



To: All Parties  
September 11, 2014  
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STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

**HUMAN RIGHTS COMMISSION**

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Cabinet Secretary

Marykaye Jacquet  
Acting Director

September 11, 2014

**VIA CERTIFIED MAIL- RETURN RECEIPT REQUESTED**

Renee L. Richardson-Powers  
2002 Alonzo Drive  
Martinsburg, WV 25401  
*Complainant*

WV Division Of Motor Vehicles  
Attn: Legal Division  
24 Roland Road  
Kearneysville, WV 25430  
*Respondent*

Garry G. Geffert, Esq.  
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Civil Rights Division  
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*Counsel for the Commission*

Jill C. Dunn, Esq.  
General Counsel, WV DOT / DMV  
P. O. Box 17200  
Charleston, WV 25317  
*Counsel for the Respondent*

Re: *Renee L. Richardson-Powers v. WV DMV*  
Docket No. EDS-94-12

Dear Parties:

Enclosed please find the final decision of the undersigned Chief 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,

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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.

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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;

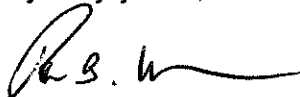
10.8.d. Supported by substantial evidence on the whole record; or

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.

Very truly yours,



Robert B. Wilson  
Chief Administrative Law Judge

RBW/rl  
Enclosure

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

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**RENEE L. RICHARDSON-POWERS,**

**Complainant,**

**v.**

**Docket No. EDS-94-12**

**EEOC No. 17J-2011-00352**

**WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,**

**Respondent.**

**FINAL DECISION**

A Public Hearing, in the above-captioned matter, was convened on December 9, 10, 11, 12 and 13, 2013, in the Berkeley County Council Chambers, Dunn Building, 400 West Stephen Street, Martinsburg, West Virginia, before Robert B. Wilson, Chief Administrative Law Judge. The Public Hearing was reconvened on February 10, 11 and 12, 2014, in the Berkeley County Council Chambers in Martinsburg, West Virginia.

The Complainant, Renee L. Richardson-Powers, appeared in person and by Counsel, Garry G. Geffert, Esq. The Respondent, West Virginia Division of Motor Vehicles, appeared in person by its representative, Jill Dunn, Esq., General Counsel, and by Counsel, Mary M. Downey, Esq., Assistant Attorney General, West Virginia Office of the Attorney General. The parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof, and response briefs through June 17, 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, Renee Richardson-Powers, is a woman who suffered a traumatic brain injury in her childhood, which affects the manner in which she learns. Complainant applied for and was hired with Respondent, West Virginia Division of Motor Vehicles, in March 2010. From April 2007 until May 2009, Complainant worked as an order fulfillment coordinator for Ralph Lauren at the Martinsburg children's wear warehouse in Martinsburg, West Virginia. The Complainant was out of work when the company transferred operations to Greensboro, North Carolina. She drew unemployment. Complainant took various tests for employment at the Workforce West Virginia office during this period. During the course of that process, she was referred to DHHR for services through the Division of Rehabilitation after answering questions in a Traumatic Brain Injury pamphlet, which suggested she may be suffering from Traumatic Brain Injury.

Complainant has proven that she is a person with a disability under the West Virginia Human Rights Act through the evidentiary deposition testimony of James Douglas Petrick, Ph. D. in clinical psychology. Dr. Petrick saw Ms. Powers on August 25, 2010, on a consult for the West Virginia Center for Excellence in Disabilities' Traumatic

Brain Injury Program operated by West Virginia University in Morgantown. Dr. Petrick testified that he can determine whether someone has suffered a traumatic brain injury with some degree of confidence through patient history and examination of the neuropsychological data. Dr. Petrick obtained a medical, developmental, family, school, and work history from Ms. Powers, and performed a behavioral exam. Dr. Petrick administered a series of different psychometrics to assist measuring cognitive styles. Dr. Petrick's conclusion was that Complainant had suffered a head trauma with traumatic brain injury secondary to a fall when she was eight years old. Diagnostics in his report listed cognitive disorder not otherwise specified secondary to traumatic brain injury and mood disorder not otherwise specified.

The Boston Naming Test and Controlled Oral Word Association Test (FAS) showed impairments in Complainant's ability to understand what is being said and to make her thoughts known to others. This impacts Complainant's learning and memory, which makes communicating with others not impossible but more difficult. There was dysnomia (word finding) associated with left hemisphere injury or lesions which reduced verbal fluency. The Trail Making Test indicated cognitive speed and efficiency were moderately impaired. Mental flexibility and sequencing skills were mildly impaired. Complainant is able to do things it just takes her longer. There was suggestion of clinical perseverative tendencies, which come across as obsessive to the average person, and which prevents flexibility in thinking. The Complainant is not incapable of problem solving there is just a decreased efficiency. Complainant exhibited noticeable but not profound tangential nonlinear thinking.

Dr. Petrick determined that these findings clearly show Complainant has cognitive deficits, as a result, she requires structure, repetition and consistency to learn. Anyone with a cognitive impairment will do better with consistency; changing the sequence in which a task is done contributes to frustration and decreases learning and task completion. Dr. Petrick's conclusions are that it is not that Complainant cannot

learn but that decreased mental flexibility and perseverative tendencies ultimately have a negative impact on her performance. Changing the order in which the steps necessary to complete a task are presented causes Complainant emotional distress thereby decreasing her chances of successfully learning the task and contributing to her confusion and frustration. This in turn will affect Complainant's interactions with co-workers, supervisors and trainers.

Dr. Petrick was asked to review trainer notes provided by Respondent. Dr. Petrick opined that with repetition, rehearsal, and routine, Complainant can learn, and eventually be successful. Complainant did not receive consistent training in order to maximize her chances of success within the context of her traumatic brain injury. To a reasonable degree of clinical certainty, Ms. Powers' chances of success would have been greatly enhanced if she had been provided with structured, repetitious, consistent, routine training. Per review of the documents, he had reason to believe there were rather significant inconsistencies. The perception of Complainant's behavior in her interactions with her co-workers was causing frustration on their part, based upon review of the daily logs of the trainers. Educating her co-workers about the disability and what could be expected might ameliorate the effects of behavior, which might otherwise be considered abnormal.

Complainant was hired to work for Respondent at its Kearneysville, West Virginia DMV office as a Customer Service Representative (CSR). Respondent trains its customer service representatives by having them observe an experienced customer service representative, who it designates as the trainer, for a period of time. Later the new employee works the window and is observed by the trainer as they handle the transactions. The new employee is normally assigned to a number of trainers to see how different customer service representatives complete the transactions.

When Complainant began her employment at the Kearneysville DMV office (sometimes also referred to in testimony as the Charles Town office in the record), she

discussed her disability with the manager of the field service office, Christine McIntyre. Ms. McIntyre has married and is now Ms. Frick. (Hereinafter she will be referred to as Ms. Frick or Ms. McIntyre Frick.) Complainant, Ms. Richardson-Powers, explained to Ms. Frick that she learns by step-by-step repetition and that she took longer to learn as a result. In the past, Complainant had explained to her co-workers that she had a disability and that this was the reason for her constantly asking the same questions over and over. Ms. Frick advised her that, she, Ms. Frick, would not tell her co-workers because it was none of their business.

The primary documentary evidence of Ms. Richardson-Powers' training is copies of handwritten trainer's notes, primarily consisting of six weekly new employee evaluation forms. One by Angie Kuykendall covers the week of March 22, 2010, to March 26, 2010. One by Danetta Calhoun is for March 28 to April 1, 2010. One is for the day of April 5 and one for the day of April 6 by Danetta Calhoun. One is for the day of April 7 and one for the day of April 8 by Terry Graves. The copies of these forms are cut off in places and obscured making them incomplete and illegible in portions. Complainant repeatedly sought originals in the discovery process to no avail. The evidence establishes that the originals of these documents, along with others such as copies or original customer comment cards for Complainant, were destroyed by Respondent in December 2010, while Ms. McIntyre Frick was out on sick leave and another manager filling in at the Kearneysville DMV field office got rid of the file Ms. Frick was maintaining documenting Ms. Richardson-Powers' employment problems with DMV. The computer records of Ms. Frick in this matter, including the other primary documentary evidence consisting of Ms. Frick's weekly summaries in her Daily Log for Renee Richardson-Powers, CSRT-2010, which runs from March 22 through July 22, 2010, and the subsequent entries for which copies do not exist, were destroyed when the computers at the Kearneysville, DMV were replaced. The spoliation of this evidence took place during a period subsequent to the filing of the request for accommodation by

Complainant, her subsequent termination from employment by Respondent, and the notice of Complainant's grievance to Joe Miller DMV Commissioner and DMV's in house counsel Ms. Dunn and Ms. Murphy, Assistant Attorney General, appearing on behalf of Respondent in a Grievance filed by Ms. Richardson-Powers in relation to the matters at issue herein. Complainant has repeatedly sought sanctions for the spoliation of evidence including an adverse inference that the originals would have disclosed that Complainant was satisfactorily performing her duties, that the customer comment cards would have been positive regarding her customer interactions, and that the Respondent should be prohibited from introducing testimony or other evidence that Ms. Richardson-Powers was not capable of performing the essential duties for a customer service representative. Complainant contends that these documents and computer data were intentionally destroyed and copies redacted of all favorable information to frustrate the Complainant's ability to obtain the information she requires documenting her satisfactory progress in completing her training.

