



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

HUMAN RIGHTS COMMISSION

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*Via Certified Mail-
Return Receipt Requested*

September 4, 2014

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Re: Joann L. Meadows v. Petroleum Fueling, Inc., dba
Maxum Petroleum
Docket Number ES-329-11

Dear Parties:

Enclosed please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

“§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the administrative law judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact Marykaye Jacquet, Acting Director of the West Virginia Human Rights Commission at the above address.

Yours truly,



Allison Carroll Anderson
Administrative Law Judge

ACA/mst
Enclosure

cc: Marykaye Jacquet, Acting Director
Dr. Darrell Cummings, Chairperson
J. Robert Leslie, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOANN L. MEADOWS,

Complainant,

v.

**Docket No. ES-329-11
EEOC No. 17J-2011-00207**

**PETROLEUM FUELING, INC.,
d/b/a MAXUM PETROLEUM,**

Respondent.

FINAL DECISION

A Public Hearing, in the above-captioned matter, was convened on November 18 and 19, 2013, at the offices of the West Virginia Human Rights Commission in Charleston, West Virginia, before Allison Carroll Anderson, Administrative Law Judge.

The Complainant, Joann L. Meadows (hereinafter referred to alternatively as "Complainant" or "Meadows"), appeared in person and by Counsel, Jane Moran, Esq. The Respondent, Petroleum Fueling, Inc. d/b/a Maxum Petroleum (hereinafter referred to alternatively as "Respondent," or "PFI"), appeared in person by its representative, Peggy White, formerly Director of Human Resources, and by Counsel, Shantel B. Walker, Esq. and Justin M. Harrison, Esq. of the law firm of Bowles Rice, LLP. The parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof, and response briefs through February 5, 2014.

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 necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

I

STATEMENT OF THE CASE

The Complainant, Joanne Meadows, was hired by PFI on March 24, 2008, for the position of onsite fueler by Greg Bess, PFI's Director of Fleet Maintenance. Bess assigned Meadows to the Black Castle Mine site located in Boone County, West Virginia. It is undisputed that Meadows is the only female that has ever applied for or been hired to the position of fueler at the Black Castle Mine site. Meadows was terminated on December 22, 2010. During her tenure with PFI, Meadows alleged that she was subject to the following unlawful gender discrimination, hostile work environment and retaliatory discharge.

Upon the completion of Meadows' initial training period, Meadows began working primarily on the night shift, where she alleges that she was subjected to verbal harassment and malicious pranks by two (2) co-workers, Gus Crowder and an individual nicknamed "Cajun"

(last name unidentified). Meadows reported these incidents to her "lead man" Mike Monhollen on various occasions, but received no response.

Meadows eventually reported her concerns to Greg Bess, who visited the mine site and determined that Meadows was just "bickering" with Crowder. Bess advised Meadows and Crowder to "get along" without further action. Meadows continued to work with Crowder and "Cajun" off and on until October 6, 2008, when she permanently returned to day shift.

Thereafter, Meadows attempted to file a complaint regarding Crowder and "Cajun" with Massey supervisors. Given that she was not a Massey employee, her complaint was directed back to Greg Bess, who immediately traveled to the mine site with Human Resources Director Peggy White and conducted an investigation. Bess and White concluded that the allegations against Crowder were unfounded. However, in an attempt to avoid any further conflict, Crowder's work schedule was changed so that he and the Complainant would have no chance to interact. A few days later, Crowder was transferred to a completely different mine site. Meadows never worked with Gus Crowder or "Cajun" again during her employment with PFI.

Meadows testified that after October 6, 2008, she did not experience any further gender-based harassment from her co-workers, with two (2) limited exceptions: (1) the lack of adequate female restroom facilities and (2) an altercation with co-worker, Mark Vint, which occurred on June 23, 2009. With regard to the issue of restroom facilities, the record demonstrates that from the beginning of Meadows' employment in March 2008 until January 2009, PFI fuelers did not have restroom facilities available and therefore would relieve themselves "behind a pile of tires or over the bank." In January 2009, one (1) unisex portable toilet was installed for PFI employees. Meadows asked for a separate portable toilet for female use, which was provided approximately two (2) weeks later.

The male PFI employees were advised not to enter the restroom designated for Meadows' use, but repeatedly ignored the directive. In order to prevent these occurrences, Meadows was permitted to put a lock on the toilet door, but the lock was removed. While the facility was unlocked, someone smeared feces on the wall and threw Meadows' feminine hygiene products into the toilet. Meadows initially complained to Greg Bess, then two (2) days later, notified Massey administrators. On that date, the facility was replaced.

In June 2009, Meadows became involved in an altercation with a co-worker named Mark Vint in the PFI fuelers' trailer. During that incident, she alleges that Vint became very angry with her and assumed a threatening position by "bowing out his chest." Meadows became frightened and called over the mine's two-way radio for "a boss," and Massey supervisor Shawn Rubin responded to the situation. Thereafter, Vint was fired for his behavior. Meadows was also reprimanded for the incident because she called for a Massey supervisor and failed to follow PFI's chain of command.

Meadows had an extensive disciplinary history during her employment with PFI, with five (5) written reprimands and one (1) letter placed in her file prior to her termination, for various instances of insubordination and/or failure to follow the PFI chain of command. The Complainant alleges that she was improperly targeted for discipline because of her gender and the fact that she made numerous complaints about the safety of PFI's fuel trucks. Further, Meadows testified that PFI's employees would not "take her word for it" when she reported a malfunctioning vehicle.

On December 21, 2010, Meadows refused to fuel a vehicle which was located in her assigned area of responsibility. Meadows asserted to "lead man" Mike Monhollen and her immediate supervisor, Howard Bias, that someone else could complete the fuel run because she

was taking her unpaid lunch break. As a result, her supervisor, Bias, completed the fuel run and reported her refusal to fuel. Based upon her disciplinary history and the refusal to fuel, Bess made the decision to terminate Meadows the following day.

II

PARTIES' CONTENTIONS

On March 9, 2011, Meadows filed a Complaint against PFI with the West Virginia Human Rights Commission (hereinafter referred to as "the Commission"), based upon allegations that the Respondent violated the West Virginia Human Rights Act, W. Va. Code §5-11-1, *et seq.* Specifically, Meadows alleges that, during the course of her employment, the Respondent unlawfully discriminated against her on the basis of her gender and further, that she was subjected to a hostile work environment. Meadows also alleges that she was wrongfully terminated in reprisal for various safety complaints and a refusal to fuel a vehicle during her unpaid lunch break.

The Respondent, PFI, denies the allegations that Meadows was subjected to unlawful gender discrimination or a hostile work environment. The Respondent further contends that, even if assuming *arguendo*, that Meadows has demonstrated a claim of sexual harassment and hostile work environment, her claim would be barred by the applicable one-year statute of limitations because the alleged harassment by co-workers, Gus Crowder and "Cajun," ended no later than October 6, 2008. Meadows' claim was not filed until more than two (2) years later on March 9, 2011.

With regard to the reprisal claim, PFI contends that Meadows' termination was proper following multiple written reprimands and disciplinary action for insubordination and failure to follow company policy and procedure, culminating in a refusal to perform a fueling request

despite an order from her direct supervisor. Further, PFI argues that the reprisal claim is beyond the scope of this Tribunal's jurisdiction because the West Virginia Human Rights Act does not provide a cause of action for an employee allegedly discharged for reporting safety violations.

III

SUMMARY OF DECISION

Looking at the record as a whole, the totality of the circumstances and the case law, Meadows fails to prove, by a preponderance of the evidence, a claim of gender discrimination against PFI. The evidence of record demonstrated that Meadows' termination on December 22, 2010, was the result of her extensive disciplinary record and her refusal to fuel following a direct order from a supervisor. Therefore, Meadows has failed to demonstrate a *prima facie* case of gender discrimination.

Likewise, Meadows has failed to prove by a preponderance of the evidence that her termination constituted a retaliatory discharge pursuant to W.Va. Code §5-11-9(7)(C). Meadows has failed to demonstrate any nexus between her complaints of gender discrimination during the first year of her employment with PFI and her subsequent termination almost two (2) years later.

To the extent Meadows claims that her termination constituted an unlawful reprisal for complaints concerning equipment safety, those claims are beyond the scope of the West Virginia Human Rights Act and this Tribunal's jurisdiction.

