STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.
Governor

November 13, 1985

Daniel Hedges, Esquire
1116-B Kanawha Boulevard, E.
Charleston, WV 25301

Lacy I. Rice, Esquire
P.O. Box 85
Martinsburg, WV 25401

RE: Lloyd S. Truly, Jr. and Steven C. Miller
V Cressler's Food Warehouse
Docket Nos.: ES-239-82 and ES-345-82

Gentlemen:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered cases of Lloyd S. Truly, Jr. and Steven C. Miller V Cressler's Food Warehouse/Docket Nos.: ES-239-82 and ES-345-82.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney

Howard D. Kenney
Executive Director

HDK/kpv

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

LLOYD STEVEN TRULY, JR.
Complainant,

V. DOCKET NO. ES-239-82

CRESSLER'S FOOD WAREHOUSE,
Respondent.

AND

STEVEN CRAIG MILLER,
Complainant,

V. DOCKET NO. ES-345-82

CRESSLER'S FOOD WAREHOUSE,
Respondent.

FINAL ORDER

The Commission, at its regularly scheduled meeting on October 9, 1985, examined the entire record in this case and rejected the Hearing Examiner's Findings of Fact and Conclusions of Law. Thereafter, the Commission adopted as its own the Complainant's Proposed Findings of Fact and Conclusions of Law and does hereby incorporate the same as part of its findings of fact and conclusions of law. In addition, the Commission further finds, based upon an affidavit filed by Complainant's counsel, that an award of $4,481.25 is a reasonable sum for an award as an attorneys fee.

It is, therefore, ORDERED:

1. That the Complainant, Lloyd Steven Truly, Jr., recover the sum of $34,484.68 representing backwages, interest and benefits due the Complainant as of the date of this order.

2. That Lloyd Steven Truly, Jr. receive the sum of $5,000.00 as incidental damages for the humiliation and loss of dignity suffered by him.

3. That Steven Craig Miller receive the sum of $30,242.00 in backwages, interest and benefits due him as of the date of this order.

4. That Steven Craig Miller be awarded the sum of $5,000.00 as incidental damages for humiliation, loss of dignity and suffering endured by him.

5. That Respondent shall pay unto the Complainants attorney, Daniel F. Hedges, the sum of $4,481.25 as his attorney fee for representation of the Complainants herein.

6. That the sums directed by this order to be paid over to the Complainants and their attorney are due and payable upon entry of this order and interest shall accrue, thereon, at the rate of 10% per annum until paid.

Entered this 8th day of November, 1985.

WV HUMAN RIGHTS COMMISSION

BY Nathaniel Jackson
NATHANIEL JACKSON, CHAIR OR
BETTY HAMILTON, VICE CHAIR

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSIO

LLOYD STEVEN TRULY, JR.,

Complainant,

v. DOCKET NO. ES-239-82

CRESSLER'S FOOD WAREHOUSE,

Respondent.

STEPHEN CRAIG MILLER,

Complainant,

v. DOCKET NO. ES-345-82 (Amended)

CRESSLER'S FOOD WAREHOUSE,

Respondent.

COMPLAINANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Proceedings

This case came on for hearing on June 13, 1985, at the Martinsburg City Hall, Martinsburg, Berkeley County, West Virginia, before Hearing Examiner David Webb. The complainant appeared in person and was represented by his counsel, Daniel F. Hedges, and the respondent appeared by its counsel, Lacy I. Rice, Jr.

On November 19, 1981, the complainant, Stephen Craig Miller, filed a verified complaint (amended February 2, 1982), with the West Virginia Human Rights Commission alleging that the respondent Cressler's Food Warehouse had discriminated against him on the basis of sex, in terminating his employment in violation of West Virignia law. The Human Rights Commission on May 11, 1982, issued a letter of determinination finding probable to believe that the Human Rights Act had been violated .

On November 6, 1981, the complainant, Lloyd Steven Truly, Jr., filed a verified complaint with the West Virginia Human Rights Commission alleging that the respondent Cressler's Food Warehouse had discriminated against him on the basis of sex, in terminating his employment in violation of West Virignia law. The Human Rights Commission on May 19, 1982, issued a letter of determinination finding probable cause to believe that the Human Rights Act had been violated.

