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May 28, 1998

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Re: Irma P. Voyle v. Fairmont Specialty Services
Docket No. ERNO-21-97

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,

NORMAN LINDELL
ACTING EXECUTIVE DIRECTOR

NL/jk
Enclosures
cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General
Civil Rights Division

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

IRMA P. VOYLE,

Complainant,

v. DOCKET NO. ERNO-21-97

FAIRMONT SPECIALTY SERVICES,

Respondent.

FINAL ORDER

This matter matured for public hearing on June 12 and 13, 1997. The hearing was held at the Marion County Courthouse, Third Floor, Fairmont, Marion County, West Virginia. Administrative Law Judge Mike Kelly presided. The complainant appeared in person and by counsel, J. Lawrence Hajduk, and J. Lawrence Hajduk & Associates. The respondent appeared by its representative, David Roberts, and its counsel, Nancy W. Brown, and Steptoe & Johnson.

On December 16, 1997, Administrative Law Judge [hereinafter ALJ] Kelly submitted his Final Decision to the Commission. On May 20, 1998, the West Virginia Human Rights Commission [hereinafter Commission] reviewed said Final Decision, as well as the Petition for Appeal and the Answer filed in response thereto by the respondent. Upon mature consideration of the Administrative Law Judge's Final Decision and all proposed documents filed subsequently by the parties, and upon an independent review of the entire record herein, the Commission does hereby enter its findings of fact and conclusions of law as set forth hereinbelow. To the extent that the findings and conclusions advanced by the ALJ have been rejected,

they have been found by the Commission to be clearly wrong and not supported by substantial evidence on the whole record.[1]

ISSUE TO BE DECIDED

Whether respondent violated W. Va. Code § 5-11-9(1) by unlawfully discriminating against the complainant with respect to the tenure, terms, conditions or privileges of employment because of her race and/or national origin, and if so, what is the appropriate remedy. The complainant alleges that respondent treated her differently because of her race and/or national origin. Specifically, the complainant alleges that the respondent allowed a racially hostile environment to exist while she was repeatedly harassed and threatened by a co-worker, Scott Fluharty, for an extended period of time before the respondent took remedial action.

FINDINGS OF FACT

Upon thorough examination of the entire record, including the two-volume transcript of the hearing, all documentary evidence and argument of counsel, the Commission incorporates Findings of Fact Nos. 1-9, 11-12, 14-20, 22-39, and 41-43; rejects in part Findings of Fact Nos. 10 and 13; and rejects outright Findings of Fact Nos. 21 and 40, as found by the ALJ. Additionally, the Commission finds the following facts to be true:

1. The ALJ properly notes in Finding of Fact No. 10 that Ms. Voyle's testimony was inconsistent as to whether she told Mr. Noechel, Production Manager, on March 16, 1995, about the anti-Mexican aspect of Mr. Fluharty's invective. He

[1]We review this matter in accord with the limitations placed upon us by W. Va. Code § 5-11-8(d)(3) and consistent with the scope of review of circuit courts as outlined in West Virginia Human Rights Commission v. United Transportation Union, Local 655, 167 W. Va. 282, 280 S.E.2d 653 (1981).

denies that she did. The ALJ found that Ms. Voyle did report Mr. Fluharty for cussing and general obnoxious behavior, but did not report his ethnic references to Mr. Noechel or any other management official on this occasion. The ALJ based this finding on Ms. Voyle's equivocation under cross examination. (Tr. 480-485). However, Ms. Voyle testified in the same cross examination that she did not report Mr. Fluharty's ethnic slurs at that time because she was more concerned about his threats of physical violence. (Tr. 483). The ALJ ignores the evidence of record that Ms. Voyle indeed specifically reported that she had been harassed and that a proper investigation by the respondent would have revealed the full extent of Mr. Fluharty's behavior toward Ms. Voyle.

2. The ALJ notes in Finding of Fact No. 13 fact that on or about April 9, 1995, Ms. Voyle recorded that "Butch came and tried to irritate me & threw labels on desk." (Comp. Ex. 18). The ALJ found that it was not disputed that Ms. Voyle usually worked alone and that it was possible for Mr. Fluharty's actions and behavior to go unnoticed by others on occasion. The ALJ further found that although Ms. Voyle testified at hearing that Mr. Fluharty also called her a "Mexican bitch" when he threw the labels, she did not record it in her calendar; nor did she report it to management. The ALJ used the previously cited cross examination testimony to support this finding. However, it should again be noted that Ms. Voyle, in the same testimony, testified that she told her immediate supervisor, Charlie Parker, of the harassment but did not file a formal complaint. (Tr. 485). Moreover, a reading of the ALJ's decision indicates that he never doubted that the harassment occurred and that the harassment was based on her national origin.

Ms. Voyle uses English as a second language and claims: "I think Spanish and then I try to translate it into English what I'm going to say before I say it." (Tr. 398). When asked if this ever causes problems in communicating with co-workers

she replied, "Well, I say things and it don't come out the same way that I intended to say . . . ." (Tr. 398-399). It is our finding that what the ALJ noted as inconsistencies in Ms. Voyle's cross examination testimony when she was asked about her previous responses in deposition are a result of this language barrier.