Finally, although Meadows has demonstrated a *prima facie* case of sexual harassment/hostile work environment, the events at issue occurred on or before October 6, 2008. As a result, her claim is time barred by the one (1) year statute of limitations found in W.Va. Code §5-11-10.

IV

FINDINGS OF FACT

1. Complainant, Joanne Meadows, was employed by PFI as an on-site fueler at its Black Castle Mine site location. [Tr. Vol. I, pp. 6-7]
2. Respondent, PFI, provides equipment-fueling services at the job sites of its customers. During Complainant's employment, the company provided fueling services to Massey Energy Co. (hereinafter referred to as "Massey"), as an on-site independent contractor at Massey's Black Castle Mine site. [Tr. Vol. II, pp. 6-7]
3. Gregory Bess served as the Director of Fleet Maintenance for PFI, and was the supervisor of all PFI employees at the Black Castle Mine site. [Tr. Vol. I, p. 16, Tr. Vol. II, p. 117]
4. Bess was responsible for Meadows' hiring, firing and discipline. [Tr. Vol. I, p. 97, Tr. Vol. II, pp. 176-177]
5. Peggy White was the Director of Human Resources for PFI during Meadows' employment. [Tr. Vol. II, p. 5]
6. Meadows was under the direction and/or supervision of various individuals during her employment including, but not limited to, "lead man" Mike Monhollen, Howard Bias, James Johnson, as well as Bob Richards. [Tr. Vol. I, p. 48, 66, Tr. Vol. II p. 149]
7. On or about March 2008, Meadows applied for a position as an on-site fueler with PFI at the company's corporate headquarters in Belle, West Virginia.¹ [Tr. Vol. I, pp. 14-16]

¹ The town of Belle is located in Kanawha County, West Virginia, approximately twenty-four (24) miles from the Black Castle Mine site in Seth, West Virginia.

8. An on-site fueler is required to refuel all of the diesel-powered equipment on the mine site. Specifically, this requires the fueler to drive a PFI fuel truck to various areas of the mine, connect the fuel hose to the diesel vehicle, and disconnect when the fueling is completed.

[Tr. Vol. I, pp. 17-18, Respondent's Exhibit. 5]

9. Fuelers were assigned areas of responsibility throughout the mine site. [Tr. Vol. II, p. 127]

10. It would be the fueler's responsibility to make an initial fuel run to his or her assigned area during the first part of a shift, and then at the end of the shift the fueler would make a second run to ensure that all of the equipment in his or her area had sufficient fuel. [Tr. Vol. II, pp. 127-128]

11. Fuelers would typically have three to four (3-4) hours between fuel runs, which was known as "down time," in which they were being paid but not assigned any specific tasks. [Tr. Vol. II, p. 128]

12. Approximately two (2) weeks later, on March 24, 2008, after submitting her application, Greg Bess contacted Meadows and requested that she come to his office. [Tr. Vol. I, p. 15]

13. Bess conducted a brief interview and hired Meadows "on the spot" for \$11.05 per hour. [Tr. Vol. I, pp. 17, 97, Tr. Vol. II, pp. 120-121]

14. Bess testified that he found Meadows to be an attractive candidate for the position because of her current CDL license and previous experience with commercial vehicles. [Tr. Vol. II, p. 121]

15. It is undisputed that Meadows is the only female that has ever applied for employment as a fueler with the company's southern district and Bess informed Meadows of this fact during the interview process. [Tr. Vol. I, p. 15, Tr. Vol. II, p. 120]

16. Upon hiring Meadows, Bess informed her that she would be given a thirty-minute unpaid lunch break, which was to be taken sometime during the fuelers' "down time" between fuel runs. [Tr. Vol. I, pp. 24-25]

17. Meadows was assigned to the Black Castle Mine site and provided with eight (8) hours of safety training and a PFI Employee Handbook. [Tr. Vol. I, pp. 100-102, Respondent's Ex. 1]

18. The PFI Employee Handbook provided that "harassment, discrimination or retaliation in any form, including verbal, physical and visual harassment is prohibited." [Complainant's Exhibit 1, p. 18]

19. The PFI Handbook set forth the company's sexual harassment policy. Under the heading "Responsibility of Employees," it provided the following reporting procedure:

It is the responsibility of each employee to assure that the discrimination on any of these bases or that prohibited harassment or prohibited retaliation does not occur within the workplace. If any employee believes that any kind of illegal harassment, discrimination or retaliation is occurring, that employee shall immediately report the facts of the incident(s) and the name(s) of the party(ies) involved to his or her Manager or the Human Resources Department. If the Manager or Human Resources Department is unavailable, or if the employee feels it would be inappropriate to contact these people, the employee should contact another member of management or a Regional President. Additionally, employees may utilize our confidential Ethics Hotline at 1-877-435-0053....

[Complainant's Exhibit 1]

20. Meadows affixed her signature to a statement confirming that she had read and understood the handbook in its entirety. [Tr. Vol. I, p. 101]

21. Meadows also received a company-wide telephone list, which contained the contact information for Bess and PFI's headquarters in Belle, West Virginia. [Tr. Vol. I, p. 100]

22. Meadows initially underwent approximately two (2) weeks of training on day shift with "lead man" Mike Monhollen. [Tr. Vol. I, pp. 25-26]

23. Meadows testified that she did not experience any discrimination or harassment during that time. [Tr. Vol. I, pp. 114-115]

24. Thereafter, Meadows was placed primarily on night shift until October 6, 2008. Bess testified credibly that most new employees begin to work the night shift once their training is complete. [Tr. Vol. II, p. 132]

25. Meadows alleged that she was the only PFI employee required to switch between day shift and night shift. [Tr. Vol. I, pp. 38-39] To the extent this statement conflicts with her testimony that she primarily worked on day shift after October 6, 2008, this statement is not credible.

26. Meadows acknowledged during her testimony that she was not guaranteed a specific shift when hired nor was the night shift any harder or worse than day shift. [Tr. Vol. I, pp. 109-113]

27. Meadows remained primarily on night shift for approximately four (4) months, until she was permanently switched to day shift on October 6, 2008. [Tr. Vol. I, p. 31]

28. Meadows testified that another male employee with less seniority, Jamie Neary, was allowed to remain on the day shift at the end of his training. [Tr. Vol. I, p. 114]

29. Bess testified credibly that Neary remained on day shift because he required additional training as a fueler and training occurred on day shift. [Tr. Vol. II, p. 133]

30. Meadows was returned permanently to the day shift on October 6, 2008, and remained there until her termination on December 22, 2010. [Tr. Vol. I, p. 31]

31. Meadows testified credibly that she never heard Bess make any derogatory statements relating to her gender in any way. [Tr. Vol. I, pp. 208-209]

32. Further, Meadows testified that no supervisor ever made any derogatory statement regarding her gender or said anything to her of a sexual nature during her employment with PFI. [Tr. Vol. I, pp. 209-210]

Allegations of Hostile Work Environment

33. During the time period in which Meadows remained on night shift, from April 2008 through October 6, 2008, Meadows testified credibly that she experienced verbal harassment from two (2) co-workers, Gus Crowder, and an individual identified only as "Cajun."

