STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 108A
Charleston, WV 25301-1400

TELEPHONE (304) 558-2616
FAX (304) 558-0085
TDD - (304) 558-2976
TOLL FREE: 1-888-676-5546

Cecil H. Underwood
Governor

Herman H. Jones
Executive Director

Certified Mail
Return Receipt Requested

March 17, 1998

Michelle Thompson
#9 Ranch Roy-L, Apt. A
High Hill, MO 63350

Dairy Mart #74/Chico Dairy
600 Willey St.
Morgantown, WV 26505

John McFerrin
Asst. Attorney General
Civil Rights Division
PO Box 1789
Charleston, WV 25326

Roger Wolfe, Esq.
Jackson & Kelly
PO Box 553
Charleston, WV 25322

Re: Thompson v. Chico Enterprises, Inc. et al.
ES-424-94

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case.

Sincerely,

Herman H. Jones
Executive Director

HHJ/mst
Enclosures

cc: The Honorable Ken Hechler
Secretary of State

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MICHELLE THOMPSON,

Complainant,

v. DOCKET NO. ES-424-94

CHICO DAIRY ENTERPRISES, INC.,
d/b/a DAIRY MART NO. 74,

Respondent.

FINAL ORDER

On April 9, 1996, a this matter came on for public hearing before Administrative Law Judge Gail Ferguson. On December 29, 1997, after consideration of the testimony and other evidence, as well as the proposed findings and other written submissions of the parties, the Administrative Law Judge issued her Final Decision. This decision found in favor of the respondent and directed that this matter be dismissed.

No appeal having been filed pursuant to W. Va. Code § 5-11-8(d)(3) and the Rules of Practice and Procedure Before the West Virginia Human Rights Commission, 6 W. Va. C.S.R. § 77-2-10, the Final Decision of the Administrative Law Judge has been reviewed only as to whether it is in excess of the statutory authority and jurisdiction of the Commission, in accordance with § 77-2-10.9. of the Commission's Procedural Rules. Other defects in said Final Decision, if there be any, have been waived. Finding nō excess of statutory authority or jurisdiction, the Final Decision of the Administrative Law Judge attached hereto is hereby issued as the Final Order of the West Virginia Human Rights Commission.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review in accordance with the

appeal process set forth in W. Va. Code § 5-11-11 and the West Virginia Rules of Appellate Procedure.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 17th day of March, 1998, in Charleston, Kanawha County, West Virginia.

HERMAN H. JONES, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MICHELLE M. THOMPSON,

Complainant,

v. DOCKET NUMBER: ES-424-94

CHICO DAIRY ENTERPRISES, INC.
DBA DAIRY MART NO. 74,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on April 9, 1996, in Monongalia County, West Virginia, before Gail Ferguson, Administrative Law Judge. Briefs were received through August, 1996.

The complainant, Michelle M. Thompson, appeared in person. Her case was presented by Assistant Attorney General Brian Skinner, counsel for the West Virginia Human Rights Commission. The respondent, Chico Dairy Enterprises, Inc. dba Dairy Mart No. 74, appeared by its representative Ronald Kopanko and by counsel, Julia Chico, Esq. and Roger Wolfe, Esq.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the

administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The complainant, Michelle M. Thompson, is a female resident of West Virginia.

2. Respondent, Dairy Mart No. 74 is located in Morgantown, West Virginia. It is one of a chain of convenience stores owned and operated by Chico Dairy Enterprises, Inc. Dairy Mart No. 74 is located on the edge of the main campus of West Virginia University. Most of the store's patrons are college students as are a large number of its employees, and the employee turnover rate is high. Dairy Mart No. 74 store although the smallest in the area with one-half the cooler capacity of other Diary Mart stores, sells the largest volume of groceries, beverages and fast food items.

3. Dairy Mart stores are staffed and managed by individuals with the following job titles and responsibilities: "Customer Service Representative," "Sandwich Maker," "Assistant Manager," "Store Manager," and "District Supervisor." Customer service

representatives act as clerks/cashiers, stock the store, attend to customers and operate the cash register. The sandwich maker is responsible for all fast food production. Assistant managers supervise the customer service representatives and perform some record keeping tasks. Each store has one manager who oversees and is responsible for the general operation of the store and supervises all store employees. The store managers report to a district supervisor who oversees the operation of a number of stores in a given geographic area.