3. The ALJ's Findings of Fact Nos. 21 and 40 are clearly wrong. The ALJ found that due to Ms. Voyle's propensity to record workplace disputes of even the most petty nature (e.g., entry on July 11, 1995: "Pudding said cutting tags was not his job"), he found it unlikely that Mr. Fluharty could have made repeated insulting references to complainant's ancestry in 1995 without Ms. Voyle making even one entry in her calendar about such ethnic slurs, other than her reference to "ugliness" in March. The ALJ further found that while he believed Mr. Fluharty was "mean, nasty, miserable and ethnically insulting to Ms. Voyle in and out of her presence," he believed that she exaggerated the number of times he called her a "Mexican bitch." Though Ms. Voyle asserts that Mr. Fluharty referred to her in that way at least 100 times, the ALJ found it telling that Ms. Voyle failed to note, at any time, in her calendar that Mr. Fluharty had used ethnic slurs toward her.

It is our finding that the fact that Ms. Voyle did not record any instances in her calendar where Mr. Fluharty had used ethnic slurs toward her in 1995 is not sufficient evidence that such harassment did not occur. Similarly, the fact that Ms. Voyle failed to note any ethnic slurs in her calendar for either 1995 or 1996 is not proof that these slurs did not happen. (Mr. Fluharty even admits to referring to Ms. Voyle as "Mexican bitch" on at least one occasion.) (Tr. 25). Furthermore, it should be noted that the entries regarding Mr. Fluharty increased after Ms. Voyle spoke with the NAACP after the April 6, 1996, lunchroom incident, suggesting a greater attention to recording her encounters with Mr. Fluharty. (Comp. Ex. 18).

4. Ms. Voyle testified that Mr. Fluharty never referred to her by her proper name or by her accepted nickname "mama." Instead he would refer to her as "hey, Mexican" and other such ethnic comments. (Tr. 430-431). Her co-worker, John Stewart, gives support to this claim through his testimony that he witnessed Mr. Fluharty say "be quiet you Mexican" to Ms. Voyle on one occasion, and on another that Mr. Fluharty told him that "he didn't have to listen to that Mexican . . . ." (Tr. 339-340).

5. James Long, co-worker, testified that on one occasion Mr. Fluharty exclaimed in the lunchroom among a crowd of co-workers that he would "knock that fat Mexican bitch's teeth down her throat." (Tr. 352-353). On cross examination Mr. Long further testified that Mr. Fluharty had been provoked into making this statement because his co-workers were teasing him about Ms. Voyle. (Tr. 355).

6. Ms. Voyle testified under cross examination that when she would report Mr. Fluharty's behavior to Jeff Noechel, Production Manager, Mr. Noechel would tell her that he (Fluharty) did not mean it and that maybe he was just playing with her. (Tr. 514). Mr. Noechel testified that he conducted an investigation because of the April 11, 1995, lunchroom incident and Mr. Fluharty's reported threats of physical violence toward Ms. Voyle. He claims to have found no evidence of ethnic harassment. (Tr. 545-547). David Roberts, Plant Manager, commented in a handwritten note to Mr. Noechel after the investigation:

> I instructed J.A.N. to have a talk with Butch, it can be non-threatening, questioning attitude, but make it clear to him, we've heard rumors, we can't see why they'd be true, but we want to insure that there is "No Question" that it is our position that we will not tolerate threats, jokes or not, to any employee.

(Comp. Ex. 1) (emphasis in original).

7. Ms. Voyle's immediate supervisor, Charlie Parker, testified that Ms. Voyle probably made over 25 complaints to him over the course of her difficulties with Mr. Fluharty. Mr. Parker could not remember an exact number, just that it was probably more than 25 times. (Tr. 649).

8. Ms. Voyle testified that David Roberts told her on the day Mr. Fluharty was fired that she would not be a hero and that he would advise her to pay attention and be careful because nobody knew what Fluharty was capable of doing. (Tr. 462-463). Mr. Roberts made a note after this meeting with Ms. Voyle:

> I advised her that I have completed investigation of complaints made by her.
>
> I got some corroboration and I'd also got some people who were not supportive of her allegations.
>
> But based on established history and previous warnings that based on further incidents we decided to terminate BF.
>
> If others at work try to bother you about this matter let us know immediately.

(Resp. Ex. 17).

DISCUSSION OF THE EVIDENCE AND THE APPLICABLE LAW

This case is before us on an appeal filed by the complainant. The ALJ ruled that the complainant met her prima facie burden but that she failed to meet her ultimate burden. Complainant has appealed that Final Decision.

This matter was comprehensively reviewed by the Commission under the limitations set forth in W. Va. Code § 5-11-8(d)(3). The Commission recognizes its obligation to sustain the ALJ's findings of fact if they are supported by substantial evidence on the whole record or are unchallenged by the parties. West Virginia Human Rights Commission v. United Transportation Union, 167 W. Va. 282, 280 S.E.2d 653 (1981). Similarly, we give great deference to any recommended

findings truly resting on an assessment of credibility since "the credibility of the witnesses was for the hearing examiner to determine." Westmoreland Coal Co. v. West Virginia Human Rights Commission, 181 W. Va. 368, 373, 382 S.E.2d 562, 567, n.6 (1989).