The two cases were consolidated and on April 5, 1985, the Human Rights Commission, by its Chairperson, served written notice of public hearing upon the parties pursuant to W. Va. Code §5-11-10. The respondent filed an answer denying any and all illegal practices on April 15, 1985, admitting that female employees were not required to perform the tasks and meet the same production quotas as men in warehousing type activities. The employer also contended that as a matter of law heavy lifting is a bona fide occupational qualification and valid business necessity which exempts the practice from the prohibitions of the Human Rights Act.

On April 19, 1985, a status conference was conducted by telephone, the complainants being represented by Emily A. Spieler, Deputy Attorney General, and the respondent by Lacy I. Rice., Jr., at which time certain pre-hearing matters were determined, and a further pre-hearing conference scheduled in the matter for May 21, 1985, with the hearing to be held on June 13, 1985, all as more fully set forth in the order of the Hearing Examiner of that date.

At the pre-hearing conference on May 21, 1985, the complainants appeared in person and by their counsel, Daniel F. Hedges, and the respondent by its manager and by its counsel, Lacy I. Rice, Jr. The matters determined at the pre-hearing conference were summarized by the Hearing Examiner and recorded in the pre-hearing order. At the pre-hearing conference it was determined that much of the case involved matters of law, many of the essential facts being undisputed. The parties agreed to submit a set of written stipulations, which was accomplished and submitted to the Hearing Examiner for inclusion into the record as Stipulations of Fact and Stipulated Exhibits.

The hearing was conducted on June 13, 1985, beginning at 9:00 a.m. and ending at approximately 5:30 p.m., at which evidence was adduced by the respective parties, all parties havinga full opportunity to be heard, and the issues submitted for decision thereon. The parties waived the presence of a Commissioner of the West Virginia Human Rights Commission at the proceeding.

After full consideration of the entire testimony, evidence, motions, briefs, arguments of counsel post-hearing

submissions, the Hearing Examiner recommends that the Commission make the following Findings of Fact and Conclusions of Law:

II. Issues

The ultimate issues to be determined in this proceeding are as follows:

1. Whether or not the complainants were subject to impermissible discrimination based on sex resulting in their termination of employment.

2. Whether or not, as a matter of law, heavy lifting constitutes a bona fide occupational qualification, and thus a statutory exemption to the complainants' charge of sex discrimination.

3. Whether or not, as a matter of law, the requirement that males perform heavy lifting and females be precluded from performing heavy lifting constitutes a valid business necessity so as to excuse the claimed sex discrimination against the complainants.

4. Whether or not the complainant Lloyd Steven Truly, Jr., was constructively discharged from his employment with the respondent.

5. If either or both complainants were discharged illegally as a result of discrimination based upon sex, what is the appropriate remedy.

III. Findings of Fact

The undersigned Hearing Examiner, based primarily on the stipulations of the parties as well as the evidence adduced, recommends that the Commission make the following Findings of Fact:

1. The complainants Lloyd Steven Truly, Jr. and Stephen Craig Miller are males who were employed by the respondent Cressler's Food Warehouse, located at 1164 Winchester Avenue, Martinsburg, West Virginia. The complainant Stephen Craig Miller was employed by the said respondent from November 28, 1977, until September 18, 1981. The complainant Lloyd Steven Truly, Jr. was employed by the said respondent from October 20, 1978, until November 3, 1981. Both Truly and Miller were part-time employees averaging twenty-five hours worked per week over the course of their employment and, for a significant period of time immediately preceeding the separation from their employment, were working thirty-two hours per week on a regular basis.

2. The respondent Cressler's Food Warehouse is a chain of four supermarkets located in Martinsburg, West Virginia, Hagerstown, Maryland, Shippensburg, Pennsylvania, and Chambersburg, Pennsylvania. The West Virginia store is incorporated as Cressler's Food Market of West Virginia, Inc.

3. For all relevant purposes the respondent (hereinafter Cressler's) is an employer and the complainants were employees within the State of West Virginia at the supermarket location on Winchester Avenue, Martinsburg, Berkeley County, West Virginia, within the meaning of the West Virginia Human Rights Act.