4. Ronald Kopanko was the manager of Dairy Mart No. 74 during the period relevant to this complaint. As manager, Mr. Kopanko was responsible for all personnel decisions including disciplinary action for the Dairy Mart No. 74 during 1993-1994.

5. Timothy Barlow was the district manager for Dairy Mart and supervises a total of 10 stores in the surrounding area.

6. Barbara Kopanko, Ronald Kopanko's wife, is currently the sandwich maker fast food manager at Dairy Mart No. 74. Prior to February 1, 1994, Mrs. Kopanko held the position of assistant manager and normally worked on the same shift as her husband. After February 1, 1994, Mrs. Kopanko stepped down from the position of assistant manager after a policy change went into effect whereby assistant managers were required to work shifts other than that worked by the store manager. As sandwich maker Ms. Kopanko was not required to work a particular shift and had flexibility in scheduling.

7. The complainant was employed at Dairy Mart No. 74 on two separate occasions. During her first period of employment, which began during the summer of 1991, it is undisputed that although the

complainant performed adequately in the beginning, her performance progressively worsened. She became tardy and failed to complete tasks assigned. As a result, the complainant received verbal and written warnings and disciplinary action. The employment ended when complainant did not report to work as scheduled. Despite the fact that complainant quit without notice, the complainant and the Kopankos' maintained a friendship after she left respondent's employment, and the complainant referred to the Kopankos as her second parents. At one point during a social gathering the complainant attended at the home of the Kopankos', the complainant apologized and attributed her poor work performance while on the job to personal problems.

8. The complainant subsequently relocated to Florida where she remained for three months before returning to West Virginia.

9. After her return in early December of 1993, the complainant visited Dairy Mart No. 74 to say hello and while there Mr. Kopanko asked her if she would be interested in returning to work. Although the complainant had not intended on applying for a position at Dairy Mart because of the circumstances of her previous employment, she completed an employment application and was hired. The complainant's first day of employment as a customer service representative for respondent was December 3, 1993.

10. General duties of a customer service representative are somewhat dependent on the shift, but generally include working the cash register, stocking shelves and maintaining the appearance of the store.

11. At the time of her hire, complainant received a list of employment rules; however, she did not receive an employee handbook. Her salary was $4.25 an hour and she worked 40 hours a week.

12. While employed as a clerk, complainant initially received no complaints about her job performance. The complainant performed her job duties well and she and the Kopankos' continued to enjoy a good relationship.

13. On February 1, 1994, complainant and a co-worker, Mike Yoho, were promoted to the position of assistant manager. This promotion occurred as a result of a company-wide change in policy regarding the position of assistant manager. These changes required that the assistant manager work different shifts than the store manager as well as a willingness to work any shift. Assistant managers were also required to lift 30 pounds.

14. At the time of the change in policy, Barbara Kopanko and Gary Bass were assistant managers. Because both were unwilling to meet the new requirements, they each accepted a demotion. Mr. Bass accepted a demotion because as a full-time student he was unwilling to be available for the early morning shift.

15. Barbara Kopanko also grudgingly accepted a demotion because of her unwillingness to work a shift different from her husband, the store manager. As sandwich maker, Ms. Kopanko was not required to work a particular shift and had some flexibility in scheduling. Although both individuals were initially unhappy with the new company policy each remained with Dairy Mart No. 74. Barbara Kopanko recommended complainant for the assistant manager position, believing

that she would be very good at the job. She even helped train complainant for the position.

16. Mike Yoho stepped down from the position of assistant manager after only one month because he preferred to work the day shift. Another store clerk, Carl Seneca, was then promoted to assistant manager.

17. Assistant managers are selected from clerks who are generally aware of shift duties and responsibilities. Duties of an assistant manager include completing purchase reports, depositing receipts, and generally making sure things get done. There was no written job description or formal training; instead, Ronald Kopanko verbally instructed new assistant managers as to their duties.

18. At the time of her promotion, complainant received some instruction regarding her duties from Mr. Kopanko and from Mrs. Kopanko. Assistant managers were required to lift 30 pounds and the complainant was aware of this requirement.