Once a case has been fully tried on the merits, a reviewing administrative body or court should focus on the "ultimate question of discrimination vel non." United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714, 103 S. Ct. 1478, 1480, 75 L. Ed. 2d 403, 408-409 (1983); Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995). The time to determine whether complainant made out a prima facie case is not after all evidence has been submitted, but is at the conclusion of the complainant's case-in-chief. Once that point is reached and the respondent fails to persuade the factfinder "to dismiss the action for lack of a prima facie case, and responds to the [complainant's] proof by offering evidence of the reason for [her] rejection, the factfinder must then decide whether the rejection was discriminatory . . . ." Aikens, 460 U.S. at 714-715, 103 S. Ct. at 1481, 75 L. Ed. 2d at 409-410.

As the Aikens Court stated:

> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff. . . . In short, the district court must decide which party's explanation of the employer's motivation it believes.

460 U.S. at 715-716, 103 S. Ct. at 1482, 75 L. Ed. 2d at 410-411.

The ALJ below having decided the ultimate issue placed before him, our role now is to determine whether his finding of no discrimination is supported by substantial evidence on the whole record. We should not, and will not, revisit a

legal framework governing allocation of burdens and the order of presentation of proof which, by this point, has dropped from the case. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216, n.10 (1981).

The ALJ found in favor of the respondent because he believed, and so held, that the complainant failed to prove that the respondent knew or had reason to know of racial harassment until Ms. Voyle directly reported it, at which time the respondent took prompt remedial action.[2]

We now review each key factor relied upon by the ALJ in his findings to determine whether they are supported by substantial evidence, and if so, whether alone or in conjunction with other facts, they provide the necessary basis to support a finding that there was no violation of the West Virginia Human Rights Act.

A. EMPLOYER'S KNOWLEDGE OF HARASSMENT

The ALJ found that the respondent proved by a preponderance of the evidence that it took prompt remedial action reasonably calculated to end the harassment and did not violate the Human Rights Act. He stated in footnote that:

> This was a close case that could have tipped the other way had respondent not fired Mr. Fluharty after the October 1996 incidents. Clearly, the progressive disciplinary approach had started to become ineffective when Mr. Fluharty attempted to intimidate Ms. Voyle in the lunchroom in the presence of witnesses just 30 days after being told to avoid all contact with her. By discharging Mr. Fluharty, FSS did "the right thing".

(Administrative Law Judge's Final Decision, p. 24, n.3).

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[2]The ALJ, as stated above, did find that the complainant met her initial prima facie burden and offered evidence which sufficiently showed that Mr. Fluharty's conduct toward her was unwelcome and was sufficiently severe and pervasive to alter Ms. Voyle's conditions of employment. However, the ALJ found that respondent took direct and prompt remedial action after it was made aware of the racial harassment by Ms. Voyle and thus did not violate the Human Rights Act. It is that finding with which we take issue.

The ALJ based his decision on the precedent that a remedial response being in the nature of an affirmative defense, the burden is on the employer to show by a preponderance of the evidence that it took prompt remedial action after being placed on notice of the harassment. Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996); *West Virginia Human Rights Commission's Legislative Rules Regarding Sexual Harassment*, 6 W. Va. C.S.R. § 77-4-3.2. (1992) ("As a defense, an employer may show that it took timely and appropriate corrective action regarding such conduct.") However, in making this determination the ALJ relied extensively on the cross examination testimony of Ms. Voyle that she did not write down,[3] nor did she report[4] Mr. Fluharty's racial harassment to management in 1995.[5]

It is our finding that ALJ Kelly gave undue weight to Ms. Voyle's cross examination testimony without properly considering the whole of the record. When the totality of the record is examined, it would seem unlikely that respondent would not have known, or at least have had reason to know, about the illegal discriminatory actions of Scott Fluharty.

Mr. Fluharty's actions were blatant and public in nature in that: 1) he frequently referred to Ms. Voyle by epithet rather than by proper name or her accepted nickname and 2) he openly made threats and slurs against Ms. Voyle to co-workers in public areas. It would be difficult to work at this small plant (80 employees in only one location) and not know about these problems.

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[3]Administrative Law Judge's Final Decision, pp. 10 and 16, Findings of Fact Nos. 21 and 40.

[4]Administrative Law Judge's Final Decision, pp. 6, 7, and 17, Findings of Fact Nos. 10, 13, and 41.

[5]Actually, the record reflects that Ms. Voyle did report harassment in 1995.

Additionally, testimony revealed that in one of the lunchroom incidents Mr. Fluharty was provoked by other employees into exclaiming that he would "knock that fat Mexican bitch's teeth down her throat." Mr. Long, a witness to the event, testified that the crowd of employees who were present provoked Mr. Fluharty by teasing him about Ms. Voyle. At least some of the other employees may have shared Mr. Fluharty's views about Ms. Voyle's ethnicity and may have intended to provoke such a response. This event suggests that the work environment of respondent may have been a racially charged or hostile environment.

Furthermore, the record reflects that the management of respondent knew that Mr. Fluharty was not a stable individual and that he did not like Ms. Voyle. Ms. Voyle testified that Jeff Noechel would suggest to her that Mr. Fluharty was playing or joking when she complained to him. (Tr. 514). This testimony is indirectly supported by Mr. Roberts' note to Mr. Noechel about his investigation ("[i]t is our position that we will not tolerate threats, jokes or not, to any employee.") (Comp. Ex. 1). It would seem likely that if respondent had completed a proper investigation of a reported threat, made in public against Ms. Voyle by a man of doubtful emotional stability, it should have been comprehensive enough to discover the extent of Mr. Fluharty's harassment.