4. For the relevant time period, the employees of the respondent through its representative, the United Food and Commercial Workers' Union Local 692 (now Local 27), and the respondent Cressler's have entered into a collective bargaining agreement. With regard to the classification of employees, sections 7.2 and 7.3 of the collective bargaining agreement provide as follows:

> A part-time employee is one hired to work thirty-three (33) hours or less per week in five (5) days. Such an employee shall be guaranteed four (4) hours work, or pay in lieu thereof, when reporting for assigned work, providing the employee is available for such time. All provisions of this Agreement shall apply to part-time employees except as may be specifically exempted in this Agreement.
> Section 7.2.
>
> There shall be one (1) job classification: grocery department.
> Section 7.3.

5. (a) The duties of employees having the job classification of grocery department are as follows: unloading trucks, cutting, pricing, and sorting, stocking shelves, operating cash registers, bailing cardboard, building displays, checking vendors, housekeeping, and such other duties as are assigned by management.

(b) Female employees within this job classification are not required to cut, price, and sort, unload trucks, build displays, or bail cardboard; the female employees, therefore, do not have to meet production standards of these jobs.

6. The cutting, pricing, and sorting activity of employees involves cutting the cardboard lids off the cases or

cartons of bottled, canned, or packaged goods, placing the carton on a table where the individual bottles, cans, or boxes are priced and are sorted, then moving the cartons and cases of goods to a skid. The goods consisted of approximately 1,000 different items of consumable goods routinely found in a retail supermarket.

7. Those employees performing cutting, pricing, and sorting activities are required to move some cases of goods of substantial weight. A representative sample of the heaviest cases include 36 pounds, 34 1/2 pounds, 50 pounds, 60 pounds, and 48 pounds. The average of the cases handled by the persons performing the cutting, marking, and sorting activities is 20 to 30 pounds. Employees performing such activities generally perform them for a four to eight hour shift; at times an employee may be assigned to cut, price, and sort for a lesser period of time.

8. The store manager of the respondent Cressler's has posted in the warehouse area a policy sign which states as follows: The production standard in this store is 100 cases per hour cut, marked and sorted. -- Richard Stouffer.

9. The manage Richard L. Stouffer has prepared a memorandum introduced as a stipulated exhibit entitled "Why Shouldn't A Women Do Job." From this handwritten statement the manager suggests that because a substantial number of the pallets which are mechanically moved from the trucks to the warehouse are of substantial weight, because some of the shelves are 59" high, because the average truck's weight is 38,000 pounds and the average case weight is 30 pounds and representative cases weigh 36, 34 1/2, 50, 20, and 48 pounds, that women should be excluded

from performing the cutting, marking, and sorting activities in the warehouse.

10. During certain periods, including that from February, 1981, to November, 1981, the respondent required all employees (males only) performing cutting and marking activities to keep hourly summaries of the number of cases cut and marked. These summaries consisted of the employee's own statement of how many cases were completed, i.e., an honor system approach; the respondent employer could check the employee count against the total number of cases received. A daily production average was compiled by respondent's management at the Martinsburg store for such employees.

11. There was a considerable volume of testimony relative to the production of various employees. The respondent was attempting to show that for a short period of time in 1981 the complainants Miller's and Truly's production on certain days was less than that of other persons in general and also specifically on those days. It is clear from the record, however, that production rates are not standardized since the production of individual employees could vary significantly on given days due to a number of variables, including but not limited to, the type of cases that were being worked (e.g. a case with 12 items versus a case with 96 items), the type of additional tasks that were required (e.g., movement of materials so trucks could be unloaded, replacing blades, cleaning up broken items, bathroom breaks). Therefore, comparisons of one employee's production figures vis-a-

vis another's without further underlying data lacks great significance.

12. The respondent had a progressive discipline policy which followed a procedure of various warnings with time off or other sanctions applied, and, with the fifth write-up, termination being the customary and expected sanction.

13. The complainant Truly was given employee write-ups for failure to attain the production quota for cutting, marking, and sorting on August 7, 1981, September 15, 1981, September 21, 1981, and September 24, 1981.

14. The complainant Stephen Miller was given disciplinary write-ups for failure to meet the production quota for cutting, marking, and sorting on June 10, 1980, June 25, 1981, June 27, 1981, July 22, 1981, and September 18, 1981.