19. Complainant typically worked an 8 hour shift which started at 12 midnight and ended at 8:00 a.m. Her responsibilities were to operate the main cash register, service customers and stock the beverage center. Occasionally, she worked the "stock shift" from 8:00 p.m. to 4:00 a.m.

20. As an assistant manager, complainant's salary increased to $4.75 per hour. Moreover, since she worked the midnight or evening shifts she earned $4.95 or 20 cents more per hour. In addition, as an assistant manager, she earned a monthly bonus which was a percentage of the store manager's bonus for store performance.

21. On or about February 4, 1994, complainant learned that she was pregnant. She received a positive pregnancy report from the Monongalia Health Department and she also learned that her expected due date was September 6, 1994. Several days later she informed Ron Kopanko who admitted that his response was surprise.

22. The following day, the complainant initiated a discussion about the pregnancy with Barbara Kopanko. Complainant had confided in Mrs. Kopanko about her personal relationships. As a result, Mrs. Kopanko's initial reaction was concern for complainant's well being and how she would get along.

23. The Kopankos' credibly testified that they responded in a supportive and positive manner to the news of complainant's pregnancy. In late February or early March of 1994, Ms. Kopanko offered to be complainant's Lamaze partner, she was planning a baby shower for complainant and had offered to baby-sit when the baby arrived.

24. On February 11, 1994, complainant obtained a prescription slip from her physician at West Virginia University Hospital limiting her lifting to 25 pounds or less during her pregnancy. Complainant immediately advised Mr. Kopanko of the restriction. All other store employees were advised by respondent of complainant's weight lifting restriction when the notice was posted on the store bulletin board near the time sheets.

25. Complainant's work performance record during the second period of employment mirrored that of the first. She performed well at first and then her performance began to wane. According to respondent she displayed the same or similar work performance

problems during her second period of employment as she had during the first. Although complainant admitted that she was late for work and was counseled Store Manager Ron Kopanko, complainant maintained that other store employees particularly Mike Yoho and Barbara Kopanko, were not disciplined for the same offense.

26. Complainant admitted to other performance failings. She was aware of the store policy prohibiting non-customers from parking in the store lot and she was reprimanded when she authorized a vehicle to be left on the lot overnight.

27. Complainant asked Mr. Kopanko to schedule her to work the stock shift which was from 8:00 p.m. to 4:00 p.m. because her physician told her to get plenty of exercise now that she was expecting. She explained that she got very little exercise on the 12 midnight to 8:00 a.m. shift where she was primarily stationed at the register. Mr. Kopanko agreed to her request.

28. An employee scheduled to work the stock shift was required to fill the store shelves and the cooler with inventory items in order to replenish products that have been sold. Gary Bass and Barbara Kopanko noticed that when complainant worked the stock shift she would fail to stock the cooler or complete other required tasks.

29. Complainant failed to properly perform the stocking duties on another occasion and was disciplined by Mr. Kopanko in written form. According to respondent, she did not stock the ice-cream products or eggs and she did a poor job of stocking the other items in the cooler. In addition, she failed to "front" the shelves, that is, she failed to bring grocery items from the rear of the shelves to the front edge of the shelves.

30. When the complainant learned of plans to paint the interior of the store, she contacted a nurse who indicated that complainant should avoid areas containing paint fumes. She then requested that Mr. Kopanko not schedule her on days on which painting would occur. Although Mr. Kopanko agreed to her request and did not schedule complainant when painting was going on, however, when complainant arrived at work for her shift, she detected strong paint fumes and became nauseous. According to the complainant, when she later confronted Mr. Kopanko, he stated that he didn't think the paint fumes were that bad.

31. At another time, complainant failed to perform a task Mr. Kopanko specifically directed she do resulting in written disciplinary action. Mr. Kopanko directed complainant to assist in the preparation of a fast food item sold in the store called "potato logs." A potato log is a large wedge-shaped version of a French fry and is very popular among the college student patrons. Mr. Kopanko asked the complainant to take potatoes from their storage container to the sink and wash and cut them. Complainant refused allegedly because she believed there was a sufficient amount already prepared and because she believed this task was the responsibility of an employee's on another shift. In addition, she claimed that the container of potatoes was too heavy for her to lift. According to respondent complainant was aware that it was not necessary for her to lift the entire container of potatoes to perform the task because she could have carried a few potatoes from the storage area to the cutting area or asked another worker to assist and carry the container for her. Complainant refused either of these methods. She

continued to refuse to perform the task even after Mr. Kopanko carried the container to the sink for her.