We find that the record clearly reflects that Mr. Fluharty's harassment was neither trivial nor isolated. Under these circumstances, management should have known about the harassment much earlier than respondent asserts. Therefore, we find that once ALJ Kelly found that the behavior constituted harassment, he should have found that the employer knew or should have known. Therefore, we overturn ALJ Kelly's decision and find for the complainant.

B. DAMAGES

Under W. Va. Code § 5-11-13(c), the Commission is authorized to compel affirmative action by a respondent who has engaged in unlawful discriminatory conduct. "[This relief] may include, but is not limited to, reinstatement or hiring of employees, granting of back pay or any other legal or equitable relief as the court deems appropriate." Id. The West Virginia Supreme Court of Appeals has construed this statute:

> The West Virginia human rights commission as part of its cease and desist orders may award to complainant incidental damages as compensation for humiliation, embarrassment, emotional and mental distress and loss of personal dignity, without proof of monetary loss.

West Virginia Human Rights Commission v. Pearlman Realty Agency, Syl. pt. 1, 161 W. Va. 1, 239 S.E.2d 145 (1977).

This authorization of incidental awards for emotional damages, originally set at $1,000, is to be adjusted for inflation in order to conform to the consumer price index. Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989). The current cap on incidental damages is $3,277.45.

Because complainant is still employed by the respondent, back wages are not an issue. However, incidental damages for embarrassment and humiliation are available and appropriate in this case.

The complainant testified at length about the emotional effects of the harassment she endured while working for the respondent. She testified that her health was adversely affected during this time as she was diagnosed with poor blood sugar leading to diabetes, high blood pressure and depression, which prevented her from working the overtime hours that she previously enjoyed working. (Tr. 439-440). In December 1995, complainant was hospitalized and treated for shingles and high blood pressure, both resulting from stress. (Tr. 441).

desk area, an enclosed and isolated place, which kept her nervous and frightened for her physical safety. (Tr. 433-435). Ms. Voyle described this feeling vividly:

> Butch [Mr. Fluharty] never stopped. You see I wanted my job, and I am not a timid person. If anything I'm a proud person. And when Butch would pass by or do anything, I would look at the floor. So I would not irritate him or do anything wrong because I figured maintenance [sic][6] was letting him get away with it, to get rid of two people with one stone. And if I let Fluharty irritate me, I let him cuss me, I let him do whatever he wanted so I wouldn't lose my job.

(Tr. 429).

Ms. Voyle also described her feelings of prejudice:

> Well, I knew Fluharty was weird, and nobody was around him, he was always in the corner laughing, doing stupid things. And I knew--I wasn't scared of him in a way, I just didn't know what he was capable of, you know. And when he--when I heard what he said, it hurts you, and then your pride comes in and you really want to hurt that person of what they tell you. And unless you've been prejudiced against you'll never know that feeling.

(Tr. 424-425).

Upon a thorough review of the record, we find that these circumstances surely justify a full award of incidental damages. Although Ms. Voyle did not request the full amount in her prayer for relief, we find it appropriate to award her the maximum, or $3,277.45, as authorized by the previously cited authority.

[6]Ms. Voyle confused the terms "management" and "maintenance."

C. ATTORNEY'S FEES AND COSTS

When private attorneys bear the cost of litigating Human Rights Act violations before the Commission, we are authorized by W. Va. Code § 5-11-13(c) to award reasonable attorney's fees and costs.

> In any action filed under this section, if the court finds that the respondent has engaged in or is engaging in an unlawful discriminatory practice charged in the complaint, the court shall enjoin the respondent from engaging in such unlawful discriminatory practice and order affirmative action which may include, but is not limited to, reinstatement or hiring of employees, granting of back pay or any other legal or equitable relief as the court deems appropriate. In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant.

Id. (emphasis added).

Administrative Law Judges for the Commission follow the Rules of Practice and Procedure Before the West Virginia Human Rights Commission which embody this portion of the Code. 6 W. Va. C.S.R. § 77-2-9.3.3.

The West Virginia Supreme Court of Appeals has addressed this issue in Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989).

> The goal of the West Virginia human rights law is to protect the most basic, cherished rights and liberties of the citizens of West Virginia. Effective enforcement of the human rights law depends upon the action of private citizens who, from our observations of these matters, usually lack the resources to retain the legal counsel necessary to vindicate their rights. Full enforcement of the civil rights act requires adequate fee awards.

181 W. Va. at 80, 380 S.E.2d at 247 (citations omitted) (emphasis added).

It should be noted that where the Legislature drafted the phrase "may award," the Supreme Court requires adequate compensation in order to serve the public policy underlying the Human Rights Act.

This issue of whether adequate compensation is required when a statute allows that a court "may" award attorney's fees was similarly addressed by the Court in Farley v. Zapata Coal Corp., 167 W. Va. 630, 281 S.E.2d 238 (1981). The Court in Farley looked to a mechanics' lien statute containing language which is similar to that of the Human Rights Act. "The court in any action brought under this article may, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable attorney fees against the defendant." W. Va. Code § 21-5-12(b) (emphasis added). The Court took note that although the statute provides only that the court "may" assess attorney fees "the costs should be awarded to the prevailing plaintiffs as a matter of course in the absence of special circumstances which would render such an award unjust." Farley, 167 W. Va. at 639, 281 S.E.2d at 244 (emphasis added). The public policy underlying this reasoning was stated:

> Both the Wage and Payment and Collection Act and our mechanics' lien statutes are designed to protect the laborer and act as an aid in the collection of compensation wrongfully withheld . . . . If the laborer were required to pay attorney fees out of an award intended to compensate him . . . the policy of these statutes would be frustrated.