15. The complainant Stephen Craig Miller was terminated in his employment on or about the 13th day of September, 1981, on the grounds that he had not maintained production in cutting, pricing, and sorting.

16. The petitioner Lloyd Steven Truly, Jr. informed the respondent that he was quitting his employment on or about the 3rd day of November, 1981. Said petitioner's assertion that he was pressured into quitting and was about to be terminated is borne out by the circumstances. He was subjected to the same procedure as was complainant Miller, having received four of the five requisite reprimands in a short period of time, and the management comment to him on the occasion he called in the Health Department to correct a health violation, demonstrates that the respondent

was seeking to discharge him. Said complainant's purpose in quitting was to attempt to prevent a negative employment record of discharge.

17. The policy and practice of the industry in the West Virginia, Maryland, and adjacent areas does not and did not at the relevant time, exclude women from warehouse activities (i.e., cutting, marking and sorting, bailing cardboard, unloading trucks, building displays). Women routinely perform these jobs in other large supermarkets in adjacent areas and there is no reason to exclude women from these specific activities or the warehouse jobs in general.

18. The exclusion of women in the stocking and warehousing jobs, including unloading trucks, and cutting, marking and sorting activity is not necessary to provide an efficient or safe operation, and the inclusion of women does not result in more grievances from women, and does not result in more injuries to women than men. Further, including women in this activity is seen as necessary for advancement in the industry. The activities performed in the warehouse are routinely performed by women in other industries.

19. (a) As a result of his termination, the complainant Stephen Miller was subjected to shame and humiliation and underwent a significant loss of self-esteem, and even considered suicide at one point.

(b) As a result of the cessation of employment of the complainant Steven Truly, he underwent substantial shame,

humiliation, and lowered self-esteem, as well as stomach pain and nerve problems.

20. (a) The production standard of 100 cases per hour cut, marked, and sorted in the warehouse at Cressler's was an unrealistic and arbitrary standard that virtually no employee met on a regular basis, and one which no employee could sustain on a permanent basis. Further, said standard was not necessary for the safe and efficient operation of the respondent's business.

(b) The production standard applied to individual employees in the warehouse area for cutting, marking, and sorting is not routinely used in the industry for application to individual employees for disciplinary purposes. When utilized at all, a production standard is a goal not a condition precedent to continued employment.

21. (a) The production standard had the effect of excluding women because no employee wanted to be forced into a position where she would be subject to a production standard that could not reasonably be met by men or women and result in discharge for not meeting an unrealistic production standard.

(b) As a part of hiring an employee for cutting, marking, and sorting activity there is no physical test or individual evaluation of ability or inability to attain the production standard. The manager of the respondent store admitted that women, although excluded from the job, could do the job of cutting, marking, and sorting as related here.

22. (a) The lost wages of complainant Miller from the period of September 18, 1981, through June 10, 1985, were $41,480.00.

(b) The lost wages of complainant Truly from the period of November 3, 1981, through April 22, 1985, were $40,336.80.

(c) The pension contribution paid by the employer for each was $11.71 per month. For each month the complainants were not engaged in more remunerative employment, the lost months are as follows:

Miller--all months September, 1981 through June, 1983;

Truly--November, 1981 through June, 1984, and October, 1984 through June, 1985.

23. (a) The complainant Miller had the following interim earnings from September, 1981, to the present time:

U.S. Marines: February, 1983 to April, 1983, $1,500.

Arco: May, 1983, to September, 1983, $1,200.

Southland Corporation: September 30, 1983, to November 30, 1983, $340.

Pinkerton: December, 1983, to the present: $11,148. Total of September, 1981, to the present time: $14, 188.

(b) The complainant Truly had the following interim earnings from November, 1981, to the present time:

Western Electric: December 18-23, 1983, $264.82.

General Motors: July 16-October 2, 1984: $6,587.30.

24. (a) During the periods from September 18, 1981, through June 10, 1985, the complainant Miller was continuously

available for more remunerative employment and was available during his unemployed periods for any employment.