32. Complainant's actions in regard to another employee were considered insubordinate and was the cause of another instance of written disciplinary action. The respondent awards a monthly bonus to its store managers based on various store performance criteria. The bonus is awarded two weeks following the month for which the store's performance was evaluated. The policy provides that assistant managers receive a percentage of the manager's bonus if the assistant manager is employed in that capacity at the time the bonus is awarded. Mike Yoho was an assistant manager for a short time and then stepped down from the position before the bonus was issued. According to the company's policy he was thus not entitled to a bonus check. Complainant provided Mr. Yoho with incorrect policy information, advising him that he should be awarded his bonus check when he was not so entitled. Mr. Kopanko disciplined complainant verbally and in writing for instigating trouble between employees and the company. Her actions were perceived by Mr. Kopanko as detrimental to employee moral and the team-work attitude.

33. On another occasion complainant failed to install paper tape known as "journal tape" in the cash register which she was operating. This tape records the daily sales activities. The store manager prepared a written disciplinary form for complainant's failure to maintain tape in the register.

34. Complainant was also showing shortages and overages on her register or "shift audit" which Mr. Kopanko found unacceptable.

35. While working the stock shift on one particular occasion, complainant failed to complete the stocking responsibilities and was disciplined. The grocery order, including the store's supply of hotdogs, typically arrives during the night shift when the store manager is not in the store. The individual on duty is responsible for taking the inventory of the items. An order of 50 boxes of hotdogs, weighing 24 pounds each, were delivered during complainant's stock shift in anticipation of a sale. Normal shipment involved only four or five cases of hot dogs. Complainant had put hotdog deliveries away properly in the past. In this instance, complainant did not put the delivery away and did not direct the customer service representative working under her supervision, Mary Meadows, to properly store the hotdogs. The boxes were placed in the cooler in a fashion which blocked the access to beverages which were to be stocked. Complainant failed to move, or have moved, the few boxes blocking the cooler and then claimed she could not reach the area to stock it. Mr. Kopanko arrived at the store and realized that complainant had not completed the stocking duties. He was upset and asked Barbara Kopanko to contact complainant. She did so and expressed Mr. Kopanko's displeasure and his request that she properly stock the items when she returned to work. However, complainant was not required to replace the inventory because it was accomplished by Mr. Kopanko before she returned to work for her next shift. He later discovered that Mary Meadows, an employee working on the shift with complainant, had offered to put the boxes away properly but complainant would not allow it.

36. Following this incident complainant contacted the home office and complained about the lifting responsibilities. Mr. Barlow was asked to investigate the matter so he scheduled a meeting at the store on April 29, 1994. Mr. Barlow also wanted to find out why an unknown individual had contacted the office inquiring about Mike Yoho's bonus check and Mr. Barlow wanted information about Mike Yoho's return to the clerk position from assistant manager.

37. At the April 29 meeting, Mr. Barlow met with Mr. Kopanko and Mike Yoho and explained the bonus policy to Mike Yoho who reported that he had not contacted the office about the bonus check. Mr. Yoho explained that he had not been demoted but that he had asked to step down form the position so that he could work the day shift.

38. Mr. Barlow also met with complainant and Mr. Kopanko to discuss her complaint that she was expected to lift the entire delivery of hot dogs. He assured her that this was not expected of her but as assistant manager she should have asked other employees to put the delivery away. Mr. Barlow stated that if complainant perceived lifting to be a problem she would be placed on register duty and would not be required to lift at all. Mr. Barlow offered this arrangement in an effort to accommodate the needs of the complainant. Mr. Kopanko did not oppose the new arrangement.

39. The complainant terminated her employment on May 2, 1994, by calling into the store and informing another employee that she was quitting.

40. According to complainant, respondent's major concern with her pregnancy was that her due date would have presented a staffing

problem in September which was a busy time for the store due to the start of the academic year at West Virginia University.