Id.

The Court in Bishop Coal had to address attorney's fees under the Human Rights Act which contained the same "may award" language as the mechanics' lien statute. A large part of the argument that the Court put forth in Bishop Coal was on the issue of reduction of incidental damage awards. However, when the Court examined the issue of attorney's fees it stated that, "Full enforcement of the civil rights act requires adequate fee awards." 181 W. Va. at 80, 380 S.E.2d at 247 (emphasis added). The Court then proceeded to a lengthy discussion to determine how an adequate fee award would be determined. Though the Human Rights Act

grants the court discretion in awarding all or a portion of the costs associated with bringing a case before the Commission, it was the intent of the Bishop Coal Court that fees not be reduced in an arbitrary manner.

The Commission has addressed the issue of adequate attorney's fees in Richard L. Crouch v. Lenscrafters, Inc., Docket No. REP-285-94. Therein, we adopted the twelve factor test for determining reasonableness of the attorney's fees which had been reiterated in Bishop Coal.

> Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.[7]

181 W. Va. at 81, 380 S.E.2d at 248 quoting Syl. pt. 4, Aetna Casualty & Surety Co. v. Pitrolo, 176 W. Va. 190, 342 S.E.2d 156 (1986).

In addition to these standards, the Bishop Coal Court looked to the "lodestar calculation"[8] of Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d

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[7]This set of standards was originally set out in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), in response to American Bar Association recommendations to abandon minimum or suggested fee schedules which were being scrutinized by the Justice Department as violations of antitrust laws. Id. at 717, n.3. The standards have been widely adopted and similar standards are now embodied in Rule 1.5 "Fees" of West Virginia's Rules of Professional Conduct. See Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984); see also Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

[8]The Court noted:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the

40 (1983), wherein the United States Supreme Court gave some guidance in adjustments to attorney fees.

The Court in Eckerhart addressed the issue of attorney fees where a plaintiff presents, in one lawsuit, distinctly different claims for relief based on different facts and legal theories but does not prevail on all of the issues litigated. In such a situation, counsel's work on one claim is unrelated to the work on another claim. 461 U.S. at 434-435, 103 S. Ct. at 1940, 76 L. Ed. 2d at 51. A problem is presented when the plaintiff prevails on some claims but not on others because, as a general principle, only the prevailing party may be awarded attorney fees. The Court reasoned that if the plaintiff only prevailed on one of six distinctly different claims, it would be excessive to award attorney fees for the sum total of the time that counsel submitted for the case when only a portion of the time spent in preparation was successfully litigated. 461 U.S. at 436, 103 S. Ct. at 1941, 76 L. Ed. 2d at 52. The Court recommended that counsel be responsible for maintaining time billing records in a manner which will enable a reviewing court to distinctly identify claims.[9] 461 U.S. at 437, 103 S. Ct. at 1942, 76 L. Ed. 2d at 53.

> value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours in inadequate, the district court may reduce the award accordingly.

Hensley v. Eckerhart, 461 U.S. at 433, 103 S. Ct. at 1939, 76 L. Ed. 2d at 50.

[9]In footnote, the Court stated:

> We recognize that there is no certain method of determining when claims are "related" or "unrelated." Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures. See Nadeau v. Helgemoe, 581 F.2d 275, 279 (CA1 1978) ("As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims").

461 U.S. at 437, 103 S. Ct. at 1941, 76 L. Ed. 2d at 53, n.12 (emphasis supplied).

Therefore, the Court held that where the plaintiff has failed to prevail on a claim that is distinct from those that were successful, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.[10] 461 U.S. at 440, 103 S. Ct. at 1943, 76 L. Ed. 2d at 55.

The Bishop Coal Court faced a similar problem where the complainant had asserted several distinct causes of action. The Court noted that when one basic problem is stated in numerous alternative ways, such as is often the case in discrimination actions, the Commission or court will tend to select one of the myriad of theories upon which to award relief. As was noted in Eckerhart, this does not necessarily mean that the plaintiff has not substantially prevailed. However, when the causes are distinct and the facts from one are entirely different from the facts supporting another, a failure to prevail on one cause of action should remove it from the consideration for attorney's fees. Bishop Coal, 181 W. Va. at 83, 380 S.E.2d at 250.

The West Virginia Supreme Court of Appeals reconciled the separate claims principle of Eckerhart and the twelve factors for determining reasonable attorney's fees from Pitrolo in Syllabus Points 3 and 4:

> When the relief sought in a human rights action is primarily equitable, "reasonable attorneys' fees" should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate--the lodestar calculation--and (2) allowing, if appropriate, a contingency enhancement. The general factors outlined in *Syllabus Point 4 Aetna Cas. & Sur. Co. v. Pitrolo, -- W.Va. --, 324 S.E.2d 156 (1986)* should be considered to determine: (1) the reasonableness of both

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The Court also noted that the lower court properly reduced the hours of one attorney by 30 percent to account for his inexperience and failure to keep contemporaneous time records. 461 U.S. at 438, 103 S. Ct. at 1942, 76 L. Ed. 2d at 54, n.13.