Complainant's date of hire was March 16, 2010. Complainant was assigned to train with Angie Kuykendall. Complainant's immediate supervisor was Karrie Whittington. Generally, new CSR's begin by learning tag renewals and regular driver's licenses as these are considered the easiest to learn. Ms. Kuykendall asked to be relieved of training Complainant on March 26, 2010, because she felt that Ms. Richardson-Powers was not paying attention to her, everything she told her went in one ear and out the other; and, that she was constantly questioning the way in which she processed a transaction. Next, she was assigned to train with Danetta Calhoun, who had the same complaints that Complainant does not pay attention and questions everything she tells her. It is clear from the evidence that this questioning was the result of her disability and related to the fact that Complainant was being shown processing of the transaction in different order of steps which Complainant considered to be "wrong". Trainers and Ms. McIntyre Frick all explained that it did not matter what order the

transaction was done in as long as the end result was the same. On April 7, 2010, due to complaints from Ms. Calhoun, Complainant was assigned a new trainer, Terry Graves. The same issues arose and it is clear that in the mind of the manager, Complainant must learn that there is more than one way to process a transaction and that each trainer has their own routine and all are correct.

It is undisputed that by sometime between March 28, 2010 through April 1, 2010, and again on April 23, 2010, Complainant told the manager, Ms. Frick that she had a brain injury, which prevented her from retaining information. This information was discussed with Ms. Frick's direct superior, Carol Huggins. She was instructed to ask why Complainant had not informed them of the brain injury when interviewed. Notes for the week of May 16 to May 21, 2010, indicate that Complainant complained about the way that each trainer did things and that with the brain injury she could not retain information. The notes indicate that the resources provided would help Complainant but that she refused to use them. Complainant again told Ms. Frick about her brain injury that prevents her from retaining information and requested additional training on May 28, 2010, after meeting with Ms. Whittington and Ms. Frick the day before when the two supervisors and Complainant met for her evaluation and reviewed goals and established expectations. The Complainant was provided an additional week of training after the matter was discussed with Carol Huggins. After receiving another bad evaluation on July 12, 2010, Complainant asked Ms. Whittington, her supervisor, to meet with Complainant's brain trauma counselor, Terry Cunningham, for one on one information about Complainant. Ms. Whittington refused. On July 22, 2010, Ms. Frick received a call from Penny Hall from the State ADA office, asking why they would not meet with Complainant's brain trauma counselor. Ms. Huggins had told Ms. Frick that is not something they do without specific disability documentation. Ms. Hall was told that any such meeting would have to be approved by the main office in Charleston and referred her to Director Pete Lake. Ms. Frick admits that she made no effort at any time

of any sort to educate herself about the effects of traumatic brain injury on the learning process or what might be helpful in facilitating Complainant's training.

On July 22, 2010, Ms. Frick sent an email recounting her contact from Ms. Hall with the State ADA office, to Mr. Lake, Director of Regional Offices and Call Centers for the Division of Motor Vehicles. Mr. Lake forwarded the e-mail to Jeff Black, Human Resources Director for the Department of Transportation. The Department of Transportation has an ADA Committee, which conducts a review process when requests for accommodation are requested or come to their attention. If they feel the request is sufficient they will begin the interactive process with the employee. Mr. Black contacted Mr. Ray Patrick, Americans with Disabilities Act (ADA) Coordinator for the West Virginia Department of Transportation, to request that he add an employee for the ADA Committee's review meeting. The Department of Transportation ADA Committee is composed of Mr. Patrick, the ADA Coordinator who gathers the information for the reasonable accommodation request file for the Committee to review; Jeff Black, Human Resources Director for the Department of Transportation; Dreama Smith, the E.E.O.C. Director for the Department of Transportation; and two attorneys from the Division of Highways, Crystal Black and Jason Workman.

The employees at the DMV offices do not have the Request for Accommodation Form available at their work site. The DMV Employee Handbook makes no mention of the availability of the Request for Accommodation Form to request an accommodation for a disability, where to send such a request, or any mention of the Department of Transportation policy regarding requesting reasonable accommodation for disabilities or conducting these reviews. The managers of the Field Service offices do not have the Request for Accommodation Forms. Managers of the offices and other supervisory employees of the DMV have no training regarding what the process is for seeking a reasonable accommodation for a disability. There is no procedure in place for front line supervisors and managers of the DMV offices to follow in these instances and they are

not aware of the process of contacting the Department of Transportation ADA Coordinator or the ADA Review Committee. Mr. Patrick testified that no formal training was given to anyone on the Department of Transportation ADA Review Committee and its procedures but that certain high-ranking personnel within the DOT stationed in Charleston received some verbal instructions on the ADA review process. This included some individuals with the DMV who work out of Charleston.

The email chain from July 22, 2010, was deemed sufficient to warrant beginning the interactive process. At that point, a packet was hand delivered from Charleston, West Virginia to the Complainant at the Kearneysville DMV office. The letter was dated July 27, 2010. The Complainant filled out a medical authorization, medical provider contact list and an employee's request for accommodation, signed and dated it on July 30, 2010. The request for accommodation form lists a disability of traumatic brain injury. It discloses that Complainant's learning process is affected in that she learns through detailed step-by-step procedures and that she can perform the essential job duties if trained in a step-by-step format. She notes that she is to meet with a doctor for a neuro-psych exam, on August 25, 2010, in Morgantown, through the Center for Excellence in Disabilities. The Medical Provider List lists George Washington Medical Center; Terry Cunningham, Center for Excellence in Disabilities; Pam Lockard, Department of Rehabilitation Services; Pediatric Associates of Alexandria; and, Penny Hall, Compliance Director with the State's ADA office. The DOT ADA Coordinator sent out letters to the identified medical providers, with the exception of Penny Hall, with a Medical Provider Response Form and the authorization to release information executed by Complainant. The ADA Coordinator also conducted an interview of the Complainant's manager, Ms. (McIntyre) Frick, on September 15, 2010; and, filled out the Manager Interview Form.

Mr. Patrick, the ADA Coordinator received page two of the Medical Provider Response Form, with some attachments, from Terry Cunningham, MA, CBIS (Certified



Brain Injury Specialist). The form stated that Complainant cannot break down large tasks into small steps, may have trouble following verbal instructions, needs more time to complete tasks, and may need frequent breaks due to diminished attention span and disability. She went on to opine that Ms. Richardson-Powers could perform the essential functions of the job with reasonable accommodation including: all instructions should be in writing, large tasks broken down to steps, more frequent breaks, and more time to complete a task. The letter addressed to the Pam Lockard, Department of Rehabilitation Services, came back with a notation that she no longer worked there. Responses were not received from the hospital or pediatrics center and no records existed from the 1970's. Mr. Patrick stated that the ADA Committee did not doubt that Ms. Richardson-Powers was a person with a disability and undertook to address the issue of whether she could be afforded a reasonable accommodation. The ADA Review Committee did not ask for an independent IME.

The Manager Interview Form only lists the employee suggestions that she learn in a step-by-step procedure format and through repetition. Ms. Frick's responses indicated Complainant could not perform the essential functions of the job, alleging that the DMV had provided Complainant with step-by-step written and oral instructions outlining all work applications and assisted the employee in writing down additional instructions, which she has stated would facilitate her learning process. She has been provided with an opportunity to work on the same task with repetition and still is unable to achieve mastery of any application. She was assigned to eight different experienced employees in a one on one training capacity without success in achieving initial training goals as expected over six months when the initial training period is one month.