41. Mr. Barlow credibly testified that within his region employees are transferred from one of the respondent's other ten locations when necessary and given the high staff turnover rate at respondent's Dairy Mart #74, should the complainant have taken maternity leave other employees would have been transferred in to replace her, if needed.

42. Following her voluntary resignation from Dairy Mart No. 74, complainant removed herself from the workforce, and began attending West Virginia University as a full-time student.

43. Sometime after leaving her employment at Dairy Mart, complainant spoke with Tim Barlow, and during their conversation, complainant apologized for leaving her position at Dairy mart, but stated that she felt she had no choice. Tim Barlow responded that he understood her decision.

B.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act [hereinafter Act or Human Rights Act], WV Code §5-11-1 to §5-11-19. Section 5-11-9 of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire tenure, terms, conditions or privileges of employment...."

The term "discriminate" or "discrimination" as defined in WV Code §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of sex...."

The West Virginia Supreme Court of Appeals has established that discrimination based upon pregnancy constitutes illegal sex discrimination under the West Virginia Human Rights Act, WV Code §5-11-9(g) Syl. pt. 2 Frank's Shoe Store v. WV Human Rights Commission, 365 S.E.2d 251 (WV 1986); see also Montgomery General Hospital v. WV Human Rights Commission, 346 S.E.2d 557 (WV 1986).

To recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful sex discrimination, or the commission acting on her behalf, must ultimately show by a preponderance of the evidence that:

(1) the employer excluded her from, or failed or refused to extend to her, an equal opportunity;

(2) sex was a motivating or substantial factor causing the employer to exclude the complainant from, or fail or refuse to extend to her, an equal opportunity. Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed.2d 268, 109 S. Ct. 1775 (1989); and

(3) the equal opportunity denied a complainant is related to any one of the following employment factors: compensation, hire, tenure, terms, conditions or privileges of employment.

The facts of this case clearly lend themselves to an analysis based on the disparate treatment theory of discrimination which requires proof of discriminatory intent. See Barefoot v. Sundale Nursing Home, Syl. pt. 6, 457 S.E.2d 152 (1995); West Virginia University v. Decker, 567, 447 S.E.2d 259 (1994); Guyan Valley Hospital, Inc. WV Human Rights Commission, 382 S.E.2d 88 (1989).

Although there are several different proof schemes which may be applied in evaluating evidence in a disparate treatment case, the most common analysis employs circumstantial evidence to prove discriminatory motive. A complainant may establish discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and adopted by our Supreme Court in Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.2d 342 (1983). See Barefoot, 457 S.E.2d at 169, n.19.

First, the complainant must establish a prima facie case of discrimination. If the complainant successfully established prima facie case, the burden then shifts to the respondent to articulate a legitimate, nondiscriminatory reason for the employee's rejection, discharge or other discrimination. Finally, if the respondent

successfully carry this burden, the complainant may demonstrate by a preponderance of the evidence that the respondent's "proffered reason was not the true reason for the employment decision," but was instead a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The gravamen of complainant, Michelle Thompson's, claim is that the respondent, Dairy Mart #74, constructively discharged her on May 2, 1994, and otherwise discriminated against her in terms and conditions of employment because she is female and was pregnant.

The standard of proof adopted by the majority of courts in regard to proof of constructive discharge claims is whether a reasonable person in the employee's position would have felt forced to resign because of terms and conditions of employment to which the employee was subjected. 81 F.3rd 975 (10 Cir.) cert. denied ___US___, 117 S.Ct. 302 (1996). In order to succeed on the underlying claim, the employee must show that the constructive discharge was motivated by sex discrimination.

In Slack v. Kanawha County Housing and Redevelopment Authority, 423 S.E.2d 547 (WV 1992), the West Virginia Supreme Court of Appeals adopted the majority view with regard to proof of constructive discharge claims.

> [I]n order to prove constructive discharge, a plaintiff must establish that the working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit.

In the instant action, the most appropriate proof scheme to establish a prima facie showing of constructive discharge on the

basis of pregnancy is the more general test set forth in Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 432 (1986), as clarified in Barefoot v. Sundale Nursing Home, Syl. pt. 6, 457 S.E.2d 152 (1995), with some adaptation based on the specific facts herein.