[10]The Court qualified in their holding that a plaintiff who has won substantial relief should not have his or her attorney's fee reduced simply because the lower court did not adopt each contention raised. It is where the plaintiff has achieved only limited success that the amount of reasonable fees should be adjusted in relation to the results obtained.

> time expended and hourly rate charged; and, (2) the allowance and amount of a contingency enhancement.

Syl. pt. 3, Bishop Coal, 181 W. Va. at 71, 380 S.E.2d at 239.[11]

> When a complainant sets forth distinct causes of action so that the facts supporting one are entirely different from the facts supporting another, and then fails to prevail on one or more such distinct causes of action, attorneys' fees for the unsuccessful causes of action should not be awarded.

Syl. pt. 4, Bishop Coal, 181 W. Va. at 71, 380 S.E.2d at 239.

In Bishop Coal, the Court decided that counsel for the Complainant, Betty Jean Hall, was one of the nation's leading experts in the field of sexual discrimination against women coal miners. Ms. Hall charged $95 per hour when the case commenced in 1981 and $110 per hour by the time the case was finished in 1986. Though the respondent asserted that this was too high a rate for Mercer or McDowell Counties (Ms. Hall was located in Dumfries, Virginia), the Court ruled that because the respondent was represented by a distinguished Charleston law firm, the rates would be comparable.[12] 181 W. Va. at 81-82, 380 S.E.2d at 248-249. Lastly, the Court found that the complainant had asserted multiple claims, with the main issue being that she should have been made a scoop operator and would have had she not been a woman. The Court determined that the complainant prevailed entirely on this issue and that the other allegations of sexual harassment were

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[11]This Syllabus Point is included in the annotations of Rule 1.5 "Fees" of the Rules of Professional Conduct.

[12]The Court noted that the losing respondent cannot be saddled with attorney's fees that are unreasonably large simply because the complainant may choose a lawyer from New York City or another urban area where overhead costs and prevailing hourly rates make the lawyer's charges far above what a competent West Virginia lawyer would charge. However, in this instance the Court found that Ms. Hall's hourly rate was comparable, if not below, to what a young partner in a major firm headquartered in Charleston would charge for a case conducted in Southern West Virginia. Bishop Coal, 181 W. Va. at 82, 380 S.E.2d at 249.

"simply part and parcel of her basic complaint." 181 W. Va. at 83, 380 S.E.2d at 250.

The Court revisited this issue of reasonable attorney fees in Human Rights Act violations in Casteel v. Consolidation Coal Co., 181 W. Va. 501, 383 S.E.2d 305 (1989). In this case, the complainant's counsel requested an hourly rate of $150, and the trial court approved a compromised rate of $130 per hour for Allan Karlin and $110 per hour for Charles DiSalvo. 181 W. Va. at 507, 383 S.E.2d at 311. The respondent claimed that the twelve factors stated in Syllabus Point 4 of Pitrolo were not followed.

The Court disagreed, however, on the grounds that Mr. DiSalvo was a distinguished law professor at the West Virginia University College of Law and that Mr. Karlin was a skilled trial advocate in the field of employment discrimination. Furthermore, the Court contrasted the complainant's counsel with that of the respondent, who was represented by a distinguished West Virginia law firm and counsel from Pittsburgh. Additionally, the Court found that the time and effort spent by the complainant's counsel indicated that they were substantially precluded from other employment and that the risk of loss and the undesirability of the case were shown by the three and a half years spent on the case and the thorough representation given by the employer's counsel. Casteel, 181 W. Va. at 508, 383 S.E.2d at 312.

In the case at hand, complainant Voyle's counsel has submitted a Petition for Attorney's Fees in the amount of $23,175.00. This figure represents 85.50 hours of preparation by J. Lawrence Hajduk at $250.00 per hour and 7.2 hours of preparation by Leslie Crosco at the same hourly rate. Additionally, Complainant's counsel has asked for $2,376.18 for advanced expenses.

Rule 7.37.2 of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission states:

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

6 W. Va. C.S.R. § 77-2-7.37.2.

The only affidavit to support this fee request filed by complainant's counsel was a copy of a previous request for attorney's fees in a case litigated in the United States District for the Northern District of West Virginia where Mr. Hajduk requested an hourly rate of $163.56 per hour.[13] The respondent filed a timely[14] memorandum in opposition to the complainant's request for attorney's fees and applied the factors set forth in Syllabus Point 4 of Aetna Casualty & Surety Co. v. Pitrolo, 176 W. Va. 190, 342 S.E.2d 156 (1986), and the lodestar calculation of Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

The respondent requests a reduction in the hourly rate that complainant's counsel has submitted. The respondent asserts that complainant's counsel has not properly argued the justification for a fee of $250.00 per hour. In fact, the respondent correctly notes that Mr. Hajduk has only submitted an actual earnings

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[13]In this request before the district court Mr. Hajduk based his request for $163.56 per hour on the calculation that he brought in $408,880 and averaged 50 hours per week for the calendar year of 1996.

[14]Complainant's counsel filed a request for fees on September 15, 1997. Respondent filed a memorandum in opposition on September 23, 1997, within the 15-day time limit set forth in 6 W. Va. C.S.R. § 77-2-7.37.2.

history of $163 per hour and that his associate, Leslie Crosco, has submitted no earnings history at all.