(b) For the period of November 3, 1981, through June 10, 1985, the complainant Truly was continuously available for more remunerative employment and during such periods as he was totally unemployed, was available for any employment. As of June 10, 1985, said complainant is no longer interested in reinstatement.

(c) Each of the complainants continuously sought employment and made applications therefor.

IV. Conclusions of Law

Based on the foregoing Findings of Fact, it is hereby concluded:

1. It is the public policy of the State of West Virginia to provide all of its citizens equal opportunity in employment without regard to race, religion, color, national origin, ancestry, sex, age, and handicap, and the denial thereof on such basis is contrary to the principles of freedom and equality of opportunity and destructive to a free and democratic society. W. Va. Code §5-11-2. It is in violation of West Virginia law to refuse to extend or exclude from employment on the basis of sex. W. Va. Code §§5-11-9(a), 5-11-3(h).

2. At all times relevant hereto,the respondent Cressler's Food Warehouse is and has been an employer within the meaning of W. Va. Code §5-11-3(d).

3. At all times relevant hereto, the complainants were citizens and residents of the State of West Virginia, and were persons covered within the meaning of the West Virginia Human Rights Act, W. Va. Code §5-11-1 et seq.

4. The complainants timely filed verified complainats alleging that the respondent had engaged in one or more discriminatory practice against them on the basis of sex by subjecting them to practices, procedures, quotas, and discharge for not meeting such quotas to which it did not subject women within the same job classification. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to W. Va. Code §5-11-1 et seq.

5. It was stipulated that the respondent employer has adopted expressed terms and conditions of employment which treat women employees, solely because of their sex, in a manner different than males. Such practices both discriminate against women in denying them employment opportunity, and discriminate against men in subjecting them to a condition of employment, i.e., the production standard, to which women are not subjected. Such is a discriminatory practice which is in the purview of the Act, and is unlawfully discriminatory unless based upon a bona fide occupational qualification. W. Va. Code §5-11-9.

6. The complainants established a prima facie case of unlawful discrimination as follows: they are members of a protected class; they were qualified to do the job for which they were hired; they were subjected to terms and conditions of

employment to which non-members of their class were not subjected; that as a result of being subjected to said terms and conditions of employment they were discharged while non-members of their class, who were not subjected to said terms and conditions of employment, were not discharged.

7. It is appropriate to look to federal decisions and compatible federal statutes for guidance in the area of discrimination law, West Virginia Human Rights Commission v. United Transportation Union, Local 655, 280 S.E.2d 653 (W.Va. 1981); Shepherdstown Volunteer Fire Department v. State Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983). The goal of equal employment legislation is to prevent discrimination of any person for statutorily prohibited reasons. The goal is the fair and neutral employment personnel decisions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), affirming and quoting from McDonnell-Douglas v. Green, 411 U.S. 792, 801, 36 L.Ed.2d 68, 93 S.Ct. 1817 (1973).

8. The respondent employer asserts as a defense that "female employees were not assigned to cutting, marking and sorting jobs because they involved heavy lifting which they were unable to perform" and that "heavy lifting is a bona fide occupational qualification and valid business necessity" which excludes this practice as being discriminatory against females. The respondent's assertion of the business necessity defense is inapplicable in this case because it is not a facially neutral stated policy, but one which specifically excludes women from a production standard and thereby specifically subjects men to a

production standard within the same classification to which women are not subjected. The business necessity defense which is only applicable to a facially neutral job classification (one which is assertable in a so-called "impact case") in which members of a particular group challenge the test or practice on the basis that the facially neutral classification had no relation to job performance.[1] See, e.g., Garcia v. Gloor, 609 F.2d 156 (5th Cir. 1980); Johnson v. Goodyear Tire and Rubber Company, 491 F.2d 1364 (5th Cir. 1974); Watkins v. Scott Paper Company, 530 F.2d 1159 (5th Cir. 1976); Carpenter v. Stephen F. Austin University, 706 F.2d 608 (5th Cir. 1983); Schlei and Grossman, Employment Discrimination Law, Chapter 12, at 358-360.