Under Conaway, the complainant must prove three elements by a preponderance of the evidence:

(1) That she is a member of a protected class;

(2) That the respondent made an adverse decision concerning the complainant; and

(3) But for the complainant's protected status, the adverse decision would not have been made.

In Barefoot, the West Virginia Supreme Court of Appeals addressed the confusion that resulted from the use of "but for" in the third prong of the analysis set forth in Conaway. The court explained that it was not its intent to require a complainant to establish anything more than an inference of discrimination to establish a prima facie case. The court also noted that Conaway itself disavowed any desire to require more:

> What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to five rise to an inference that the employment decision was based on an illegal discriminatory criterion.
>
> Barefoot, quoting Conaway, 178 WV at 170-71, 358 S.E.2d at 429-30.

Applying this standard, the query is whether the complainant has established a prima facie case of unlawful sex discrimination.

It is undisputed that the complainant is a member of a protected class since she is female and was pregnant when the alleged discriminatory events took place.

Next, the complainant must demonstrate that she suffered adverse treatment. Complainant asserts that respondent discriminated against her in the terms and conditions of her employment by disciplining her, harassing her and thereby forced her resignation because she was pregnant. The latter contention is clearly an allegation of constructive discharge.

Respondent contends that complainant cannot meet this burden since she was neither actually nor constructively discharged. However, respondent's contention ignores the reality that an employee may seek redress under the statute for other alleged acts in addition to an improper discharge, and consequently may demonstrate a prima facie case by showing the occurrence of such other acts.

The complainant has met the second element of a prima facie case by producing evidence that she was reprimanded and disciplined for job performance by respondent, and that such action constitutes and adverse term and condition of her employment.

Conversely, however, the record in this matter clearly establishes that the complainant has not met the adverse action requirement of a prima facie case of constructive discharge.

The case law is clear that, if a court finds a constructive discharge to have occurred, "an employee's resignation is treated for the purpose of establishing a prima facie case of employment discrimination--as if the employer had actually discharged the employee." Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir.

1987). Therefore, in evaluating plaintiff's prima facie case, a determination must be made as to whether the complainant was constructively discharged.

A "constructive discharge," satisfying the second element of the prima facie case, occurs when an employer "makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." Pena v. Brattleboro Retreat, 702 F.2d at 322 (2nd Cir. 1983). See also Slack, supra. A constructive discharge cannot be proven merely by evidence that an employee disagreed with the employer's criticisms of the quality of his work, nor is the test merely whether the employee's working conditions were difficult or unpleasant.

Unless the evidence is sufficient to permit a rational trier of fact to find that the employer created working conditions that were "'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign,'" Pena v. Brattleboro Retreat, 702, F.2d at 325, the employee's claim must fail.

The record in the present case does not contain evidence which compels a conclusion that in May of 1991 a reasonable person in the complainant's position would have felt compelled to resign.

In Slack, supra, in conjunction with its analysis of the intolerable working condition element of a constructive discharge, the court cited Thompson v. McDonnell Douglas Corp., 552 F.2d 220 (8th Cir. 1977) and other opinions which describe working conditions which were, according to the courts, insufficiently severe to rise to the level of "intolerable" so as to support a constructive discharge claim. In Thompson, the employee claimed that he was discriminated

against with regard to terms and conditions of employment and constructively discharged by his employer; that he was discriminated against with respect to pay; that he was discriminatorily transferred; and that he was denied a promotion for which he was qualified. The court held that these claims did not warrant constructive discharge when the hostile working conditions were due to the subject employee's own behaviors and performance.

In the instant action, an application of the Thompson analysis is appropriate. The evidence herein reveals that the complainant experienced work performance problems during both periods of her employment with respondent. After complainant's first period of employment wherein she admitted her performance was poor and from which she quit without notice, respondent gave the complainant a second opportunity to succeed. The complainant was promoted to assistant manager and given a pay raise and a bonus opportunity. It is also apparent from the record that the complainant performed adequately at the beginning of her second period of employment but thereafter received verbal and written reprimands for various infractions including tardiness, poor work performance and insubordination. Although, a constructive discharge may be found on the basis of evidence that an employer sought to place and employee in a position that jeopardized his or her health. See e.g. Meyer v. Brown & Root Construction Co., 661 F.2d 369, 271-72 (constructive discharge in violation of Title VII where pregnant employee transferred to position requiring heavy manual labor). When the complainant in the matter at bar became pregnant, respondent sought to accommodate her weight lifting restrictions and other

accommodations she requested. These facts, rising to the level of grounds for a constructive discharge claim, do not support a finding of intolerable working conditions