Additionally, the respondent requests a reduction in the number of hours that complainant's counsel has submitted. The respondent asserts that only some of the complainant's causes of action have been successful and also notes that the complainant is involved in three separate lawsuits, one before the Human Rights Commission and two before the circuit court. Furthermore, respondent correctly notes that the complainant's time sheets are drafted in such a way that it is impossible to discern whether counsel's time was spent on the Human Rights Commission suit or the circuit court suits.

It is our finding that complainant's counsel has failed to adequately document his preparation in such a way that the time spent on the action before the Human Rights Commission can be separated from time spent on the actions before the circuit court. An arbitrary reduction by one-third may be unduly harsh due to the fact that the combined submitted preparation time for complainant's counsel is 92.7 hours. This case was in hearing before ALJ Kelly for two days and generated a trial record that is 668 pages in length. The typical single-issue case litigated before Judge Kelly lasts only one day. Examination of the record shows that during litigation complainant's counsel tended to stray from matters which were relevant to an action in this forum.[15] A quick estimate indicates that Mr. Hajduk expended roughly one-sixth of his litigation time on matters which were not properly before this Commission. Therefore, we find it appropriate to reduce complainant's

[15]The most notable examples of these deviations were the instances where Mr. Hajduk repeatedly explored Ms. Voyle's difficulties when she requested Emergency Family Medical Leave. This issue had been resolved and no retaliatory discharge claim was being asserted. Furthermore, Mr. Hajduk sometimes asked questions about the other two actions which have been filed against Ms. Voyle in circuit court.

submitted preparation time by one-sixth so that Mr. Hajduk's adjusted time is 71.25 hours and his associate's adjusted time is 6 hours.

Next, we find that attorney Hajduk's hourly fee request is clearly excessive. Complainant's counsel submitted only one affidavit which was not even crafted for this specific action.[16] Neither Mr. Hajduk nor his associate has proven a level of expertise in this administrative forum which would justify an hourly rate of $250.00 Furthermore, Mr. Hajduk does not explain how he arrived at an hourly fee calculation of $250.00 or why this Commission should require respondent to pay this amount. Having billed for 92.7 hours, there has been no substantial preclusion of other employment and the issue was neither novel nor unique.

If an experienced litigator with expertise in this forum commands an hourly fee of $175.00, Mr. Hajduk's requested hourly rate must be reduced. A perusal of other Human Rights actions litigated by private counsel before this Commission would indicate an appropriate hourly fee for one with limited experience before the Commission and in this area of the law. Therefore, we find it appropriate that attorney Hajduk's hourly fee be reduced to $120.00 and that attorney Crosco's fee be reduced to $80.00 per hour.

Complainant's advanced expenses appear to be reasonable, as they are witness fees, transcription charges, and other necessary expenses. Thus, we reduce complainant's requested attorneys' fees from $23,175.00 to $9,030.00, with an award of $2,376.18 for costs.

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[16]Complainant's counsel chose to submit a previous affidavit for attorney's fees which had been submitted to the United States District Court on a matter which is unclear. One could assume that the submitted affidavit is for a Workers' Compensation action due to the fact that Mr. Hajduk details his expertise in this area of the law. However, Mr. Hajduk has submitted no affidavits of previous experience in employment discrimination cases which could possibly justify such an exorbitant fee request. Even more perplexing is the fee request for Mr. Hajduk's associate who has no established earnings history and no affidavits supporting such a request.

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 W. Va. Code § 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), and is an employee within the meaning of W. Va. Code § 5-11-3(e).

3. West Virginia Code § 5-11-9(1) imposes a duty on employers to ensure that workplaces are free of unlawful harassment due to an employee's sex, race, ancestry or other protected status. Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995). The criteria established to evaluate cases of sexual harassment are equally applicable to cases of alleged harassment due to ancestry or national origin. See Amirmokri v. Baltimore Gas and Electric Co., 60 F.3d 1126 (4th. Cir. 1995).

4. To establish a claim for unlawful harassment under W. Va. Code § 5-11-9(1), based upon a hostile or abusive work environment, a complainant must prove: (1) the subject conduct was unwelcome; (2) it was based on the protected status of the complainant; (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. Hanlon, Syl. pt. 5.

5. Where, as here, the harasser is not a management or supervisory employee, the employer is not strictly liable for his actions. As stated by the Hanlon Court, and as applicable here:

> When the source of the harassment is a person's co-workers and does not include management personnel, the employer's liability is determined by its knowledge of the offending conduct, the effectiveness of its remedial procedures, and the adequacy of its response.

. . . .

> [The employer] must do what it can to prevent harassment and must respond swiftly and effectively to complaints about harassment. The sufficiency of the employer's response determines its legal responsibility.

195 W. Va. at 108, 464 S.E.2d at 750.

6. Once an employer "has knowledge of a . . . combative atmosphere in the workplace, he has a duty to take reasonable steps to eliminate it." Snell v. Suffolk County, 782 F.2d 1094, 1104 (2d Cir. 1986). An employer "may not stand by and allow an employee to be subjected to a course of [unlawful] harassment by co-workers." DeGrace v. Rumsfeld, 614 F.2d 796, 803 (1st Cir. 1980). The scope of an employer's duty to correct a hostile workplace was laid out by the First Circuit in DeGrace.