34. During Meadows' first night shift, Meadows testified credibly that "Cajun" blocked her entry into the fuelers' trailer, stating, "there has never been a woman worked [sic] here and never will." [Tr. Vol. I, p. 30]

35. Meadows reported the incident to "lead man" Mike Monhollen, with the understanding that the incident would be reported to Bess. [Tr. Vol. I, p. 32]

36. Meadows did not hear anything further concerning the incident. [Tr. Vol. I, p. 32]

37. Meadows testified credibly that during another night shift, "Cajun" remarked to a co-worker "you think you are going to get that p***y first, you're crazy, because I am." [Tr. Vol. I, pp. 34-35]

38. Meadows testified credibly that "Cajun" repeatedly warned her that "this is a man's environment." [Tr. Vol. I, p. 37]

39. Meadows testified credibly that she once found the seat of her fuel truck covered in grease. [Tr. Vol. I, pp. 35-36]

40. When asked if he was responsible, Meadows testified credibly that "Cajun" replied, "if you are going to work in a man's environment, you're going to have to do the men's jokes." [Tr. Vol. I, pp. 36- 37]

41. Meadows testified credibly that she reported this incident to Mike Monhollen but received no response. [Tr. Vol. I, p. 37]

42. Meadows testified credibly that "Cajun" repeatedly made Meadows the focus of jokes about being a woman. [Tr. Vol. I, p. 37]

43. Meadows testified credibly that she repeatedly advised Mike Monhollen of her issues with "Cajun," with the understanding that Monhollen would pass along her concerns to Bess. [Tr. Vol. I, p. 37]

44. "Cajun" also took part in malicious pranks with fellow employee Gus Crowder. On several occasions while Meadows was out fueling during the night, "Cajun" would drive Gus Crowder out to her location. [Tr. Vol. I, pp. 40, 120]

45. Once there, in the poorly lit areas, Gus Crowder would approach her unobserved and touch Meadows on the shoulder in order to frighten her. As a result, Meadows would be so concerned for her safety that she would leave the fueling job unfinished and return at a later time, in order to avoid being on the mountainside alone with Crowder. [Tr. Vol. I, pp. 40, 120]

46. Meadows reported these incidents to Mike Monhollen, but no further action was taken. [Tr. Vol. I, p. 41]

47. Meadows also testified to verbal harassment from Gus Crowder. Meadows testified that on one (1) occasion, she was attempting to leave the fuelers' trailer when Crowder stated, "ain't no white b***h going to walk by me and not f**k me." [Tr. Vol. I, p. 39]

48. Meadows reported this incident to Mike Monhollen, but no further action was taken. [Tr. Vol. I, p. 40]

49. Crowder made remarks concerning Meadows' sexuality. [Tr. Vol. I, p. 41]

50. On one occasion, Gus Crowder asked Meadows about her sexuality and she informed Crowder that she was a lesbian. In response, Crowder told her "I can turn you straight." [Tr. Vol. I, p. 41]

51. Meadows again reported Crowder's behavior to Mike Monhollen. [Tr. Vol. I, p. 43]

52. Meadows testified credibly that she reported Gus Crowder's behavior to Bess personally on two (2) different occasions during Bess's weekly safety meetings with the PFI fuelers. [Tr. Vol. I, p. 121]

53. According to Meadows, Bess indicated that Mike Monhollen had already discussed the issues with him and that Bess would "take care of it." [Tr. Vol. I, p. 123]

54. At some time thereafter, Bess testified that he visited the mine site in order to speak with both Meadows and Crowder to investigate Meadows' complaints. [Tr. Vol. II, pp. 137-138]

55. Bess spoke with Meadows and Crowder separately, and determined that Meadows was not in any danger from Crowder. [Tr. Vol. II, p. 140]

56. Bess informed Meadows and Crowder that he wanted them to "all get along" and at that point, Bess considered the matter resolved. [Tr. Vol. II, p. 140]

57. Meadows continued to work with Crowder and “Cajun” on night shift for a total of four (4) months. [Tr. Vol. I, p. 125]

58. Following her return to day shift, Meadows briefly went back to night shift for one (1) week from September 29, 2008 through October 6, 2008. [Tr. Vol. I, pp. 128-129]

59. Meadows testified that she did not experience any harassment during this time because she largely avoided the fuelers’ trailer. [Tr. Vol. I, pp. 129-131]

60. October 6, 2008, is the last time Meadows worked with either Gus Crowder or “Cajun.” [Tr. Vol. I, p. 133]

61. Meadows testified that she did not experience any sexual or gender-based harassment while working the day shift. [Tr. Vol. I, pp. 132-133, 209-215]

62. In November 2008, Meadows was approached by Steven Davis, the Safety Director of Massey Energy, concerning a previous request to file a complaint against Crowder and “Cajun.” [Tr. Vol. I, pp. 134-135]

63. Meadows was not working with either Crowder or “Cajun” at the time. [Tr. Vol. I, p. 139]

64. Steven Davis provided Meadows with a form to complete regarding her complaints. [Tr. Vol. I, p. 139]

65. Meadows filled out the form, which was not generated by PFI, and listed two (2) incidents which had occurred near the beginning of her employment – *i.e.*, that “Cajun” told her this was “man’s” work and that Crowder told her “no white b***h was going to walk past him.” [Tr. Vol. I, p. 140]

66. Meadows returned a copy of the form to Davis. [Tr. Vol. I, p. 140]

67. Employees of Massey contacted Bess and advised him of Meadows' complaint.
[Tr. Vol. II, pp. 141-142]

68. Bess and White traveled to the mine site that same afternoon to conduct an investigation into the allegations. [Tr. Vol. II, pp. 33, 143]

69. Bess and White remained on the work site until approximately 1:00 or 2:00 a.m. speaking to PFI employees. [Tr. Vol. I, p. 141, Tr. Vol. II, p. 42]

70. White took written statements during the investigation, but these statements were destroyed shortly after the incident. [Tr. Vol. II, pp. 49-50, 71-72]

71. Bess and White determined that Meadows' allegations could not be substantiated.
[Tr. Vol. II, p. 145]

72. However, Bess testified that in order to make Meadows more "comfortable," he decided to move Crowder to a different shift than Meadows. [Tr. Vol. II, pp. 145-146]

73. Shortly thereafter, Bess reconsidered his decision and moved Crowder to a completely different mine site, over Crowder's objection. [Tr. Vol. II, p. 46]

74. Meadows did not work with Crowder or "Cajun" again after the investigation.
[Tr. Vol. I, p. 142]

75. Meadows also testified concerning the lack of toilet facilities at the Black Castle Mine site. [Tr. Vol. I, pp.43-44]

76. When Meadows began working at the mine site, there were neither male nor female restroom facilities. [Tr. Vol. I, pp.43-44]

77. Fuelers relieved themselves "behind a pile of tires or over the bank." [Tr. Vol. I, p. 43]

78. In January 2009, approximately ten (10) months after Meadows began working for PFI, a portable unisex toilet facility was placed on the site. [Tr. Vol. I, p. 43]

79. Meadows requested to Mike Monhollen that a separate, female-only facility be installed and this request was granted two (2) weeks later. [Tr. Vol. I, p. 44]

80. Thereafter, it was undisputed that Bess advised the male fuelers to stay out of Meadows' toilet. [Tr. Vol. I, p. 44]

81. The other fuelers initially ignored Bess' directive and continued using Meadows' toilet. [Tr. Vol. I, pp. 44-45]

82. When Meadows complained to Bess, he gave her permission to put a lock on the door of the facility. [Tr. Vol. I, pp. 44-45]

83. However, the lock on Meadows' portable toilet facility was repeatedly tampered with until it had to be cut off of the door. [Tr. Vol. I, p. 45]

84. Shortly after the lock was removed, someone smeared feces on the wall of the bathroom and placed Meadows' sanitary napkins in the toilet. [Tr. Vol. I, p. 45]

85. Meadows testified that she reported the vandalism to Bess, but no action was immediately taken. [Tr. Vol. I, p. 46]

86. Two (2) days later, she reported the vandalism to a Massey supervisor. The facility was replaced that day by PFI. [Tr. Vol. I, p. 46]

87. Bess testified that he did not receive any further complaints concerning the portable toilet after he advised Meadows to add the lock. [Tr. Vol. II, pp. 212-213] Given the undisputed fact that PFI paid for the portable toilet facility, and that it was ultimately replaced, Bess' testimony is not credible as to this issue.