Having determined that complainant has not established a prima facie element of a constructive discharge claim, complainant must next demonstrate that discrimination in the conditions of her employment, i.e., disciplinary action and reprimand, occurred under circumstances giving rise to an inference of discrimination. This may be accomplished by either direct, statistical or circumstantial evidence. McDonnell Douglas.

Recognizing that "the burden of establishing a prima facie case of disparate treatment is not onerous," Burdine, 450 U.S. at 254, complainant has demonstrated an inference of discrimination by circumstantial evidence, through the series of events described in her complaint.

The complainant has established that prior to informing the respondent of her pregnancy during her second period of employment with respondent, the complainant's job performance was satisfactory. Moreover, that soon after complainant told Ronald Kopanko, respondent's manager, of her pregnancy, that she was subjected to disciplinary action and reprimands. Finally, the complainant alleges that she was, on several occasions, disciplined for conduct which, when engaged in by her co-workers, was overlooked. Even with deminimus evidence of comparable treatment, complainant has demonstrated a prima facie case on these facts of sex discrimination. In order to rebut complainant's prima facie case,

respondent must articulate a legitimate, nondiscriminatory reason for its action toward the complainant.

Although the burden on respondent under this test is only one of production, to accomplish it a respondent "must clearly set forth through the introduction of admissible evidence the reason for the [complainant's] rejection." Id. The explanation provided "must be clearly and reasonably specific," Id at 258, "must be legally sufficient to justify a judgment for the defendant," and it must be both legitimate and nondiscriminatory. Id., at 254.

If the respondent clearly articulates a legitimate, nondiscriminatory reason for its disparate treatment of the complainant, "then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for unlawful discrimination." Shepherdstown, 309 S.E.2d at 352. The complainant may succeed in this either by persuading the court that the employer's proffered explanation is unworthy of credence. Burdine, 450 U.S. at 256. See also O.J. White Transfer Storage Co. v. WV Human Rights Commission, 383 S.E.2d 323, 327 (1989).

The respondent has articulated nondiscriminatory reasons for its disciplinary action and treatment of the complainant. In this case, respondent maintains that complainant's failure to perform her job properly and to following respondent's policy and directives were the sole reasons she was subjected to reprimands and discipline. Moreover, respondent contends that when it was revealed that the complainant was pregnant that it sought to accommodate her needs.

The question then becomes whether the complainant has proven by a preponderance of the evidence that the reasons offered by respondent are pretexts for unlawful discrimination.

Complainant admits that she arrived late for work even after she received verbal and written warnings. Although the complainant presented testimony by her co-worker and friend Mike Yoho that he was very often late because he was very often intoxicated at night, and yet was not reprimanded, Mr. Yoho was not a believable witness and his testimony is not credited. Similarly, complainant's rebuttal evidence that Barbara Kopanko was often late with impunity is not supported by the record. Mr. Kopanko's duties as sandwich maker allowed her flexibility in her scheduling and she did not have to report on a particular shift. Complainant admittedly breached store policy by authorizing use of the store parking lot which she knew was prohibited and was verbally reprimanded as a result; she failed to perform the inventory stocking tasks required of her; she refused to perform a food preparation task which the store manager instructed her to complete because she disagreed that the task needed to be done; she provided misinformation about pay procedures to another employee causing morale problems; and she failed to maintain her case register journal tape, as was required.

The most discussed incident of all at the hearing was the episode when complainant failed to stock, or cause to be stocked, an order of hotdogs. She did not ask the two other employees on the shift under her supervision to put the order away. She refused one employee's specific offer to put the boxes away. She refused to put away, or cause to put away, even a few of the boxes allowing them to

block the coolers. She used the fact that the coolers were blocked by the boxes as an excuse not to stock those areas. Exasperated by this complete refusal by complainant to perform, Ron Kopanko directed Barbara Kopanko to call her and advise her that she would be required to complete her required tasks. Complainant was not being personally required to perform that stocking task, only to oversee it, and it was completed by other employees before she returned to work.