> It may not always be within an employer's power to guarantee an environment free from all bigotry. He cannot change the personal beliefs of his employees; he can let it be known, however, that . . . harassment will not be tolerated, and he can take all reasonable measures to enforce this policy . . . . But once an employer has in good faith taken those measures which are both feasible and reasonable under the circumstances to combat the offensive conduct we do not think he can be charged with discriminating on the basis of race [or ancestry].

Id. at 805.

As applied by other courts, the DeGrace standard has been held to place a "reasonable duty on an employer who is aware of a . . . discriminatory atmosphere adversely affecting the emotional well-being and productivity of its employees to take reasonable steps to remedy it. Whether an employer has fulfilled his responsibility in this regard is to be determined upon the facts in each case." Snell, 782 F.2d at 1104. The factors that may be considered in determining whether an employer has met its duty include the gravity of the harm, the nature of the work

environment, the degree of acquiescence in the harassment by supervisors, the promptness of the employer's responsive action and the apparent sincerity of the employer's actions. Id.

7. We conclude as a matter of law that Irma P. Voyle showed by a preponderance of the evidence that Mr. Fluharty's conduct towards her was unwelcome. Mr. Fluharty's conduct clearly exceeded the normal and became frightening, menacing, insulting and most unwelcome.

8. We conclude as a matter of law that Mr. Fluharty's conduct, at least in significant part, was due to Ms. Voyle's Mexican ancestry. We base this conclusion on his use of the term "Mexican" in a disparaging and insulting tone when threatening Ms. Voyle's physical safety and when discussing her with co-workers.

9. We conclude as a matter of law that Mr. Fluharty's conduct was sufficiently severe and pervasive to alter Ms. Voyle's conditions of employment. In making a determination on this issue, we apply by analogy the West Virginia Human Rights Commission's legislative regulations on sexual harassment, and particularly 6 W. Va. C.S.R. § 77-4-2.4., which provides that:

> 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.

We also recognize that, as the United States Supreme Court made clear in Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), and Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (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, 510 U.S. at 21, 114 S. Ct. at 370, 126 L. Ed. 2d at 302.

Applying the law to the facts at bar, it is not difficult to conclude that Mr. Fluharty's threats against Ms. Voyle's person, his bizarre antics, such as circling her work area, and his apparent inability to control his anger and hostility towards her even after being warned by management, were sufficient to cause Ms. Voyle, and a reasonable person, to perceive her work environment to be abusive.

10. We conclude as a matter of law that Ms. Voyle gave sufficient notice to management of Mr. Fluharty's behavior to trigger respondent's duty to take prompt remedial action.

11. In determining whether an employer took direct and prompt action reasonably calculated to end unlawful harassment, one must apply common sense. Hanlon, 195 W. Va. 109, 464 S.E.2d 751. The response must be reasonable under the totality of the circumstances, including the severity and persistence of the harassment and the effectiveness of any initial remedial steps. We conclude as a matter of law that a remedial response being in the nature of an affirmative defense, the burden is on the employer to show by a preponderance of the evidence that it took prompt remedial action after being placed on notice of the harassment. Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996); 6 W. Va. C.S.R. §

77-4-3.2. ("As a defense, an employer may show that it took timely and appropriate corrective action regarding such conduct.")

12. We conclude as a matter of law that respondent did not prove by a preponderance of the evidence that it took prompt remedial action reasonably calculated to end the harassment. Our conclusions are based on the following:

(a) Ms. Voyle's harassment was severe and pervasive, as it occurred in and out of public areas where other workers witnessed and testified to its existence;

(b) When Ms. Voyle reported the severity of the harassment, the respondent should have discovered through a proper investigation that Mr. Fluharty was both threatening Ms. Voyle and harassing her on the basis of her national origin/ancestry;

(c) Respondent knew or should have known of the extent of Mr. Fluharty's harassment; and

(d) Respondent did not discharge Mr. Fluharty until October 1996, after Ms. Voyle filed formal charges with the Commission in June 1996, and one year and seven months after she first notified respondent of the harassment in March 1995.

RELIEF AND ORDER

Pursuant to the above Findings of Fact and Conclusions of Law, the West Virginia Human Rights Commission hereby ORDERS as follows:

1. Cease and desist order. The respondent shall cease and desist its discriminatory employment practices. Further, respondent shall post brightly colored, unobstructed, and prominently displayed notices at its premises indicating that respondent is an equal opportunity employer and that violations of the West Virginia

Human Rights Act may be reported to the West Virginia Human Rights Commission. Respondent shall submit copies of all of its federal and state EEO reports to the Human Rights Commission for the next two years, along with a list of the name and race of all applicants for employment. Finally, the Commission, by its designee, shall be allowed access to respondent's premises on a periodic, unannounced basis for up to two years to determine whether respondent is complying with the posting requirement.

2. Damages. Within 31 days of receipt of this Final Order the respondent shall pay to the complainant incidental damages in the amount of $3,277.45, for humiliation, embarrassment, and emotional distress suffered as a result of respondent's unlawful discrimination.

3. Attorney's fees and costs incurred by the complainant. Within 31 days of receipt of this Final Order the respondent shall pay to the complainant attorneys' fees in the amount of $9,030.00 and costs in the amount of $2,376.18.

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 28th day of May, 1998, in Charleston, Kanawha County, West Virginia.

NORMAN LINDELL
ACTING EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

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 West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity 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, person or entity 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.