88. A few months later, on June 23, 2009, Meadows became engaged in a verbal altercation with co-worker Mark Vint in the fuelers' trailer. Another co-worker, Jamie Pfizer, was also present although he took no part in the incident. [See Respondent's Exhibit 7]

89. Although there was conflicting evidence as to whether Meadows started the disagreement, it was undisputed that at some point during the confrontation Mark Vint and Meadows were "nose to nose." [Tr. Vol. I, pp. 169-170, Respondent's Exhibit 7]

90. At that juncture, Meadows testified that she became afraid for her safety and walked away to call for a supervisor over the two-way radio. [Tr. Vol. I, pp. 169-170]

91. According to Meadows, Mark Vint made a comment to the effect of "what are you going to do, call your boyfriend?" (referring to Massey supervisor, Shawn Rubin). [Tr. Vol. I, p. 175]

92. Massey Supervisor Shawn Rubin responded to the call, even though he was not employed by PFI. [Tr. Vol. I, p. 173]

93. According to Meadows, she told Shawn Rubin about Mark Vint's comments, including his statement that Rubin was her boyfriend, and Rubin intervened in the altercation, advising that "you all's [sic] always picking on Joann and I'm sick of it...it's going to stop one way or another." [Tr. Vol. I, pp. 175-176]

94. Thereafter, Meadows, Shawn Rubin and co-worker Jamie Pfizer all exited the fuelers' trailer. [Tr. Vol. I, p. 177]

95. As a result of the incident, Bess terminated Mark Vint for his conduct toward Meadows. [Tr. Vol. II, p. 150]

96. Meadows was also reprimanded for failing to follow the PFI chain of command in that she called Massey supervisor Shawn Rubin instead of one of the PFI supervisors. [Tr. Vol. II, pp. 55-56, Complainant's Exhibit 4]

Meadows' Interaction with Her Coworkers

97. Meadows also alleges that throughout her employment at PFI, the male fuelers refused to cooperate with her in the performance of her job duties. In support of her allegation, she testified regarding one specific occasion, in which she was called to fuel equipment and realized she would need an additional tank of fuel. Meadows therefore called for assistance over the two-way radio several times but received no response. Massey employee Titus Bryant volunteered to go back to the fuelers' trailer to obtain the equipment. [Tr. Vol. I. p. 348]

98. Bryant testified that when he arrived at the trailer, he found three or four (3-4) other fuelers between runs and asked why they had not responded to the calls for assistance. He testified that the fuelers advised him they were "on lunch." [Tr. Vol. I. p. 348]

99. PFI employees James Pfizer and Jefferson Selby testified credibly that Meadows would on occasion engage in sexually explicit conversations. [Tr. Vol. II, pp. 280-282, 309, 311]

100. Meadows admitted that she openly discussed her sexuality with her co-workers. [Tr. Vol. I, p. 211]

101. This included discussions concerning the fact that Meadows is a lesbian and details concerning her sexual relations. [Tr. Vol. I, pp. 212-213]

102. Additionally, Pfizer testified that Meadows often displayed hostile behavior toward other employees, would get angry, cuss, and yell. [Tr. Vol. II, p. 288]

103. Meadows threatened to fight other employees and would often say she "wasn't afraid of no man." [Tr. Vol. II, p. 283]

Meadows' Safety Complaints

104. Meadows testified credibly that after October 6, 2008, her primary complaints to her supervisors related to safety concerns about PFI fuel trucks. [Tr. Vol. I, p. 215]

105. PFI follows specific safety procedures with regard to the condition of the fuel trucks. All PFI employees are required to inspect their vehicles prior to driving and to “red tag” (*i.e.*, remove from service) any vehicle deemed unsafe or in need of repair. [Tr. Vol. I, pp. 155-156.]

106. Meadows alleges that she made complaints about the safety of PFI’s vehicles and that the other employees did not “take her word for it” with regard to those complaints. [Tr. Vol. I, pp. 155-157]

107. Meadows testified, however, that a mechanic always evaluated her concerns and that “sometimes” trucks were taken out of service as a result. [Tr. Vol. I, pp. 157-158]

108. Meadows testified that she was never required to drive an unsafe truck during her employment with PFI. [Tr. Vol. I, p. 158]

109. Meadows admitted that she never filed any safety complaints with any agency such as MSHA, OSHA or any other regulatory body. [Tr. Vol. I, p. 159]

Meadows' Disciplinary History

110. Throughout the course of her employment, Meadows was rated as “meeting expectations” with regard to her work performance. [Respondent’s Exhibit 1]

111. However, despite her satisfactory performance of her duties, Meadows was reprimanded a total of six (6) times prior to termination for incidents of insubordination and/or failure to follow company policy with regard to the chain of command. [Tr. Vol. II, p. 148]

112. First, on August 22, 2008, Meadows received a written reprimand for leaving a fuel truck unattended at the Georges Branch area of the Black Castle Mine site at the end of her shift. [Complainant's Exhibit 3]

113. Meadows testified that she drove the fuel truck to the Georges Branch security station at the bottom of the hill because her personal vehicle was not running. [Tr. Vol. I, p. 53]

114. At the bottom of the hill, Meadows exited the vehicle and turned it over to co-worker Scott Hubbard, whose fuel truck had broken down near the station. Hubbard entered the truck and drove it back up the hill to use for work that night. [Tr. Vol. I, p. 53]

115. Although Meadows testified that she only left the truck unattended for a short amount of time, Bess testified credibly that there are only certain areas of the mine in which fuel trucks may be parked due to concerns about fuel leakage on the mine site. It was within the normal course of business for an employee to be reprimanded for parking a truck outside of the designated area. [Tr. Vol. II, p. 149]

116. Bess further testified that both Meadows and her "lead man" Mike Monhollen were disciplined as a result of the incident. [Tr. Vol. II, p. 196]

117. On August 22, 2008, Meadows also received a written reprimand for failing to reduce her hours as instructed by her supervisor. [Complainant's Exhibit 3]

118. In the written report, Meadows wrote, "I do not think it is fair for my hours to be cut because the way I have been treated by two (2) of your employees." Meadows testified that her statement referred to the harassment of Gus Crowder and "Cajun." [Tr. Vol. I, pp. 56-57; Complainant's Exhibit 3]

119. As a result of the reprimand, Meadows was instructed to clock out that day at 5:00 p.m. and to take off the following Saturday and Sunday. [Complainant's Exhibit 3]

120. On June 23, 2009, Meadows received a written reprimand and three (3) days suspension without pay for failing to follow company policy in connection with the verbal altercation with Mark Vint. [Complainant's Exhibit 4]

121. The Supervisor's Personnel Report, authored by Bess, states:

Joann has been instructed in the past if any problems occur to notify her supervisor or somebody at the Petroleum Fueling, Inc. office. On Friday night instead of contacting her supervisor she called a Massey foreman for her problems. This is a violation of company policy and will not be tolerated. Any further actions like this can lead to disciplinary action up to and not excluding discharge.

[Complainant's Exhibit 4]

122. Meadows testified that she was afraid for her safety and so she called for "a boss" on the two-way radio. In the Supervisor's Personnel Report, she wrote:

I was afraid for my safety for what Mark Vint could have done to me that night on 6-19-09 because he was really mad at me. That was why I called for Shawn Rubin so nothing serious would have happen to me and I called Ronald Legg and told him what happen [sic]. I was afraid because they was [sic] no bosses around.

[Complainant's Exhibit 4]

123. On September 19, 2009, Meadows was cited by Bess and again given three (3) days suspension without pay for failing to wear proper safety equipment. [Tr. Vol. I, pp. 179-181, Complainant's Exhibit 5]

124. Meadows testified that Massey supervisor Tom Beasley told her that it was unnecessary to wear safety equipment when near the fuelers' trailer. [Tr. Vol. I, p. 179]

125. However, Beasley testified credibly that he never told Meadows she could forego wearing her safety equipment, nor was she in fact permitted to forego her safety equipment outside of the fuelers' trailer. [Tr. Vol. I, p. 311]

126. Meadows also testified that Mike Monhollen advised her that she did not need to wear safety equipment while adjacent to the trailer. [Tr. Vol. I, p. 311]

127. The record demonstrates, however, that Mike Monhollen was one (1) of three (3) other male PFI employees to receive reprimands and suspensions for failure to wear proper safety equipment during the same time period. [Tr. Vol. I, pp. 181-182]

128. Two (2) other male employees in fact received greater punishment than Meadows--one (1) male employee was terminated and another was suspended for five (5) days. [Tr. Vol. I, p. 183]

129. On January 29, 2010, Meadows received a letter in her personnel file for statements made during a safety meeting held by Massey supervisors. [Complainant's Exhibit 6]

130. Meadows testified that during a mandatory safety meeting at the Black Castle Mine site she asked Massey personnel whether PFI employees could be fired for refusing to drive an unsafe truck. [Tr. Vol. I, pp. 152-153]

131. Massey supervisors contacted Bess shortly thereafter concerning her statements. As a result, Meadows was asked to come to the Belle, West Virginia headquarters for a meeting with Bess and Human Resources Director Peggy White, to discuss her statements during the training session. [Tr. Vol. I, p. 159]

132. During the meeting, Bess told Meadows that she was a valued employee and that any complaints would be taken seriously. [Tr. Vol. I, p. 161]