Following this incident, complainant contacted the home office and complained about the lifting responsibilities. Mr. Barlow was asked to investigate the matter, so he scheduled a meeting at the store on April 29, 1994. Mr. Barlow also wanted to find out why an unknown individual had contacted the office inquiring about Mike Yoho's bonus check and Mr. Barlow wanted information about Mike Yoho's return to the clerk position from assistant manager.

At the April 29 meeting, Mr. Barlow met with Mr. Kopanko and Mike Yoho and explained the bonus policy to Mike Yoho who reported that he had not contacted the office about the bonus check. Mr. Yoho explained that he had not been demoted but that he had asked to step down form the position so that he could work the day shift.

Mr. Barlow discussed with complainant and Mr. Kopanko, her complaint that she was expected to lift the entire delivery of hot dogs. He assured her that this was not expected of her but as assistant manager she should have asked other employees to put the delivery away. Mr. Barlow stated that if complainant's lifting presented a problem for her that she would be placed on register and would not be required to lift at all. Mr. Barlow offered this

arrangement in an effort to keep complainant as an employee. Ron Kopanko did not oppose the new arrangement.

On May 2, 1994, the complainant terminated her employment by calling into the store and informing another employee that she was quitting.

Complainant's assertion that respondent sought to force her resignation because her due date would create a staffing hardship since her maternity leave would coincide with the commencement of classes during respondent's busy period, is not persuasive in light of respondent's testimony that employees at respondent's other locations within the region could be transferred in to cover any vacancy on as needs be basis.

Considered as a whole, the evidence that complainant offers to establish pretext is insufficient to meet her burden of proof. To be sure, the evidence reveals that respondent sought to accommodate the needs of the complainant related to her pregnancy. After she became pregnant, respondent honored her weight lifting restriction even though it required her to lift less than the assistant manager's position called for. Respondent further accommodated complainant's request for stock duty so that she could exercise; and complainant's request that she not be scheduled when painting was occurring. Finally, respondent sought to offer her an assignment at the cash register to resolve any concern the complainant might have about lifting all together. In the meanwhile, complainant failed to satisfactorily perform her job duties and sought to rely on her pregnancy as a means to thwart her employer's authority.

In conclusion, it is readily apparent that the relationship between the Kopankos' and the complainant deteriorated during the course of her second period of employment, and that there was tension in the workplace. However, this, to a large degree, is attributable to complainant's own conduct. It is equally clear, however, that complainant has failed to establish by a preponderance of the evidence that respondent discriminated against her on the basis of her pregnancy in violation of the West Virginia Human Rights Act.

C.

CONCLUSIONS OF LAW

1. The complainant, Michelle Thompson, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Chico Dairy Enterprises, dba Dairy Mart #74, is and was at all times relevant hereto, an employer as defined by WV Code §5-11-3(d), and is subject to the provisions of the West Virginia Human Rights Act.

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

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

5. The complainant has failed to establish a prima facie case of constructive discharge based upon her sex and pregnancy.

6. The complainant has established a prima facie case of discrimination in terms and conditions of employment based on her pregnancy.

7. The respondent has articulated legitimate nondiscriminatory reasons for its actions toward the complainant which the complainant has failed to establish to be pretext for unlawful sex discrimination based on her pregnancy.

8. This matter is dismissed.

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is **ORDERED** that this case be dismissed with prejudice and be closed.

It is so **ORDERED**.

Entered this 1 day of December, 1997.

WV HUMAN RIGHTS COMMISSION

BY: _____
GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I, Gail Ferguson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 29th day of December, 1997, to the following:

MICHELLE THOMPSON
#9 RANCH ROY-L APT A
HIGH HILL MO 63350

DAIRY MART #74/CHICO DAIRY
600 WILLEY ST
MORGANTOWN WV 26505

JOHN MCFERRIN
ASST ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
PO BOX 1789
CHARLESTON WV 25326-1789

ROGER WOLFE ESQ
JACKSON & KELLY
PO BOX 553
CHARLESTON WV 25322

GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE