intolerable conditions were created by Bentley's and were related to those facts which gave rise to the resignation. *Slack v. Kanawha County Housing and Redevelopment Auth.*, 188 W.Va. 144, 423 S.E. 2d 547 (1992).

Upon careful review of the record, and after an assessment of the demeanor of the witnesses on the stand, I have reached the following conclusions on the issues of constructive discharge and unlawful retaliation:

(1) The conditions during George Topping's tenure were intolerable and would have caused a reasonable person to quit.

(2) Obviously, Ms. Shaffer did not quit during Mr. Topping's tenure, but took action that caused his discharge. The intolerable conditions ceased after Mr. Topping was fired.

(3) The dinner with Mr. Tomlin in June 1991 during which he allegedly threatened Ms. Shaffer with retaliation if she did not drop her HRC complaint either did not take place at all or was not perceived as threatening by Ms. Shaffer since she made no mention of it whatsoever in her formal, signed HRC complaint or in her resignation letter, both of which were reviewed and signed by her after the dinner with Mr. Tomlin, or in her 11 October 1993 correspondence with the HRC.

(4) Ms. Shaffer began efforts to find other work almost immediately upon her return from maternity leave and prior to the issuance of the October 1991 counseling statements.

(5) Ms. Shaffer's motivation for leaving Bentley's was her good faith, albeit incorrect, perception that respondent had discriminated against her by twice failing to promote her to the position of store manager.

(6) The Commission failed to show by a preponderance of the evidence that the October 1991 counseling statements were not justified or were caused in whole or in part by an unlawful retaliatory motive.

In summary , the Commission has not shown that Ms. Shaffer's resignation was compelled by intolerable conditions, nor has it shown by a preponderance of the evidence that a retaliatory motive played a part in an employment decision adverse to Ms. Shaffer.

V. SUMMARY OF FINDINGS OF FACT

1. The Administrative Law Judge finds as fact that the Commission has shown by a preponderance of the evidence that complainant was subjected to an unlawful hostile and abusive work environment because of her sex in violation of W.Va. Code §5-11-9(1).

2. The Administrative Law Judge finds as fact that as a result of respondent's unlawful discriminatory act, Ms. Shaffer suffered embarrassment, humiliation, annoyance and mental and emotional distress.

3. The Administrative Law Judge finds as fact that respondent did not unlawfully discriminate against Ms. Shaffer when it failed to promote her to the position of store manager in February 1991 and June 1991.

4. The Administrative Law Judge finds as fact that respondent did not engage in any act of reprisal or retaliation against Ms. Shaffer and did not constructively discharge her.

VI. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W.Va. Code §5-11-3(d), and a person within the meaning of §5-11-3(a) and is subject to the jurisdiction of the West Virginia Human Rights Commission.

2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W.Va. Code §5-11-3(a).

3. Complainant was subjected to a hostile work environment because of her sex and in violation of W.Va. Code §5-11-9(1). Given Mr. Topping's position as a supervisory employee, respondent is responsible for his acts and may be held liable to complainant. 6 W.Va. C.S.R. §77-4-3.1.

4. Respondent did not unlawfully discriminate against Ms. Shaffer when it twice failed to promote her to the position of store manager.

5. Respondent did not in any way or form retaliate against Ms. Shaffer because she filed a complaint with the Commission, nor did it cause her to be constructively discharged.

6. The Commission having proven a case of sexual harassment by a preponderance of the evidence, Ms. Shaffer is entitled to an award of incidental damages in the amount of $2,900.00

for the humiliation, embarrassment and loss of personal dignity suffered by her as a result of the respondent's unlawful acts.

7. A cease and desist Order should be, and is hereby, directed against Bentley's to cease and desist from engaging in acts of sexual harassment in violation of the West Virginia Human Rights Act.

8. The Commission is awarded costs in the amount of $1,309.92.

9. The Commission's claim of unlawful sexual harassment is SUSTAINED to the extent of the relief stated above. All other claims are DENIED.

ISSUED this 11th day of December, 1995.

Mike Kelly

MIKE KELLY
Administrative Law Judge
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