9. The respondent's requirement that men perform the cutting, marking, and sorting activities which females in the same job classification are not required to perform, ostensibly because they are not physically capable of such performance, does not constitute a bona fide occupational qualification as asserted by the respondent. The defense of a bona fide occupational qualification is narrowly construed. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 53 L.Ed.2d 876, 97 S.Ct. 2720 (1977). The BFOQ as a defense to allegations of intentional discrimination in W. Va. Code §5-11-9 is not applicable in a heavy lifting context. It is sexual characteristics and not sexual stereotypes that must be the basis for a bona fide occupational qualification exception. (For example, a sex as sex context where the needs of the client

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1. In contrast to the BFOQ defense which is asserted in the general context where an employer admits they are subjecting employees of one sex to disparate treatment on account of sex.

or customer require for privacy purposes that the employee be the same sex as the client, such as counselors of youths or those conducting body searches, e.g., City of Philadelphia v. Pennsylvania Human Relations Commission, 300 A.2d 97 (1973), or where authenticity or genuineness is required as with actors or actresses, see Rosenfeld v. Southern Pacific Company, 416 F.2d 711 (7th Cir. 1969), or where the physiological ability to perform the job is required as with a wet nurse, see, e.g., Rosenfeld, supra). The Courts have been unwilling to uphold a BFOQ defense in the context of sex and a perceived ability to perform the demands of a job, e.g., Rosenfeld v. Southern Pacific Company, 444 F.2d 1219 (9th Cir. 1971) (BFOQ defense not applicable to company policy excluding women from certain strenuous jobs); EEOC v. Spokane Concrete Products, 534 F. Supp. 518 (E.D. Wash. 1982) (the defense was not applicable to the exclusion of women from truck drivers' jobs involving loading and unloading trucks on the basis that loading and unloading aspects are very strenuous); Weeks v. Southern Bell Telephone Company, 408 F.2d 288 (5th Cir. 1969) (company policy precluding females from holding jobs requiring lifting over 30 pounds); Bowe v. Colgate-Palmolive Company, 416 F.2d 711 (7th Cir. 1969).

10. The employer introduced no evidence whatsoever to show that women could not meet a heavy lifting requirement. In fact the evidence was to the contrary; women do perform these jobs on a routine basis in retail grocery store stocking and warehousing operations, and it has had no impact on efficiency, safety, capability to do the job, injuries, or any other matter.

The employer introduced no substantive evidence to show to the contrary, and admitted that women could perform the job; therefore, the assertion of the BFOQ defense must fail in any event. The respondent noted that there was no physical test given with the individual evaluation of ability. The determination was merely based upon the sexual stereotype of women apparently based on the manager's preconceptions, which is clearly illegal and clearly improper from the standpoint of an assertion of the BFOQ defense. See, EEOC v. Spokane Concrete Products, 534 F. Supp. 518 (E.D. Wash. 1982); Bowe v. Colgate-Palmolive Company, 416 F.2d 711 (7th Cir. 1969); Rosenfeld v. Southern Pacific Company, 444 F.2d 1219 (9th Cir. 1971); Weeks v. Southern Bell Telephone Company, supra. Here, where there are not great numbers of employees involved and where the employer has a definitely ascertainable objective production standard, the employer could and must test each person to determine whether or not he or she could perform to meet the production standard. Until the employer does so, it is precluded from blanket exclusions of women from performing those jobs which are imposed upon men and conversely requiring all men to perform those duties and subjecting them to discharge. Conversely, because it is the employee's right not to be discriminated against, as a personal right as opposed to a collective right, the individual male employees must be given an opportunity to show that they are able to perform the task and meet the production standard before a term and condition of employment can be imposed upon them and subjecting them to

discharge for not meeting it, unless it is uniformly imposed on all employees without regard to sex.

11. To the extent that the respondent employer has refused to apply a term and condition of employment to women which it applies to men because of the womens' preference not to do the job, the imposition of the requirement on the males cannot constitute a bona fide occupational qualification.

12. The employer has engaged in an unlawful discriminatory practice prohibited by W. Va. Code §5-11-9 with respect to tenure and conditions of employment on the basis of sex.

13. To the extent that the employer imposes upon them the production standard of 100 cases per hour and does not inform women that if they do not decline to assume the responsibilities of cutting, marking, and sorting in the warehouse areas the production quota will be applied to them, and if they fail, they will be terminated as men have been terminated, the unrealistic production standard is used as a term or condition or discriminate against women in their employment opportunities.

14. The complainant Lloyd Steven Truly, Jr., was constructively discharged from his employment by the imposition of the production standard. The actions of the complainant in attempting to avoid a negative job record by quitting on the verge of discharge do not in any way diminish his claim of being subjected to terms and conditions to which women were not subjected and claims for back wages as a result of the constructive discharge. See e.g., Bourque v. Powell Electric Mfg.

Company, 617 F.2d 61 (5th Cir. 1980); Penna v. Braddleboro Retreat, 702 F.2d 322 (2d Cir. 1983); Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982). His discharge was clearly inevitable and imminent.

15. The assertion of the respondent that the termination of the complainants were based upon not meeting the production quota is not of great relevance or materiality to the claim of the named complainants inasmuch as they were subjected to a term or condition of employment to which women in the same classification were not subjected and disciplined. Whether or not the standard is realistic or attainable is of little relevance to the named complainants' claim. However, with regard to the effect upon women, the unrealistic nature of this standard, and its assertion in such a way which results in the discharge of men, has the effect of discouraging and precluding women from opting into the warehouse activity on a voluntary basis and is therefore discriminatory against women.

16. The complainants are entitled to back pay and the reasonable value of the pension plan contributions they would have received. See e.g., Danner v. Phillips Petroleum Company, 447 F.2d 159 (5th Cir. 1971); Shaffield v. Northrop Worldwide Aircraft Services, Inc., 373 F. Supp. 937 (M.D. Ala. 1974); Tidwell v. American Oil, 332 F. Supp. 24 (D. Utah 1971); EEOC v. Riss International Company, 35 F.E.P. (W.D. Mo. 1982); Sears v. Atchison, Topeka and Sante Fe Railroad Company, 30 F.E.P. 1084, 1088-89 (D. Kan. 1982); W. Va. Code §5-11-13(c)&(d).

17. In addition, the complainants are entitled to receive interest at the rate of ten percent per annum on the amounts to which they were entitled on each pay period to the date of receipt. W. Va. Code §56-6-31; Kirk v. Pineville Mobile Homes, 310 S.E.2d 210 (1983); Bell v. Inland Mutual Ins. Co., ___ S.E.2d ___ (W.Va. Apr. 11, 1985). This is likewise true under the Federal law, e.g., Cline v. Roadway Express, Inc., 689 F.2d 481 (4th Cir. 1982). In addition, the complainants are entitled to receive damages for humiliation and loss of dignity; State Human Rights Commission v. Pearlman Realty Agency, 211 S.E.2d 349 (W.Va. 1975), and an award of attorney's fees. W. Va. Code §5-11-13(c) & (d).

ORDER

Based upon the foregoing Findings and Conclusions is it hereby ORDERED as follows:

1. That the complainants shall recover damages as follows:

(a) Lloyd Steven Truly, Jr.: $34,484.68 in back wages plus ten percent interest per annum from the due date of each scheduled pay period until the date of payment; an amount equivalent to the pension fund contribution plus ten percent interest per annum from the due date of each scheduled monthly contribution until the date of payment; $5,000 in damages for humiliation and loss of dignity.

(b) Stephen Craig Miller: $30,242.00 in back wages plus ten percent interest per annum from the due date of each scheduled

pay period until the date of payment; an amount equivalent to the pension fund contribution hereinbefore set forth plus ten percent interest per annum from the due date of each scheduled monthly contribution until the date of payment; $5,000 in damages for humiliation and loss of dignity.

2. The respondent shall pay costs and attorney's fees in the amount of $75 per hour to be paid within 30 days of submission of an itemized statement by counsel.

3. The respondent shall cease imposing the 100 case production standard or any other standard in the cutting, marking, and sorting activity to employees of only one sex and shall permit each employee to demonstrate his/her ability to meet any production standard before such standard is applied to said individual.

4. The respondent shall comply with paragraph one of the Commission's Order within thirty days from the receipt of the Order by submitting to the Commission certified checks made payable to the complainants for payment in full to the complainants.

Recommended:

_____
Hearing Examiner

Date: _____

Enter this the _____ day of _____, 1985.

_____
Chairperson, West Virginia
Human Rights Commission