There were in fact no step-by-step instructions for completing various transactions. The written instructions included cheat sheets for computer codes for certain transactions and lists of acceptable documentation for different transactions.

When Ms. Frick states that Complainant refused to take notes that could have helped her learn in the fashion she stated she needed, it ignores the problem that Complainant was being confused by being given the verbal instructions in different sequences by the trainers which her disability entails. Ms. Frick assumed that the only way to learn was the way the DMV teaches everyone and that if she does not learn it that way she won't understand. Contrary to these assertions, it would not place an undue hardship upon the DMV to teach transactions to the Complainant or other persons with traumatic brain injuries in a single sequence of steps. Neither would it be an undue hardship upon the DMV to have its managers and persons training such individual to meet with a Traumatic Brain Injury Specialist prior to beginning training to assist them in understanding what techniques are effective and what behaviors are exhibited by such individuals. Ms. Frick did in fact allow extra time for Complainant to train. That training however was not appropriate for the Complainant.

When conducting the ADA Committee review, the Committee did not check to see if the information Ms. Frick provided was correct. They did not talk to any trainers. None of the members of the ADA Committee has any knowledge of what the effects of traumatic brain injury are or what would be useful in training someone with such a condition. The ADA Coordinator does not know whether the resources, the materials or training were of the sort that would be useful to train someone with a traumatic brain injury. There was no follow up by the DOT ADA Coordinator or the ADA Review Committee with Terry Cunningham, the Traumatic Brain Injury Specialist, beyond the form they received back. There was no follow up with the Doctor who performed the August 25, 2010, consult for the West Virginia Center for Excellence in Disabilities, Traumatic Brain Injury Program (Dr. Petrick). There was no communication with the State ADA Director of Compliance, Penny Hall. There was never any direct interaction between Terry Cunningham, the Traumatic Brain Injury Specialist, and either Ms. Whittington, Complainant's direct supervisor, or Ms. Frick, the Manager of the

Kearneysville, DMV office, as had been requested by Complainant, Ms. Cunningham and Ms. Hall.

By letter dated September 15, 2010, from Jeff Black, Human Resources Director, West Virginia Department of Transportation, Ms. Richardson-Powers' Request for Reasonable Accommodation was denied. Pursuant to the review, the letter states the information submitted demonstrated that the local DMV office previously made multiple attempts to assist you in learning the duties of customer service representative in ways consistent with the recommendations of Ms. Cunningham. It concludes that based upon these unsuccessful attempts it is apparent that no reasonable accommodation would enable you to perform the essential duties of your job and informs Complainant that she would not be considered for review by the Reasonable Accommodation Team. By letter dated September 16, 2010, from Joe Miller, Commissioner of the West Virginia Division of Motor Vehicles, Complainant was notified of her non-retention by the DMV and that her employment would be terminated effective September 30, 2010.

Complainant has demonstrated that she is capable of performing similar customer service jobs in the past, when she has explained her learning problems to her co-workers. These include jobs with extended periods of multiple year employment in these jobs; including as bank teller, Budget Rent-a-Car Customer Service Agent at Washington Dulles Airport, Sam's Club, in various capacities, and as the Customer Service Coordinator for Ralph Lauren mentioned above. The evidence established that she has a record of helpful courteous interaction with those employers' customers as recognized and documented by the prior employers. The only credible instance of rudeness to a customer of DMV involved her saying, "At least I didn't say here's your card." The comment was made to a customer making loud racist comments in line. Complainant was given a written reprimand for that comment by Respondent.

Subsequent to her discharge from the DMV, Complainant filed for Social Security Supplemental Security Income benefits to assist in obtaining training benefits and to supplement part time work. Complainant's last day of work at the DMV was September 30, 2010. When Complainant found part time work in January 2011, she stopped looking for full time employment.

## II PARTIES' CONTENTIONS

Complainant contends that she is a qualified person with a disability. Complainant suffered a traumatic brain injury. That injury substantially limits a major life activity, the ability to learn. Complainant contends that she is a qualified individual with a disability, in that she could have performed the job with a reasonable accommodation. Complainant worked successfully at customer service positions in the past prior to her employment with the Respondent.

Complainant told her office manager, on at least six occasions, of her disability. Complainant told her manager when she started to work, that she learned through repetition of step-by-step procedures. She told her manager many times that she had suffered a traumatic brain injury, which affected her ability to learn. She completed a request for accommodation form and asked her manager to contact her brain trauma counselor. Respondent was aware of Complainant's disability. Complainant's Field Service Office manager received a call from the State ADA Director of Compliance regarding complainant's situation.

Complainant required an accommodation in order to perform the essential functions of the job. Complainant learns through repetition of step-by-step procedures. She requires structure and repetition, with consistency in the teaching. She requires a longer learning period. Complainant contends that a reasonable accommodation existed that met her needs in that Respondent could have provided consistent, structured,

repetitive instructions on how to do the required tasks. Complainant contends the Respondent could have provided additional training.

Complainant contends Respondent failed to provide the accommodation. Respondent assigned Complainant to different trainers who did tasks in different ways. When Complainant expressed confusion because she was told different, inconsistent ways of doing tasks, she was disciplined. Finally, Respondent assigned an inappropriate person to train Complainant as the Respondent knew the person had been disciplined for absenteeism, tardiness, reporting to work in an intoxicated state and had received negative evaluations on skills related to training. The training provided was not effective for Complainant and Respondent knew that it was not effective.

Complainant contends Respondent failed to engage in a meaningful interactive process with Complainant to ascertain whether an appropriate accommodation could be made which would allow her to perform the essential functions of the job. Respondent failed to provide training through repetition as Complainant requested. Respondent failed to provide the trainers with any instruction on Complainant's training needs. Respondent's supervisor refused Complainant's request to contact her brain trauma counselor. Complainant contends Respondent did not even engage in the pro forma interactive process until after they had decided to terminate Complainant's employment.

Complainant contends Respondent has provided no meaningful training to its supervisory personnel regarding compliance with the disability discrimination provisions of the West Virginia Human Rights Act and that some of its policies in fact violate the West Virginia Human Rights Act. Respondent terminated the employment of Complainant after failing to comply with the disability discrimination provisions. Further, Respondent has destroyed or altered documents relating to Complainant's job performance. Complainant contends that those documents would have shown Complainant was capably performing the duties of her job and that Respondent should

be sanctioned for the destruction of the evidence with an adverse inference to that effect and/or the exclusion of any evidence that Respondent would put forth to show Complainant could not perform the essential functions of the job.

Complainant has requested that she be awarded loss of income damages from the discriminatory discharge both past and future. She does not seek to be ordered reinstated. Complainant also seeks to be compensated for her distress, annoyance and inconvenience as a result of her termination.

Respondent contends that Complainant did not disclose her disability until weeks after she was hired. That it was only after being disciplined twice and two trainers that she disclosed that she had a disability. Respondent contends that Complainant did not provide documentation of her disability, even though requested by management at the local DMV office. The Respondent contends that the reason Complainant did not have documentation changed over time as well as how and when the injury occurred.

Respondent contends that Complainant is not a qualified individual with a disability. Complainant affirmed during the interview process that she could adjust to change and could do the job. Later Complainant announced she was unable to deal with inconsistency and change; that Complainant was unable or unwilling to function in an environment of inconsistency and constant change. Respondent claims Complainant requested to take notes but then refused to take notes.

Respondent contends that Complainant requested to be trained using a step-by-step process, which Respondent claims it provided. Respondent contends that Complainant requested longer training than given to other trainees and that Complainant was given a longer training period. Respondent contends that Complainant was trained consistently with her requests. Complainant stated she needed repetition to learn. Respondent allowed the Complainant to spend the vast majority of her six months of training repeating the simplest transaction, a driver's license application, to no avail. After six months, Complainant could perform the task only with someone

standing next to her even though she could repeat the steps necessary to complete the transaction. Management repeatedly asked what more they could do to help her with no success.