133. Meadows testified that often she did not take her complaints to Bess because her co-workers discouraged it. [Tr. Vol. I, p. 162]

134. However, during the meeting Bess gave her permission to skip the PFI chain of command and contact him directly with any problems. [Tr. Vol. I, p. 163]

135. Meadows admitted that, prior to the January 29, 2010, safety meeting, she never reported to Bess or anyone else at PFI that she had been required to drive an unsafe truck. [Tr. Vol. I, p. 154]

136. Meadows testified that prior to January 29, 2010, any issues she had with the fuel trucks were discussed solely with Mike Monhollen or the mechanics. [Tr. Vol. I, p. 155]

137. Meadows admitted that on one prior occasion, she called Bess regarding a truck and he told her, "if a truck is unsafe, you do not have to drive it." Following that conversation, she told Mike Monhollen that she would not drive a truck that was unsafe. [Tr. Vol. I, p. 155]

138. Prior to the conclusion of the January 29, 2010, meeting, Meadows was told that if she violated the chain of command and reported any complaints to Massey again that she would be terminated. [Tr. Vol. I, p. 161] A letter was thereafter placed in her file memorializing the conversation. [Complainant's Exhibit 6]

139. On December 7, 2010, Meadows received her final reprimand prior to termination. She was suspended for three (3) days without pay for failing to report an absence from work. [Complainant's Exhibit 10]

140. Meadows denied that she failed to contact her supervisor and testified that she called the guard shack that morning to report her absence. [Tr. Vol. I, pp. 187-188]

141. Meadows admitted however, that she knew she was supposed to contact a supervisor regarding any absence, and that she never attempted to speak with her immediate supervisor, Howard Bias, that day. [Tr. Vol. I, pp. 188-189]

142. Meadows was also fully aware that the security guard with whom she spoke was not a PFI employee. [Tr. Vol. I, p. 190]

143. Bess testified credibly that his decision to discipline Meadows on each of the foregoing occasions was not based on her gender. [Tr. Vol. II, p. 177] Bess further testified that he did not reprimand Meadows in retaliation for her safety complaints. [*Id.*]

144. Based upon the foregoing evidence of record, several male employees were disciplined for offenses similar to those committed by Meadows. [Tr. Vol. II, pp. 54-63, Respondent's Exhibit 6]

145. The record demonstrates that Meadows was afforded a great deal of leniency by Bess during her employment with respect to discipline. [Tr. Vol. II, pp. 63-64.] Bess testified credibly that she received more written reprimands than any other employee at the mine site during her time with PFI. [Tr. Vol. II, p. 156] No other employee was given as many write-ups as Meadows without being terminated. [Tr. Vol. II, p. 155-156]

Ms. Meadows Termination from Employment

146. On December 21, 2010, an equipment operator from Massey requested that PFI deliver fuel to an 830-rock truck. [Tr. Vol. II, p. 220]

147. Meadows, as well as Mike Monhollen and Howard Bias, her immediate supervisor, were on "down time" between fueling runs when they received the request. [Tr. Vol. I, pp. 81-82]

148. Meadows admitted that PFI employees were often required to fuel during their "down time" between fuel runs and that she had done so in the past. [Tr. Vol. I, pp. 195-196]

149. Meadows and Bias offered conflicting testimony as to whether Meadows was finished with her lunch at the time the call came in, but it is undisputed that employees are

guaranteed a thirty minute unpaid lunch break as set forth in the PFI Employee Handbook. [Tr. Vol. II, p. 210, Respondent's Exhibit 1]

150. However, Bias testified that Meadows had finished eating her lunch and was asleep in PFI's trailer when the fueling request was received. [Tr. Vol. II, p. 223]

151. Mike Monhollen received the request and told Meadows that the truck needed to be fueled. [Tr. Vol. II, p. 220]

152. The 830-rock truck in question was in an area adjacent to the section for which Meadows was responsible that day. [Tr. Vol. I, pp. 199-200, Tr. Vol. II, pp. 221-222]

153. It is undisputed that Meadows refused to fuel the 830-rock truck. [Tr. Vol. II, p. 223, Complainant's Exhibit 11]

154. Bias testified credibly that Meadows stated she was not "f**king doing it," which Meadows denied. [Tr. Vol. I, p. 203]

155. Meadows admitted that she said, "what's wrong with you, you done ate your lunch," and "there are three people sitting here, why can't one of you go and fuel the truck." [Tr. Vol. I, pp. 193, 202]

156. Her direct supervisor, Howard Bias, was present during the exchange and Meadows testified that she included him in her statement referencing the three (3) people sitting there who could fuel the vehicle. [Tr. Vol. I, p. 203]

157. Monhollen and Bias both told Meadows that the rock truck was in her area of responsibility. [Tr. Vol. II, p. 224]

158. Nevertheless, Meadows testified that she did not get up to fuel the vehicle because she believed she was on her lunch break. [Tr. Vol. I, p. 204]

159. As a result, Bias fueled the vehicle without any assistance from Meadows. [Tr. Vol. I, p. 206, Tr. Vol. II, p. 224]

160. Meadows was still sitting in the trailer when Bias returned from fueling the vehicle a short time later. [Tr. Vol. I, p. 206]

161. Meadows testified that when Howard Bias returned to the trailer, he said, "you better make sure you get all kinds of fuel in that truck...because not a damned soul is going to come help you this evening." [Tr. Vol. I, p. 83]

162. The next day, Supervisor James Johnson met Meadows at the guard shack and advised her of her termination. [Tr. Vol. I, pp. 83-84]

163. Meadows testified that she knew refusing to fuel was an offense for which she could be fired. [Tr. Vol. I, p. 192]

164. Bias testified credibly that he himself had been interrupted during lunch breaks to fuel and frequently observed the interruption of other male fuelers during lunch breaks. [Tr. Vol. II, pp. 249-251]

165. Meadows also admitted that she knew that male employees had been fired for refusing to fuel. [Tr. Vol. I, p. 192]

166. It was undisputed that Bess had terminated an entire shift of male employees at the Progress Mine site for refusing to fuel. [Tr. Vol. II, pp. 175-176]

167. Further, this was not the first time Meadows had refused to fuel equipment. [Tr. Vol. II, p. 171]

168. Her co-worker Jamie Pfizer testified credibly that he had observed Meadows' refusal to fuel several times in the past. [Tr. Vol. II, pp. 290, 303]

169. Meadows was terminated on December 22, 2010. [Tr. Vol. I, p. 14]

170. The decision to terminate was made by Bess, in consultation with Human Resources Director, Peggy White. [Tr. Vol. II, pp. 63, 172]

171. Bess testified credibly that his decision to terminate Meadows was based on her disciplinary history and her refusal to fuel the 830-rock truck on December 21, 2010. [Tr. Vol. II, pp. 172-173, 176]

V

DISCUSSION

A. Complainant Has Failed to Establish a *Prima Facie* Case of Gender Discrimination by PFI.

The West Virginia Human Rights Act forbids discrimination against persons on the basis of their sex. West Virginia Code §5-11-9(1) makes it unlawful; “For any person, employer, . . . to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment . . .” West Virginia Code §5-11-3(h) defines discriminate or discrimination as “to exclude from, or fail or refuse to extend to, a person equal opportunities because of . . . sex”

In order to prove a *prima facie* case of discrimination under the Act, the Complainant must show:

- (1) That the Complainant is a member of a protected class.
- (2) That the employer made an adverse decision concerning the Complainant.
- (3) But for the Complainant's protected status, the adverse decision would not have been made.

See Syl. Pt. 3, *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986). *Mayflower Vehicle Systems, Inc. v. Cheeks*, 218 W.Va. 703, 713-714, 629 S.E.2d 762, 772 - 773 (2006).

A discrimination case may be proven under a disparate treatment theory, which requires that the Complainant prove a discriminatory intent on the part of the Respondent. The Complainant may prove discriminatory intent by a three-step inferential proof formula first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); and adopted by the West Virginia Supreme Court of Appeals in *Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Under this formula, the Complainant must first establish a *prima facie* case of discrimination; the Respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the Complainant must show that the reason proffered by the Respondent was not the true reason for the decision, but rather pretext for discrimination.

The United States Supreme Court has made it clear that the *McDonnell Douglas* test is not the exclusive method by which a plaintiff or Complainant may establish a *prima facie* case. *Teamsters v. United States*, 431 U.S. 324, 358, (1977). The Complainant may meet her initial burden simply by “offering evidence adequate to create an inference that an employment decision was based on discriminatory criterion illegal under the Act,” *i.e.*, evidence that indicates that “it is more likely than not” that the employer’s actions were based on unlawful considerations. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 576 (1978).

The term “pretext” has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason: false appearance or pretense. *West Virginia Institute of Tech.*

v. West Virginia Human Rights Comm'n, 181 W. Va. 525, 531, 383 S.E.2d 490, 497 (1989). A proffered reason is pretext if it is not the true reason for the decision. *Conaway v. Eastern Associated Coal Corp.*, *supra*. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and where pretext is shown, discrimination may be inferred, *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995), although it need not, as a matter of law, be found. *St. Mary's Honor Society v. Hicks*, 509 U.S. 502 (1993).

There is also the "mixed motive" analysis under which a Complainant may proceed to show pretext, as established by the United States Supreme Court in *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989), and recognized by the West Virginia Supreme Court of Appeals in *West Virginia Institute of Tech.*, *supra*. "Mixed motive" applies where the Respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the Complainant need only show that the Complainant's protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the Complainant's protected class had not been considered. *Barefoot*, *supra*, 193 W. Va. at 485, 487, 457 S.E.2d at 162 n.16, 164 n.18.

In this instance, the Complainant alleges that she would not have been disciplined and ultimately terminated by PFI but for her gender. While Meadows has clearly satisfied the first two (2) prongs of the *McDonnell Douglas* test, she has failed to establish that she was subjected to harsher discipline than her co-workers and/or terminated based on discriminatory criterion illegal under the West Virginia Human Rights Act. She therefore cannot demonstrate a *prima facie* case of gender discrimination. In other words, upon review of the record, Meadows has

failed to show any sort of nexus between her gender and her employer's decision to terminate her.

In *Conaway v. Eastern Associated Coal Corp.*, the West Virginia Supreme Court of Appeals suggested several ways in which a Complainant may raise an inference of discriminatory intent:

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 give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.

178 W.Va. 164, 170-171, 358 S.E.2d 423, 429-430 (1986) (rejecting age discrimination claim where dismissed employee had a history of written reprimands for safety violations and refusals to obey management directives).

In the present case, there has been no evidence of any direct or indirect admission of discriminatory intent on the part of PFI's Director of Fleet Maintenance, Greg Bess. Bess hired Meadows "on the spot" following a personal interview in which Bess was clearly aware of the Complainant's gender. In *Johnson v. Killmer*, the West Virginia Supreme Court of Appeals found that when the same individual hires and fires an employee, with full knowledge of the employee's protected status, the employer is entitled to a "strong inference" that the protected status was not a determining factor in his or her termination. 219 W.Va. 320, 325, 633 S.E.2d 265, 270 (2006) ("Therefore, in cases where the hirer and firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a

strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.” (internal citations omitted)). Although Meadows was the first woman who ever applied for the job of onsite fueler with PFI’s southern district,² Meadows testified that Bess treated her respectfully throughout the hiring process and that no one discouraged her from applying for the position of onsite fueler. Further, Bess testified credibly that he considered Meadows an attractive candidate for the position of fueler based upon her previous familiarity with commercial vehicles and that he believed she could do the job she was hired to perform.

Meadows remained Bess’ subordinate throughout her approximately two and a half (2 ½) year tenure at PFI. Based upon the reasoning in *Johnson*, it is irrational to find that Bess had a discriminatory animus in firing Meadows, but not in hiring her.

The record further demonstrates that Meadows’ termination was the result of multiple reprimands for insubordination and/or failure to follow instructions, culminating in the violation of a direct request to fuel from her superior. The evidence of record shows that Meadows was reprimanded a total of six (6) times prior to her termination on December 22, 2010. At least four (4) of those instances were based upon a failure to follow instructions. Meadows admitted that in each instance she engaged in the behavior for which she was cited, although she disagreed with the severity of the discipline.

Although Meadows testified that she believed she was subject to harsher discipline than her co-workers, her perception is not relevant under the law and it is not borne out by the

² While Meadows was undisputedly the first female to apply for the position of onsite fueler under Greg Bess’s supervision in the southern coalfields of West Virginia, former Human Resources Director Peggy White testified that there were approximately six (6) to eight (8) female fuelers in the company’s operations in the northern region of the state. [Tr. Vol. II, pp. 14-15]

personnel records submitted on behalf of the Respondent. *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-961 (4th Cir. 1996)(“It is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff.”). As set forth in the record, Meadows received five (5) written reprimands and one (1) letter in her file during her employment with PFI; three (3) of those reprimands involved instances where male employees were written up at the same time and for the same behavior as Meadows. Specifically, Mike Monhollen was reprimanded for allowing Meadows to leave a vehicle at Georges Branch Road on August 22, 2008, and Mark Vint was reprimanded and ultimately terminated for swearing at Meadows during the argument on June 23, 2009. In September 2009, three (3) other male employees were reprimanded at the same time as Meadows for not wearing their safety equipment; two (2) of the male employees received harsher discipline than the Complainant.

The evidence was also undisputed that Meadows received more reprimands prior to termination than any other fueler. Bess testified credibly that no other employees were given as much latitude as Meadows with regard to disciplinary infractions but that Meadows’ insubordination on December 21, 2010, was the proverbial “last straw.” The mere fact that an adverse employment action was taken against Meadows as a female employee does not give rise to a presumption that the adverse action was taken because of gender. *See Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810, 823-24 (4th Cir. 1995)(finding that racial or gender discrimination cannot be presumed from the mere fact that someone adversely affected by an action has a particular skin color or gender).

With regard to Meadows’ termination on December 22, 2010, Meadows’ refusal to fuel the 830-rock truck constituted a legitimate, non-discriminatory reason to end her employment

with PFI. The primary responsibility of an on-site fueler for PFI is to fuel equipment. On December 21, 2010, Meadows conceded she was responsible for fueling all vehicles in the Rainnow area of the mine. Meadows conceded that the 830-rock truck, which needed fuel, was closest to her assigned area. Supervisor Howard Bias and “lead man” Mike Monhollen both advised Meadows that the truck was located in her area of responsibility.

While Meadows contended that she was on her lunch break at the time, PFI employees do not have designated window of time in which to take their thirty-minute lunch breaks, but rather, may take that break at any point in the extensive amount of “down time” between fuel runs. Further, Meadows’ supervisor, Howard Bias, testified credibly that he himself had been interrupted during lunch breaks to fuel and frequently observed the interruption of other male fuelers during lunch breaks.³

Meadows was fully aware that her refusal to fuel the 830-rock truck on December 21, 2010, could lead to her termination. Meadows was also fully aware that other male fuelers had been reprimanded and an entire shift of male employees terminated for the same offense. Further, her coworker Jamie Pfizer testified credibly that this was not the first time she had refused to perform her duties.

As set forth in *Conaway*, the standard of proof is not whether Meadows or the fact finder agree with the decision to terminate Meadows, but rather, whether the decision was motivated by discriminatory animus.

The reason need not be a particularly good one. It need not be one which the judge or jury would have acted upon. The reason can be any other reason except that the plaintiff was a member of a protected class. If the

³ Somewhat confusingly, PFI’s Employee Handbook states that “employees are not permitted to disturb other employees who are not on a meal or rest break.” [Complainant’s Exhibit 1, p. 33]

fact finder believes that the proffered reason was the true reason for the decision, then the employer, while he may be guilty of poor business practices, is not guilty of discrimination.

Conaway v. Eastern Associated Coal Corp., 358 S.E.2d at 430. “Courts simply have no business telling employers how to make personnel decisions.” *Skaggs v. Elk Run Coal Co.*, 198 W.Va. 51, 79, 479 S.E.2d 561, 589 n. 33 (1996).

In this instance, the undersigned finds that Bess, acting on behalf of PFI, made a personnel decision to terminate Meadows after a series of reprimands for insubordination and failure to follow instructions, culminating in the refusal to perform her primary duty as an employee. No admission of discrimination was made and no credible evidence of unequal treatment in the disciplinary process was offered. As a result, Meadows has failed to demonstrate a nexus between her discharge and her gender. Even assuming a *prima facie* case has been established, there has been no evidence of pretext. Therefore, her discrimination claim must fail.

B. Meadows’ Claim of Hostile Work Environment is Barred by the Statute of Limitations.

While Meadows was unable to demonstrate that her termination was based in part or whole upon her gender, based upon the evidence of record, Meadows has demonstrated a *prima facie* case of sexual harassment/hostile work environment during the period of April 2008 through October 6, 2008. During that time, she was subjected to various indignities and abusive behaviors by two co-workers, Gus Crowder and “Cajun.” PFI had knowledge of these incidents but failed to promptly respond to Meadows’ allegations against her co-workers. Further, no disciplinary action was ever taken against either employee. However, based upon Meadows’

unequivocal testimony, any sexual harassment which she suffered ended prior to March 9, 2010,⁴ and thus her claim is barred by the applicable one year statute of limitations set forth in W.Va. Code §5-11-10.

In order to prevail on a cause of action in a sexual harassment case based upon a sexually hostile or abusive work environment, the Complainant must prove that:

(1) she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;

(2) the harassment complained of was based upon sex (that is, gender);

(3) the harassment complained of was sufficiently severe and pervasive as to affect a term, condition or privilege of employment and create an abusive working environment;

(4) that the employer had actual or constructive knowledge of the existence of a sexually hostile work environment either through specific complaints to the employer or by proof that the harassment was so pervasive that the employer's awareness may be inferred;

(5) that the employer took no prompt and adequate remedial action; and

(6) the existence of sexual harassment must be determined in light of the record as a whole and that totality of circumstances.

See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); *Hanlon v. Chambers*, Syl. Pts. 5, 9, 195 W.Va. 99, 464 S.E.2d 741 (1995).

A sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so. In making its determination, the fact finder must look at the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, whether it

⁴ Meadows filed her Complaint with the West Virginia Human Rights Commission on March 9, 2011.

is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993).

In this instance, Meadows' treatment by her two (2) co-workers, Gus Crowder and "Cajun," constituted serious and pervasive harassment sufficient to create a hostile work environment. Meadows testified credibly that she was repeatedly subjected to unwelcome conduct from Crowder and "Cajun" in the form of sexually derogatory remarks as well as negative gender-based statements. They also subjected Meadows to physical intimidation by playing repeated pranks on her for the purpose of making her fearful to be alone on the mine site in the dark during her night shift.

Given the misogynistic nature and crude content of her co-workers' comments and behavior, the harassment was sufficiently severe and pervasive throughout her tenure on night shift that it interfered with her ability to complete her fueling activities. Further, Meadows testified credibly that she would interrupt her fuel runs to return to the fuelers' trailer until she felt it was safe to be alone on the mine site. She further testified that their harassment continued throughout the duration of her tenure on night shift from April 2008 through August 2008, and then briefly on the week of September 29, 2008 through October 6, 2008.⁵

PFI, as Meadows' employer, had actual knowledge of the existence of a sexually hostile work environment through Meadows' direct complaints. Meadows testified that she repeatedly reported these incidents to her immediate superior, "lead man" Mike Monhollen. Although the

⁵ Meadows actually testified that she did not interact with Crowder or "Cajun" during the week of September 28 through October 6 because she largely remained alone in her truck during the daily period of "down time" in order to avoid interacting with either individual.

testimony was conflicting as to the nature of Monhollen's authority, there is no question that he occupied a position in the chain of command between Director of Fleet Maintenance, Greg Bess and Meadows. Further, Bess acknowledged that he was aware of at least some of Meadows' complaints, which she brought to him directly during his regularly scheduled visits to the mine site.

Once made aware of the situation, PFI failed to take prompt remedial action to correct the sexually hostile work environment. The evidence was undisputed that Bess initially investigated Meadows' allegations but determined that they were nothing more than a "personality conflict." Although an attempt was made to separate Meadows from Crowder by placing them on different shifts to avoid any further conflicts, no disciplinary action was taken against the offenders.

The evidence established that no significant action was taken until approximately one (1) month after Meadows' last night shift with Crowder and "Cajun." At that point definitive steps were finally taken to ensure that Meadows would not have to interact with either co-worker, but no discrimination was ever acknowledged. In light of the record as a whole and the totality of the circumstances, PFI failed to take prompt remedial action to correct the abusive environment.

Meadows' claim must fail, however, based upon her unequivocal testimony that she did not experience any treatment which she considered sexual harassment after her tenure on night

shift ended, with two (2) limited exceptions: (1) the altercation with Mark Vint on June 23, 2009, and (2) the initial failure to provide and maintain adequate restroom facilities.⁶ In order to survive the one-year statute of limitations, the actions that lead to Meadows' claims must have occurred on or after March 9, 2010.

W.Va. Code §5-11-10 provides that "any complaint must be filed within three hundred sixty-five days after the alleged act of discrimination." The West Virginia Supreme Court of Appeals has held that the statute of limitations for a discrimination claim will begin to run on the date of the last offensive contact, or threat of offensive contact. *See* Syl. Pt. 3, *Harmon v. Higgins*, 188 W.Va. 709, 426 S.E.2d 344 (1992). Here, the record is undisputed that Meadows' last interaction with her co-workers, Crowder and "Cajun," occurred on October 6, 2008, long outside the statutory period. According to her testimony, once she no longer worked with Crowder or "Cajun," Meadows testified that she was not subject to any sexual comments, offensive touching, pornography, or other sex-based conduct, which would demonstrate a hostile work environment. In fact, she specifically denied having any other issues with her co-workers after August 2008. She further testified that her primary concerns after Crowder and "Cajun" left related to safety complaints or "messed up" trucks. Further, no statements, actions, documents or other evidence of gender based harassment by any supervisor, including Bess,

⁶ *See* Tr. Vol. I, pp. 208-215, wherein Meadows testifies extensively to the fact that she did not experience any sexual harassment or gender discrimination from her co-workers once she no longer worked with Gus Crowder or "Cajun." As an example, she states:

Q: After Gus and Cajen [sic] left, you didn't contact Greg much, did you?

A: No. I don't think so, no.

Q: Because you didn't have any complaints after that?

A: The only complaints I would have is just like if a truck was messed up or something.

[Tr. Vol. I, p. 215]

were introduced at the Hearing. Given that Meadows did not file her claim with the Commission until more than two and a half (2 ½ years) later, her claim must fail as time barred.

To the extent Meadows alleges other incidents as examples of a hostile work environment, her claims constitute a small handful of discreet occurrences. A hostile work environment has been defined as “one that is so permeated with discriminatory intimidation, ridicule and insult that it is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive work environment.” *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (internal citations omitted). The West Virginia Supreme Court of Appeals has held that “more than a few isolated incidents are required” to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs. v. W.Va. Human Rights Commission*, 206 W.Va. 86 ,96, 522 S.E.2d 180, 190 n.9 (1999). Based upon the evidence of record, there was simply nothing which would suggest Meadows suffered the type of severe and pervasive harassment that would constitute a hostile or abusive work environment.

To the extent Meadows alleges that her co-workers used “her” portable toilet facility and that on one (1) occasion she discovered the facility had been vandalized (*i.e.*, feces smeared on the walls and sanitary napkins in the toilet), this occurred approximately ten (10) months into Meadows’ nearly three (3) year employment with PFI. Further, it is undisputed the toilet facility was replaced within two (2) days of the vandalism and no further complaints were registered. With regard to the altercation with Mark Vint, which occurred on June 23, 2009, this was an isolated incident for which Vint was promptly fired.

The evidence, when considered as a whole, does not establish that Meadows was subjected to the type of severe and pervasive conduct, which rises to the level of a hostile work environment, in light of Meadows' own testimony that she did not experience gender-based harassment from her co-workers after October 6, 2008. To sustain a claim for hostile work environment, the subject conduct must be more than episodic; it must be sufficiently continuous and concerted in order to be deemed pervasive. *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2nd Cir. 1987). A handful of incidents spread over many months are unlikely to have so great an emotional impact as a concentrated or incessant barrage. *Doe v. R.R. Donnelly & Sons Co.*, 42 F.3d 439, 444 and n.3 (7th Cir. 1994). Here, the offensive conduct, based upon the evidence of record, consists of isolated incidents which cannot, as a whole, be considered a hostile work environment.

Moreover, Meadows offered no evidence which established that these incidents were more than crude behavior by her co-workers. Civil rights statutes like the West Virginia Human Rights Act are not intended to be general civility codes. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Federal Courts interpreting Title VII have recognized that mean-spiritedness is not the same as actionable discrimination.⁷ See e.g. *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766, 773 (4th Cir. 1997) (“Title VII is not a federal guarantee of refinement and sophistication in the workplace – in this context, it prohibits only harassing behavior that is so severe or pervasive as to render the workplace objectively hostile or abusive.”).

⁷ The West Virginia Supreme Court of Appeals has repeatedly held that it “will construe the Human Rights Act to coincide with the prevailing federal application of Title VII unless there are variations in the statutory language that call for divergent applications or there are some other compelling reasons justifying a different result.” *Hanlon v. Chambers*, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995)

Accordingly, for the reasons stated above, to the extent Meadows presented a *prima facie* case of sexual harassment and/or hostile work environment, such harassment ended on October 6, 2008, which was the last date on which she worked with Gus Crowder and “Cajun.” Given that the harassment ended more than three hundred sixty-five (365) days prior to the filing of the Complaint with this Commission, the claim must fail as time barred. The claim must fail as time barred pursuant to W.Va. Code §5-11-10.

C. Meadows Failed to Establish that Her Termination Constituted a Retaliatory Discharge.

In addition to her claims of gender discrimination and hostile work environment, Meadows alleges that her termination constituted an unlawful reprisal for her complaints of gender discrimination and safety issues to PFI. As set forth below, Meadows has failed to prove by a preponderance of the evidence that her termination constituted a retaliatory discharge pursuant to the West Virginia Human Rights Act, W.Va. Code §5-11-9.

West Virginia Code §5-11-9(7)(c) provides that it shall be an unlawful discriminatory practice for any person or employer to:

Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

The West Virginia Supreme Court of Appeals has explained that “W.Va. Code §5-11-9(7)(C) prohibits an employer or other person from retaliating against any individual for expressing opposition to a practice that he or she reasonably and in good faith believes violates the provisions of the West Virginia Human Rights Act.” Syl. Pt. 3, *Colgan Air, Inc. v. W.Va.*

Human Rights Commission, 221 W.Va. 588, 656 S.E.2d 33 (2007)(quoting Syl. Pt. 11, *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995)).

In order to establish a claim of unlawful retaliatory discharge/reprisal, Meadows must prove, by a preponderance of the evidence, “(1) that the complainant engaged in protected activity, (2) that complainant’s employer was aware of the activity, (3) that complainant was subsequently discharged and (absent other evidence tending to establish retaliatory motivation), (4) that complainant’s discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.” Syl. Pt. 4, *Colgan Air, Inc. v. W.Va. Human Rights Commission*, 221 W.Va. 588, 656 S.E.2d 33 (2007)(quoting Syl. Pt. 6, *Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996)).

Meadows must therefore establish first and foremost that she was engaged in a “protected activity,” which is defined by the West Virginia Supreme Court of Appeals as “opposition to a practice that the plaintiff reasonably and in good faith believes violates the provisions of the Act.” Syl. Pt. 7, *Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996). Meadows’ complaints regarding the harassment of Gus Crowder and “Cajun” would by definition fall within the category of a “protected activity,” as would her complaints concerning the portable restroom facility and her altercation with Mark Vint, to the extent such complaints may be

characterized as arising in good faith from her belief that such incidents arose from a discriminatory animus.⁸

However, these “protected activities” occurred primarily during the period in which she worked night shift with Gus Crowder and “Cajun” on or before October 6, 2008. Her additional complaints concerning the portable toilet facility, and her altercation with Mark Vint, likewise occurred primarily during 2009, many months prior to Meadows’ termination on December 22, 2010.

Given the significant gap of time between Meadows’ complaints and her termination, there is no basis upon which to find any nexus between protected activity and the employer’s adverse action. *See* Syl. Pt. 4, *Colgan Air, Inc. v. W.Va. Human Rights Commission*, 221 W.Va. 588, 656 S.E.2d 33 (2007)(requiring “that complainant’s discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation”).

Furthermore, after October 6, 2008, Meadows’ primary complaints to Greg Bess concerned “messed up” trucks. *See* Tr. Vol. I, p. 215. The Act does not provide a cause of action for former employees who were allegedly discharged for reporting safety violations. Therefore,

⁸ With regard to “protected activity,” the West Virginia Supreme Court of Appeals has explained:

This standard has both an objective and subjective element. The employer’s opposition must be reasonable in the sense that it must be based on a set of facts and legal theory that are plausible. Further, the view must be honestly held and be more than a cover for troublemaking. Thus, even if there was no actionable sexual harassment, the plaintiff could still have been engaged in a protected activity if she complained about being sexually harassed.

Syl. Pt. 7, *Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996).

to the extent Meadows' reprisal claim is based upon reports of safety violations, her claim is outside the scope of the Commission's jurisdiction.⁹

The record taken as a whole does not support Meadows' claim of retaliation. PFI had a legitimate business reason for letting Meadows go, in that she refused to perform her primary duty as a fueler at the Black Castle Mine site. Actions taken by an employer for legitimate business reasons, even though they may be adverse or perceived as adverse by the employee, are not actionable and do not form a basis for a claim of retaliation. See *Faragher v. City of Boca Raton*, 524 U.S. 77 (1998); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-961 (4th Cir. 1996); *Slack v. Kanawha County Housing and Redevelopment Authority*, 188 W.Va. 144, 155, 423 S.E.2d 547, 558 (1992).

Meadows has therefore failed to make out a *prima facie* case of retaliation inasmuch as she has not offered any evidence linking her previous claims of discrimination with her termination on December 22, 2010, for insubordination/refusal to fuel. Even assuming that a *prima facie* case has been established, the Complainant offered no evidence of pretext and PFI has articulated a legitimate, nondiscriminatory reason for its decision to terminate Meadows.

⁹ On page 69 of the November 18, 2013, transcript, Respondent objected to the admission of portions of Complainant's Exhibit 8, a CD recording of the conversation between Bess, White and Meadows on January 29, 2010. Respondent objected on the basis that those portions of the recording pertained to safety violations, which are not covered under the West Virginia Human Rights Act, W.Va. Code §5-11-1, *et seq.* The objection is sustained in light of the ruling that allegations of safety complaints are beyond the scope of the Act.

VI

CONCLUSIONS OF LAW

1. The Complainant, Joanne Meadows, is an individual allegedly aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act, W. Va. Code §5-11-1, *et seq.*

2. The Respondent, Petroleum Fueling, Inc., is a “person” and an “employer” as those terms are defined under W. Va. Code §5-11-1 *et seq.*, and is subject to the provisions of the West Virginia Human Rights Act.

3. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W. Va. Code §5-11-9 *et seq.*

4. The Complainant, Joanne Meadows, has failed to establish a *prima facie* case of gender discrimination.

5. The Complainant, Joanne Meadows, has failed to prove by a preponderance of the evidence that the Respondent, PFI, discriminated against her because of her sex.

6. The Complainant, Joanne Meadows, has failed to prove by a preponderance of the evidence that she was subjected to a hostile work environment within the one (1) year statute of limitations set forth in W.Va. Code §5-11-10, therefore, her hostile work environment claim is time barred.

7. The Complainant, Joanne Meadows, has failed to prove by a preponderance of the evidence that she was unlawfully discharged by the Respondent, PFI, in reprisal for “protected activities” pursuant to the West Virginia Human Rights Act.

8. To the extent the Complainant's claims are based upon issues concerning the safety of Respondent's equipment, those issues are beyond the scope of the West Virginia Human Rights Act, W.Va. Code §5-11-1, *et seq.* and the jurisdiction of this Commission.

VII

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** that the above captioned matter is dismissed against the Respondent, PFI, with prejudice and stricken from the docket of the West Virginia Human Rights Commission.

It is so **ORDERED**.

Entered this 24th day of September 2014.

WV HUMAN RIGHTS COMMISSION



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BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOANN L. MEADOWS,

Complainant,

v.

Docket No. ES-329-11
EEOC No. 17J-2011-00207

PETROLEUM FUELING, INC.,
d/b/a MAXUM PETROLEUM,

Respondent.

CERTIFICATE OF SERVICE

I, Allison Carroll Anderson, 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, via certified mail return receipt requested, this 4th day of September 2014, to the following:

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