Respondent contends that Complainant's position as customer service representative was to effectively and pleasantly assist customers. Respondent claims that Complainant was repeatedly rude, would not stay at her window even when customers were at the window for assistance, and believed it was easier to ask management rather than refer to the provided resources creating problems for an entire office. It is Respondent's position that Complainant is unable to perform the essential functions of the job. Complainant told the Social Security Administration that she needed help understanding a simple instruction, getting along with people, changing routines, retaining letters on a keyboard, following conversations, and knowing what to say when answering the telephone. Respondent contends that Complainant's own expert testified that Complainant's condition prevented her from doing her DMV job. Respondent contends that Complainant cannot pursue a failure to accommodate disability claim under the West Virginia Human Rights Act because she filed a Social Security Supplemental Security Disability Income claim and that the Social Security Administration determined that her disability prevented her from pursuing her previous employment with the Respondent, DMV.

Respondent contends that it complied with the interactive process. When Complainant asked management to talk with her brain specialist, management responded appropriately by beginning the formal interactive process. Respondent engaged in the process in good faith, requesting information from those providers that Complainant said could verify her disability and needs. Respondent contends that the accommodations that were reported as needed had already been provided unsuccessfully for six months. Respondent contends that Complainant never said she needed to be shown the steps in the same sequence and that she failed to engage in the

interactive process in good faith because she withheld the Division of Rehabilitation Services psychologist report and failed to meet with Pam Lockhart when requested to develop an individual plan for employment. Respondent offered the expert testimony of its ADA Coordinator that Respondent had complied with the provisions of the ADA's interactive process in its interactions with Complainant.

Respondent contends that to continue the employment of the Complainant would cause undue hardship even if she could do the job successfully. The argument is premised upon the claim that change is constant at the DMV and that the time required for Complainant to adapt to those changes would be too long. Respondent contends that it is not reasonable or efficient to allow Complainant to perform only the easiest transactions in a small DMV office while someone stands with her for each transaction. Although Complainant has repeatedly alleged that documents were deliberately destroyed or altered by the Respondent, Respondent contends they were not. Respondent contends that all the files for employees kept by Ms. McIntyre Frick were thrown out, not just those of Complainant; and, that the computer copy of Ms. Frick's Daily Log Notes were lost when the computers at the Kearneysville office were replaced.

### **III SUMMARY OF DECISION**

This case can be boiled down to a few basic facts, which are apparent from the evidence in this case. Complainant told her manager repeatedly that she needed to be shown the transactions in the same order of steps. Although Respondent argues otherwise, Respondent's own documentary exhibits and testimony contain repeated references to the effect that Complainant has been repeatedly told that it does not matter in what order the steps of the transaction are completed as long as it comes out right in the end. However, it does matter to the Complainant what order the steps of



the transaction are completed. This is established both by Complainant's own testimony and by that of her expert in clinical neuropsychology, James Douglas Petrick, Ph.D.

Other notations exist that her trainers were showing her how to do the transactions wrong. This is further evidence of a failure of communication between Complainant and Respondent's manager regarding what accommodation she needed in order to successfully complete her training. Respondent's manager testified that if Complainant did not learn it the way everyone else did, "that it did not matter what order the steps are completed", Complainant would not be able to learn how to complete the transactions. The manager is not qualified to offer this opinion as she has no training or expertise to make such an assertion. It is instructive as to the discriminatory motive of Respondent's agent in failing to offer this simple accommodation of showing her the transaction in the same sequence of steps. It is clear that Respondent's manager failed to appreciate Complainant's need to have the steps of the transactions shown to her in the same sequence to facilitate her learning. This failure is based upon the manager's ignorance of the nature and consequences of Complainant's disability; which in turn led to the Complainant's negative performance issues, culminating in the Respondent's decision to terminate her employment.

The supervisor refused to meet with Complainant's Traumatic Brain Injury Specialist. Respondent does not have any reference to its Department of Transportation, ADA Committee, or Request for Accommodation forms, in the DMV Employee Handbook. Respondent does not have the Request for Accommodation forms available at its Field Service Offices, nor does it train its supervisory employees regarding its ADA request for accommodation process. Nevertheless, Respondent undertook the DOT ADA review process, relied upon the partial written responses of the medical providers and a telephone interview of Complainant's manager, reaching a conclusion that the requested accommodation had been provided without success. That determination was made by a committee, which by the DOT ADA Committee

Coordinator's own admission had no knowledge regarding the effects of a traumatic brain injury on how a person learns. Respondent's manager, and the DOT ADA Committee, failed to engage meaningfully in the interactive process by refusing the request by Complainant that her supervisor meet with her Traumatic Brain Injury Specialist.

The Complainant has shown by a preponderance of the evidence that the Respondent, DMV, breached its duty to provide reasonable accommodation to the Complainant under the West Virginia Human Rights Act. To state a claim for breach of duty of reasonable accommodation under the West Virginia Human Rights Act, W. Va. Code Ann. § 5-11-9, a plaintiff must allege the following elements: (1) The plaintiff is a qualified person with a disability; (2) the employer was aware of the plaintiff's disability; (3) the employee required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the employer knew or should have known of the plaintiff's need and of the accommodation; and, (6) the employer failed to provide the accommodation. Syllabus Point 2, Skaggs v. Elk Run Coal Co., Inc., 198 W. Va. 51, 479 S.E.2d 561 (1996).

The Complainant is a qualified individual with a disability. W. Va. Code Ann. § 5-11-3(m) (West) defines "disability" to mean: "(1) A mental or physical impairment which substantially limits one or more of such person's major life activities. The term 'major life activities' includes functions such as . . . hearing, speaking . . . learning and working; . . ." The West Virginia Human Rights Commission's, Rules Regarding Discrimination Against Individuals With Disabilities, provides at W. Va. C.S.R. § 77-1-4.2:

"Qualified Individual with a Disability" means an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job . . .

Complainant has proven that she is a person with a disability under the West Virginia Human Rights Act through the evidentiary deposition testimony of James

Douglas Petrick, Ph. D. in clinical psychology. Dr. Petrick saw Ms. Powers on August 25, 2010, on a consult for the West Virginia Center for Excellence in Disabilities' Traumatic Brain Injury Program operated by West Virginia University in Morgantown. Dr. Petrick administered a series of different psychometrics to assist measuring cognitive styles. Dr. Petrick's conclusion was that Complainant had suffered a head trauma with traumatic brain injury secondary to a fall when she was eight years old. Diagnostics in his report listed cognitive disorder not otherwise specified secondary to traumatic brain injury and mood disorder not otherwise specified. The Boston Naming Test and Controlled Oral Word Association Test (FAS) showed impairments in Complainant's ability to understand what is being said and to make her thoughts known to others. This impacts Complainant's learning and memory which makes communicating with others not impossible but more difficult. There was dysnomia (word finding) associated with left hemisphere injury or lesions which reduced verbal fluency. The Trail Making Test indicated cognitive speed and efficiency were moderately impaired. Mental flexibility and sequencing skills were mildly impaired. Complainant is able to do things; it just takes her longer. There was a suggestion of clinical perseverative tendencies, which prevents flexibility in thinking. The Complainant is not incapable of problem solving there is just a decreased efficiency. Complainant exhibited noticeable but not profound tangential nonlinear thinking.

The Complainant has provided evidence that when coworkers are aware of her condition, which causes her to have to repeatedly ask questions, and present the tasks necessary to perform a job function in a consistent step-by-step format, she can be successful. This is demonstrated by a work history involving similar customer service positions, which Complainant has held for extended periods of time with performance that was recognized and rewarded by her previous employers. Subsequent to her discharge from the DMV, Complainant filed for Social Security Supplemental Security Income benefits to assist in obtaining training benefits and to supplement part time

work. Complainant's last day of work at the DMV was September 30, 2010. When Complainant found part time work in January 2011, she stopped looking for full time employment. In Cleveland v. Policy Management Systems Corporation, 526 U.S. 795, at 797-798, 119 S.Ct. 1597, at 1597, 143 L.Ed.2d 966 (1999), the United States Supreme Court held in an ADA case:

[The] pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI claim that she was too disabled to work. To survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could "perform the essential functions" of her previous job, at least with "reasonable accommodation".

The West Virginia Supreme Court is in accord in its decision in Alley v. Charleston Area Medical Center, Inc., 216 W. Va. 63, 602 S.E.2d 506 (2004). In that decision the Court noted that the vocational specialist had testified that SSDI required proof of inability to work without consideration of whether reasonable accommodation would allow the person to continue working. *Id.* at 216 W. Va. 76, 602 S.E.2d at p. 519 (2004).

The Respondent was aware of the Complainant's disability. It is undisputed that by April 23, 2010, Complainant told the manager, Ms. Frick, that she had a brain injury which prevented her from retaining information. This information was discussed with Ms. Frick's direct superior, Carol Huggins. She was instructed to ask why Complainant had not informed them of the brain injury when interviewed. Notes for the week of May 16 to May 21, 2010, indicate that Complainant complained about the way that each trainer does things and that with the brain injury she cannot retain information. Complainant again told Ms. Frick that she had the brain injury that prevents her from retaining information and requested additional training on May 28, 2010, after meeting with Ms. Whittington and Ms. Frick the previous day. The Complainant was provided an

additional week of training after the matter was discussed with Carol Huggins. After receiving another bad evaluation on July 12, 2010, Complainant asked Ms. Whittington to meet with Complainant's brain trauma counselor, Terry Cunningham, for information about Complainant. Ms. Whittington refused. On July 22, 2010, Ms. Frick received a call from Penny Hall from the Sate ADA office, asking why they would not meet with Complainant's brain trauma counselor. She was told that any such meeting would have to be approved by Charleston and referred her to Director Pete Lake.

The Complainant required an accommodation. Dr. Petrick testified concerning the nature of that need. Dr. Petrick determined that Complainant has cognitive deficits, as a result of which she requires structure, repetition and consistency to learn. Anyone with a cognitive impairment will do better with consistency; changing the sequence in which a task is done contributes to frustration and decreases learning and task completion. Dr. Petrick's conclusions are that it is not that Complainant cannot learn but that decreased mental flexibility and perseverative tendencies ultimately have a negative impact on her performance. Changing the order in which the steps necessary to complete a task are presented causes Complainant emotional distress decreasing her chances of successfully learning the task contributing to confusion and frustration. This in turn will affect Complainant's interactions with co-workers, supervisors and trainers.

Respondent should have known of the need for a reasonable accommodation as they were aware of the Complainant's disability. Ms. Frick admits that she made no effort at any time of any sort to educate herself about the effects of traumatic brain injury on the learning process, or what might be helpful in facilitating Complainant's training. Instead the Respondent persisted in providing its idea of effective accommodation involving inconsistent repetition of the tasks in differing sequences and providing a longer training period, even though those efforts were ineffective. Ms. Frick refused to allow Ms. Whittington to meet with Complainant's Traumatic Brain Injury Specialist to discuss her training needs without going through the Department of

Transportation in Charleston. Ms. Frick discouraged Complainant from telling her coworkers about her problems in learning, such as repeating questions as part of the manner in which she learns. This led to her trainers considering her behavior rude and disinterested rather than the result of her disability. The West Virginia Human Rights Commission's, Rules Regarding Discrimination Against Individuals With Disabilities, provides that reasonable accommodations include but are not limited to among others, at W. Va. C.S.R. § 77-1-4.5.3 and 4.5.4:

- 4.5.3 Appropriate adjustments or modifications of examinations, training materials or policies; and
- 4.5.4 The preparation of fellow workers for the individual with a disability, to obtain their understanding of the limitations of the disability and their cooperation in accepting other reasonable accommodations for the individual with a disability.

Respondent could have encouraged Complainant to tell her coworkers of her learning difficulties when she began her employment as she had in the past. Ms. Frick instead encouraged her not to do so. Ms. Frick could have learned about the impacts of traumatic brain injuries on learning but did not. The trainers who trained Complainant could have been instructed to repeat the steps in completing a transaction in the same sequence to facilitate Complainant's ability to comprehend and learn the transaction, but did not. There would be no undue hardship placed upon the Respondent, DMV, to instruct its trainers of Complainant to repeat transactions in the same sequence. Respondent did not do so because it made no effort to see that the manager responsible for Complainant's training as a Customer Service Representative learn what the disability of Complainant entailed. The manager was unwilling to meet with Complainant's Traumatic Brain Injury Specialist; and, both the ADA Coordinator and ADA Committee of the Department of Transportation failed to see that this interaction occurred. The ADA Committee made its decision to deny Complainant's request for

accommodation in a complete vacuum of knowledge concerning the disability itself and the interaction with the DMV's training process of Complainant.

Under the West Virginia Human Rights Act, W. Va. Code Ann. § 5-11-9, once an employee requests a reasonable accommodation, an employer must assess the extent of an employee's disability and how it can be accommodated. Syllabus Point 4, Skaggs, 198 W. Va. 51. In Skaggs, 198 W. Va., 68, 69; the court made several observations about the process that should occur in determining and adopting reasonable accommodations as follows:

The process by which accommodations are adopted ordinarily should engage both management and the affected employee in a cooperative, problem solving exchange. The federal regulations implementing the ADA state:

"To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."

Thus, under West Virginia's Human Rights Act, an employer is required to provide an interactive process with a person with a disability to determine what accommodations are required. In the instant case the Respondent, DMV, has made that process difficult for employees to navigate. The DMV personnel handbook does not disclose the existence of the Department of Transportation ADA Coordinator and ADA Committee. Complainant and other employees are not made aware of the process for making a request for accommodation or the availability of the forms for making the request for accommodation. Respondent's regional office managers have never been trained regarding the expectations of the Respondent regarding the interactive process once an employee has identified a disability or made a request for accommodation.

The Respondent, DMV, has failed to meaningfully participate in the interactive process with the Complainant in this matter. The ADA Coordinator for the Department of Transportation testified that the ADA Committee meets and decides whether to engage in the interactive process. Neither the West Virginia Human Rights Act, nor the ADA, permit an employer to make a decision regarding whether or not to engage in this interactive process. Managers should be trained to immediately instruct the employee who has requested an accommodation to fill out the Department of Transportation's Request for Accommodation form. Should the Respondent have done so in this case when Complainant informed Ms. Frick of her traumatic brain injury in April 2010, the manager could have been instructed to meet with the Traumatic Brain Injury Specialist to determine the Complainant's actual limitations and training needs. Respondent cannot rely on written submissions to the ADA Committee and a phone interview of its supervisor/manager in the field in failing to agree to the reasonable request of Complainant to meet with her Traumatic Brain Injury Specialist.

Complainant's last day of work at the DMV was September 30, 2010. When Complainant found part time work in January 2011, she stopped looking for full time employment. The Complainant has not requested reinstatement to her job. Instead the Complainant has submitted expert testimony regarding lifetime diminution in expected earnings and requests that she be awarded this amount for prevailing in her failure to accommodate West Virginia Human Rights Act case. Respondent has failed to provide evidence regarding the availability of comparable positions in the area where Complainant could be employed.

It is well settled that discrimination complainants have a duty to mitigate their damages by accepting equivalent employment. Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990). The burden of raising the issue of mitigation is on the employer. Mason Cnty. Bd. of Educ. v. State Superintendent of Sch., 170 W. Va. 632, 295 S.E.2d 719, 719 (1982). The Court held at Syllabus Point 2:



Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

In Syllabus Point 4, Vorhees v. Guyan Machinery Company, 191 W. Va. 450, 446 S.E.2d 672 (1994), the Court held that:

If anything has occurred to render further association between the parties offensive or degrading to the employee, an offer of employment will not diminish the employee's recovery if the offer is not accepted.

This holding was applied in the context of a West Virginia Human Rights Act case in Burke-Parsons-Bowlby Corp. v. Rice, 230 W. Va. 105, 736 S.E.2d 338 (2012), where the Court held at Syllabus Point 4:

In a wrongful discharge action filed in circuit court alleging a violation of The West Virginia Human Rights Act, W. Va. Code 5-11-1 [1967], et seq., the circuit court may submit the question of reinstatement to employment versus award of front pay to the jury, where the facts and inferences concerning those remedies are in conflict.

This case poses a conundrum. Complainant did mitigate her damages by accepting part time employment in January 2011. However, by her own admission she stopped seeking full time employment once she found her part time job. Respondent has not provided evidence regarding availability of full time equivalent employment opportunities. Complainant has failed to offer evidence that anything occurred, which renders reemployment with the Respondent offensive or degrading to Complainant. Nor was there evidence establishing that the Respondent's actions were malicious. Therefore, award of front pay in the nature of lifetime diminution of earnings in lieu of ordered reinstatement is not appropriate.

As the prevailing party, Complainant's attorney is entitled to award of attorney's fees. Complainant is entitled to award of damages for humiliation, embarrassment, emotional distress and loss of personal dignity, suffered as a result of being subjected to unlawful discriminatory actions by Respondent. Complainant is entitled to an award of back pay and front pay until reinstated to the Customer Service Representative position with Respondent, DMV. Prior to beginning training for the position, Complainant and her supervisors and managers shall meet with her Traumatic Brain Injury Specialist, to determine the best method for trainers instructing Complainant, to assure that they are aware of what to expect and how to provide training to Complainant. The Complainant is entitled to a cease and desist order, which will prohibit Respondent from engaging in this type of discrimination; and, specifically require the inclusion of the Department of Transportation ADA Committee process for requests of reasonable accommodation in the DMV personnel handbook, training of its supervisory staff in this process, and that the Request for Accommodation forms be available to its field service and regional DMV offices.

#### **SPOILATION OF EVIDENCE**

The issue of spoliation of evidence in this case, needs to be addressed. As a factual matter, copies of handwritten trainer's notes, primarily consisting of six weekly evaluations for new employees forms are cut off in places and obscured making them incomplete and illegible in portions. Complainant repeatedly sought originals in the discovery process to no avail. The evidence establishes that the originals of these documents, along with others such as copies and original customer comment cards for Complainant, were destroyed by Respondent in December 2010. Ms. Frick was out on sick leave and another manager filling in at the Kearneysville DMV field office got rid of the file which Ms. Frick was maintaining documenting Ms. Richardson-Powers employment problems with DMV. Respondent contends that all the files for employees kept by Ms. Frick were thrown out. The computer records of Ms. Frick in this matter,

including the other primary documentary evidence consisting of Ms. Frick's weekly summaries in her Daily Log for Renee Richardson-Powers, CSRT-2010, which runs from March 22 through July 22, 2010, were destroyed when the computers at the Kearneysville, DMV were replaced. The spoliation of this evidence took place during a period subsequent to the filing of the request for accommodation by Complainant, her subsequent termination from employment by Respondent, and the appearance of counsel for the DMV, appearing on behalf of Respondent in a Grievance filed by Ms. Richardson-Powers in relation to the matters at issue herein. Neither, Ms. Frick, nor the manager who filled in for her in December 2010, at the Kearneysville office, were instructed to preserve the originals or other evidence regarding Ms. Richardson-Powers by anyone including the ADA Committee at the Department of Transportation, Ms. Dunn, General Counsel for Respondent DMV, who received notice from the Grievance Board when Complainant filed her grievance, nor any other DMV upper management.

Respondent has destroyed or altered documents relating to Complainant's job performance. Complainant contends that those documents would have shown Complainant was capably performing the duties of her job and that Respondent should be sanctioned for the destruction of the evidence with: 1) an adverse inference that customer comment cards and daily log notes for July 23, 2010, forward would have shown Complainant was performing her job with the Respondent in a satisfactory manner, 2) Respondent should be prohibited from presenting any testimony or other evidence regarding the content of customer comment cards or any of the Daily Log Notes for July 23, 2010, to the end of Complainant's employment with Respondent, 3) the ALJ should infer that the portions of the Weekly Evaluation reports which have been obscured contain information about Complainant's job performance which is favorable to her, and 4) Respondent should be prohibited from presenting any testimony regarding Complainant's job performance after July 22, 2010.

In Tracy v. Cottrell, 206 W. Va. 363, 524 S.E.2d 879, (1999) at Syllabus Pt. 2, the West Virginia Supreme Court of Appeals held that:

2. Before a trial court may give an adverse inference instruction or impose any other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence.

Examining the factors listed; it is clear that Respondent had complete control over the records and evidence, which was destroyed. Although it can be argued that some of the inferences that Complainant requests are not warranted, it is clear that the Complainant herein has been significantly prejudiced by the destruction of the evidence at issue. The evidence sought was highly relevant to the issue of whether Ms. Powers was satisfactorily performing her duties. This is true both regarding the cut off and obscured portions of the copies of the trainer notes which might have shown positive progress in addition to the negative aspects; but more importantly, the destruction of the documentary evidence of performance after July 23, 2010, permits the Respondent to make uncontroverted assertions regarding her progress and performance thereafter through the testimony of its supervisory personnel. Complainant was unable to examine the notes to test the veracity of those assertions. Complainant's counsel had to expend a great deal of effort to obtain the discovery of these primary original documents of critical importance to the issues of the case. It was only through the expenditure of considerable time and resources that the circumstances concerning the disappearance of the documents were ultimately forthcoming. Thus, Complainant herein has been highly prejudiced by the destruction of this primary source documentation in this case.

Respondent was on notice that the evidence was critical at the time of its destruction by Respondent. The Complainant herein had already filed a grievance over her termination, citing the grounds that form the gravamen of the instant action before the Human Rights Commission prior to the time during which the spoliation of evidence occurred. The Respondent is entirely at fault for the destruction of the evidence. Respondent had been served with a copy of the grievance, both upon its Commissioner, Joe Miller and upon its in house counsel, Jill Dunn. An Assistant Attorney General had made an appearance of record in the matter. This all occurred prior to Ms. McIntyre-Frick being out of her office for the month of December 2010. During this period no one was instructed to preserve the records at issue. It is unlikely that the Respondent would allow evidence that would be beneficial to its position in the grievance to be destroyed. It is also not in character with its management style that a person would go into a manager's office and "get rid of all the files" without being instructed to do so by someone in authority to give such instructions. There is a high degree of fault upon the Respondent, DMV, in the disappearance of these documents and the failure to preserve the computer files of Ms. Frick.

The Complainant is entitled to an inference that her performance after July 23, 2010, was as portrayed by her testimony and not that of Ms. Frick or Ms. Whittington. Similarly, Complainant is entitled to an inference that no written step-by-step instructions existed, as those were never produced by Respondent in discovery or at Public Hearing. Complainant is entitled to an award of attorney's fees and costs in seeking discovery and sanctions for the spoliation of the evidence in this matter. Those costs and attorney's fees are included in the remedy given for prevailing upon the merits of this cause of action. The undersigned makes no separate determination of their amount, as sanctions imposed on account of the Respondent's spoliation of evidence are not to be collected twice.

IV  
FINDINGS OF FACT

**I. Renee-Richardson Powers suffered a traumatic brain injury.**

1. Renee Richardson-Powers (Ms. Powers) was born on May 7, 1971. [Dec. 9, 2013 Tr. 208]

2. When she was about eight years old, Ms. Powers fell from a ledge at the Lincoln Memorial. [Dec. 9, 2013 Tr. 39; Dec. 10, 2013 Tr. 96]

3. Medical records of Ms. Powers' injury and treatment no longer exist. The records had been sent to Ms. Powers' mother, who died in 1990. Ms. Powers does not know what her mother did with the records. [Dec. 9, 2013 Tr. 43 - 45]

4. All of the pediatricians who treated Ms. Powers have retired, and none have copies of her records any longer. [Dec. 9, 2013 Tr. 44]

5. Ms. Cunningham, Ms. Powers' counselor, tried to obtain medical records about Ms. Powers' injury, but was informed that they no longer existed. [Dec. 9, 2013 Tr. 110 - 111; Pl.Ex.38]

6. Ms. Powers' twin sister, Michelle M. Richardson, saw her fall and land on her head. Ms. Richardson was in the ambulance with Ms. Powers, her mother and her younger sister when Ms. Powers was taken to the hospital. [Dec. 10, 2013 Tr. 96 - 98, 120]

7. Kathleen A. Kundy is Ms. Powers' younger sister. She is four years younger than Ms. Powers. [Dec. 10, 2013 Tr. 124]

8. Ms. Kundy remembers her mother holding Ms. Powers and screaming for someone to help her and her daughter. She then remembers a man coming, and then remembers being in the ambulance and, after that, waiting in the hospital lobby until her grandparents came for her. [Dec. 10, 2013 Tr. 124 - 125]

9. Ms. Powers does not remember falling, but remembers waking up under an x-ray machine. The next thing Ms. Powers remembers is waking up again with bandages on

her head, and then vomiting and crying because of the excruciating pain. [Dec. 9, 2013 Tr. 39 - 40]

10. Michelle Powers remembers her sister being in the hospital for about two weeks. [Dec. 10, 2013 Tr. 99]

**II. Ms. Powers has a disability as a result of the brain injury**

11. When Ms. Powers got out of bed after the accident, her equilibrium was off and for the first time she needed assistance with walking. [Dec. 9, 2013 Tr. 41]

12. Michelle Powers was instructed to be careful with her sister when she came home from the hospital. Ms. Renee Powers could not run or engage in any physical activity, did not speak much, and seemed like she was in a fog and unsteady. [Dec. 10, 2013 Tr. 99]

13. Doctors forbade Ms. Powers from running or playing sports for two years because of the way her skull had been broken by the fall. They feared that any kind of jarring of her head could kill her. [Dec. 9, 2013 Tr. 42]

14. Before the accident, Ms. Powers had been a good student. After the accident, Ms. Powers was removed from the normal classes in her school and placed into special education classes. [Dec. 9, 2013 Tr. 42; Dec. 10, 2013 Tr. 100 - 101]

15. Ms. Powers lost some hearing as a result of the accident. [Dec. 9, 2013 Tr. 41]

16. The accident harmed Ms. Powers' ability to speak and to find the right words to express herself. Her speech was slurred and slow after the accident. [Dec. 9, 2013 Tr. 41; Dec. 10, 2013 Tr. 100]

17. As a result of the injury, in order for Ms. Powers to learn and retain how to do new tasks, she must do the task over and over. The task must be broken down into a series of steps, and she must do those steps, over and over, the same way every time. She also needs to ask questions, sometimes the same questions repeatedly, until she learns the task. [Dec. 9, 2013 Tr. 45 - 46; Dec. 10, 2013 Tr. 101 - 102]

18. As she grew older, Ms. Powers learned to compensate for her disability. Among other things, she learned to ask questions, and repeat tasks until she learned them. [Dec. 10, 2013 Tr. 103]

19. As a result of the injury, an organized work space is of especial importance to Ms. Powers. She has to have every document in its place, or it hinders her ability to remember and process information. [Dec. 9, 2013 Tr. 46 - 47]

20. Once she has learned a task by doing it over and over and asking questions, Ms. Powers is able to do the task, and do it well. [Dec. 9, 2013 Tr. 46]

21. Neuropsychologist James D. Petrick, Ph.D. conducted an examination of Ms. Powers on August 25, 2010, as consultant for the West Virginia Center for Excellence in Disabilities' Traumatic Brain Injury Program operated by the West Virginia University in Morgantown. Based upon his examination, and the history given by Ms. Powers, Dr. Petrick concluded that Ms. Powers had suffered head trauma with a traumatic brain injury secondary to a fall she suffered when she was a child. [Pl. Ex. 75, Petrick Dep., 11, 13 - 14, 76 - 77; Pl. Ex. 2]

22. Dr. Petrick also concluded that Ms. Powers has a cognitive disorder not otherwise specified secondary to traumatic brain injury. He explained that this meant Ms. Powers had a problem with her thinking. [Pl. Ex. 75, Petrick Dep., 14]

23. Dr. Petrick found that, as a result of her disability, Ms. Powers at times has problems finding the right word to express herself. Ms. Powers also thinks more slowly, and needs more time to figure things out. [Pl. Ex. 75, Petrick Dep., 15 - 17]

24. Specifically, Dr. Petrick found that the Boston Naming Test and Controlled Oral Word Association Test (FAS) showed impairments in Complainant's ability to understand what is being said and to make her thoughts known to others. This impacts Complainant's learning and memory, which makes communicating with others not impossible but more difficult. There was dysnomia (word finding) associated with left hemisphere injury or lesions which reduced verbal fluency. The Trail Making Test



indicated cognitive speed and efficiency were moderately impaired. Mental flexibility and sequencing skills were mildly impaired. Complainant is able to do things it just takes her longer. There was suggestion of clinical perseverative tendencies, which can come across as obsessive to the average person, which prevents flexibility in thinking. The Complainant is not incapable of problem solving there is just a decreased efficiency. Complainant exhibited noticeable but not profound tangential nonlinear thinking. [Pl. Ex. 75, Petrick Dep., 15 - 20]

25. Dr. Petrick determined that these findings clearly show Complainant has cognitive deficits, as a result of which she requires structure, repetition and consistency to learn. [Petrick Dep., 21]

26. In addition, Dr. Petrick concluded that Ms. Powers had a mood disorder not otherwise specified. Dr. Petrick explained that Ms. Powers demonstrated problems with her emotions. [Pl. Ex. 75, Petrick Dep., 14]

27. Dr. Petrick opined that if Ms. Powers were shown how to do a task in one order one day (A, B, C, D) and then shown how to do it in a different order the next (B, A, C, D), that it would cause her frustration and would greatly decrease her chances of successfully learning the task. Ms. Powers' frustration, in turn, could make it more difficult for her to deal with her coworkers. [Pl. Ex. 75, Petrick Dep., 21 - 23, 25 - 26]

28. Ms. Powers' ability to adapt to changes in DMV procedures, Dr. Petrick said, would depend on how well she had been trained on the procedure before the change and the nature of the change in the procedure. This is also true of anyone else, regardless of disability. [Pl. Ex. 75, Petrick Dep., 82]

29. Dr. Petrick said that Ms. Powers' behavior toward her co-workers was consistent with behavior that could be expected of a person who has her disability and who was given training, which was not meeting her needs. [Pl. Ex. 75, Petrick Dep., 37]

### **III. Ms. Powers' education and employment before being hired by the DMV.**

#### **A. Ms. Powers achieved a GED.**

30. Ms. Powers quit high school four months shy of graduation on the advice of her school principal. She then began working full time while helping to take care of her mother, who was dying of breast cancer. The principal thought that this was too much for her, and Ms. Powers agreed. [Dec. 9, 2013 Tr. 42 - 43]

31. Her mother was not pleased with Ms. Powers' decision to quit school, but Ms. Powers promised that she would get her OED. She was able to take the test for her OED, which she passed, just before her mother passed away in 1990. [Dec. 9, 2013 Tr. 43]

**B. Ms. Powers' job at a hardware store.**

32. Ms. Powers worked in a hardware store in Woodbridge, VA, where Ms. Kundy later got a job and worked with Ms. Powers. [Dec. 10, 2013 Tr. 125 - 126]

33. Ms. Kundy testified that Ms. Powers knew the hardware store job, and was "detailed" about it. [Dec. 10, 2013 Tr. 126]

**C. Ms. Powers was successfully employed with Nations Bank/Bank of America**

34. Ms. Powers' first full-time job as an adult was at Nation's Bank, now known as Bank of America. She started working at the Manassas, Virginia branch in 1993, as a drive through teller. [Dec. 9, 2013 Tr. 47]

35. As a drive-through teller, Ms. Powers handled deposits, cashed checks, provided information about accounts, replenished ATMs and audited the machines. [Dec. 9, 2013 Tr. 47 - 49]

36. Ms. Powers received good evaluations of her work in that job. [Dec. 9, 2013 Tr. 50]

37. Ms. Powers never told anyone at Nations Bank about her injury. She just told them how she learned things, and they accommodated her by teaching her in the way she learned. [Dec. 9, 2013 Tr. 49 - 50]

38. Ms. Powers had no prior experience as a teller, but learned how to do her job as a drive-through teller through repetition, structure and repeatedly asking questions -

sometimes the same question over and over - of her coworkers. [Dec. 9, 2013 Tr. 48 - 49]

39. Both the managers and coworkers were helpful to Ms. Powers. They did not get annoyed when she asked questions, and tried to help her. [Dec. 9, 2013 Tr. 49]

40. Ms. Powers learned the tasks for the job well enough that, later on, she was able to help new hires. [Dec. 9, 2013 Tr. 49]

41. Ms. Powers worked at the Manassas branch of Nations Bank for about one year. [Dec. 9, 2013 Tr. 50]

42. Ms. Powers and her son moved to Reston, Virginia, and she transferred to Fair Oaks branch of Nations Bank, again working as a drive-through teller. [Dec. 9, 2013 Tr. 50]

43. As part of her duties, Ms. Powers informed customers of promotions on financial products, like certificates of deposit and money market accounts, and sold those products. [Dec. 9, 2013 Tr. 51]

44. The interest rates of the products Ms. Powers sold changed from time to time, and Ms. Powers was able to keep up with those changes. [Dec. 9, 2013 Tr. 52]

45. Ms. Powers received good evaluations of her work at the Fair Oaks branch. Nations Bank gave Ms. Powers an award for being second in the region in sales of financial products. [Dec. 9, 2013 Tr. 50 - 52]

46. Ms. Powers worked at the Fair Oaks branch for about one year, and then she transferred to the Herndon branch, again as a drive-through teller. [Dec. 9, 2013 Tr. 52]

47. After working four to six months at the Herndon branch, Ms. Powers was promoted to commercial teller because of her attention to detail and her customer service skills. [Dec. 9, 2013 Tr. 52 - 53]

48. Ms. Powers was not familiar with the commercial side of banking at the time of her promotion to commercial teller. The head teller taught Ms. Powers how to perform in her new position. [Dec. 9, 2013 Tr. 53]

49. Ms. Powers received good evaluations for her work as a commercial teller. [Dec. 9, 2013 Tr. 54 - 55]

50. Ms. Powers worked at the Herndon branch for about one year. Ms. Powers left her job with Nations Bank in October 1997, out of fear for her safety after she learned of the shooting of a commercial teller at another branch of the bank. [Dec. 9, 2013 Tr. 58]

**D. Ms. Powers was successfully employed with Budget Rent-A-Car**

51. After leaving Nations Bank, Ms. Powers was hired as a customer service agent at the Dulles International Airport office of Budget Rent-a-Car. [Dec. 9, 2013 Tr. 59]

52. Ms. Powers' duties as a customer service agent included handling rental car reservations, checking in return rentals, cleaning cars, and selling rentals to walk-in customers. [Dec. 9, 2013 Tr. 59]

53. Ms. Powers did not know how to handle car rental transactions when she began her job with Budget. She was trained one on one by a supervisor and a co-worker. [Dec. 9, 2013 Tr. 60]

54. Ms. Powers told her new employer that she learned through a step-by-step process, through repetition and by doing the job. [Dec. 9, 2013 Tr. 60]

55. Even after her initial training, Ms. Powers asked questions frequently. The Budget co-workers and supervisors did not get upset when Ms. Powers asked questions. Instead, they answered her questions. [Dec. 9, 2013 Tr. 60]

56. The job at Budget was fast-paced at times, especially on weekends. [Dec. 9, 2013 Tr. 60 - 61]

57. The basic car rental process was the same for most transactions. The details of transactions, however, changed frequently depending upon vehicle make, vehicle size, and options requested. There were variations between corporate and individual rentals. From time to time, there were special rates and promotions. [Dec. 9, 2013 Tr. 61 - 62]

58. From time to time, Budget offered incentives for selling vehicle insurance, fuel option packages, and other services. These incentives changed daily based upon the inventory. [Dec. 9, 2013 Tr. 62]

59. Ms. Powers was able to keep up with the changes at Budget. [Dec. 9, 2013 Tr. 62]

60. Ms. Powers received all positive evaluations for her work at Budget. [Dec. 9, 2013 Tr. 62]

61. Customers commented favorably on her work, and some wrote to Budget headquarters, and to Ms. Powers' supervisor, commending Ms. Powers for her exceptional service and assistance. [Dec. 9, 2013 Tr. 63 - 73, Pl. Ex. 34]

62. Budget recognized Ms. Powers' exceptional customer service in its monthly customer magazine. [Dec. 9, 2013 Tr. 71; Pl. Ex. 34]

63. Ms. Powers quit her job with Budget shortly after September 11, 2001. [Dec. 9, 2013 Tr. 73 - 74]

**E. Ms. Powers was successfully employment at Sam's Club**

**1. Ms. Powers performed well in the cash associate position**

64. Shortly after leaving Budget, Ms. Powers was hired by the Sterling, Virginia Sam's Club as a cash office associate. [Dec. 9, 2013 Tr. 74]

65. Cash associates accounted for all the money taken in by the store - checks, cash, credit cards and debit cards - and prepared cash drawers for cashiers coming on duty. Cash associates counted all money that was received, and audited the drawers for each cashier, both at the end of the cashier's shift and during the cashier's shift. Cash associates also called customers to try to obtain payment when a check did not clear. [Dec. 9, 2013 Tr. 74 - 79]

66. While Ms. Powers was familiar with handling and accounting for cash, checks and bank cards from her prior employment, Sam's Club used procedures and computer programs which were different from those used at Nations Bank. [Dec. 9, 2013 Tr. 78]

67. Ms. Powers told the cash office lead and the store general manager that she learned by doing tasks in a very structured manner, by asking a lot of questions, and through repetition. [Dec. 9, 2013 Tr. 79]

68. Sam's Club trained her in the manner she requested. [Dec. 9, 2013 Tr. 78 - 79]

69. Throughout the time she worked as a cash associate, Ms. Powers asked a lot of questions to help her retain the knowledge of how to do her job. [Dec. 9, 2013 Tr. 79]

70. The job as cash associates could be fast paced, as transactions had to be accounted for quickly, and required 100% accuracy. [Dec. 9, 2013 Tr. 79 - 80]

71. Ms. Powers was able to meet the time deadlines and accuracy demands of the job at Sam's Club. [Dec. 9, 2013 Tr. 80]

72. Ms. Powers had the position in the cashier's office for about one year. [Dec. 9, 2013 Tr. 80]

## **2. Ms. Powers performed well as a receiving clerk**

73. The Sam's Club store general manager recommended Ms. Powers for the position of receiving clerk because of Ms. Powers' attention to detail and organization. [Dec. 9, 2013 Tr. 80 - 81]

74. As receiving clerk, Ms. Powers scheduled deliveries of product being delivered to the store. The store had only four truck bays, so the receiving clerk has to make sure that delivery trucks come when a bay will be available for them so product can be unloaded. [Dec. 9, 2013 Tr. 81]

75. The receiving clerk also helped account for product brought into the store. For items like bakery goods, the receiving clerk accounted for old, unsold product that was taken out of the store, and for which credit would be given to the store. [Dec. 9, 2013 Tr. 81 - 82]

76. The receiving clerk job required dealing with different vendors and different products from day to day. [Dec. 9, 2013 Tr. 84 - 85]

77. This position, like the cash associate position, required 100% accuracy, a standard, which Ms. Powers met. [Dec. 9, 2013 Tr. 83]

78. When Ms. Powers started in the receiving clerk position, she was anxious because she did not know how to do the job. [Dec. 9, 2013 Tr. 83]

79. Ms. Powers explained how she learned, and that she needed to ask a lot of questions. The receiving manager and the store manager helped her learn in accordance with her needs. Ms. Powers' co-workers also helped her by answering her questions. [Dec. 9, 2013 Tr. 83 - 84]

80. Ms. Powers described the receiving clerk job as fast-paced and non-stop. [Dec. 9, 2013 Tr. 84]

81. Ms. Powers was able to do the job as receiving clerk, and held the position for about one year. [Dec. 9, 2013 Tr. 84]

**3. Ms. Powers performed well as an assistant in the pharmacy**

82. When an opening occurred in the over-the-counter area of the Sam's Club Pharmacy department, Ms. Powers applied for the position, and got it. [Dec. 9, 2013 Tr. 85]

83. In her new position, Ms. Powers stocked shelves, rotated product, set up new displays, changed product displays, started up the cash register, obtained the cash for the change drawer, and audited inventory. She also responsible for making sure that the store had product on hand for repeat customers who had special orders. [Dec. 9, 2013 Tr. 85 - 88]

84. When she started the new position, Ms. Powers told the pharmacist that she learned by repetition. The pharmacist gave Ms. Powers written, visual instructions to help her learn her job. [Dec. 9, 2013 Tr. 88 - 89]

85. Ms. Powers asked questions continually, sometimes asking the same question day after day. The pharmacist answered the questions, without retaliation of any sort. [Dec. 9, 2013 Tr. 89]

86. Ms. Powers held the pharmacy position for about two years. [Dec. 9, 2013 Tr. 87]

4. **Ms. Powers received excellent evaluations for her work at Sam's Club**

87. Sam's Club conducted written evaluations of Ms. Powers. [Dec. 9, 2013 Tr. 89]

88. On her six-month evaluation, which covered her work in the cash office, Ms. Powers received the highest possible evaluation, which earned her a fifty-cent per hour raise. [Dec. 9, 2013 Tr. 89 - 91; Pl. Ex. 35]

89. An evaluation of her work in the pharmacy also gave her the highest possible score, and another raise. [Dec. 9, 2013 Tr. 90 - 91; Pl. Ex. 36]

90. The pharmacy evaluation recognized her good people skills. [Dec. 9, 2013 Tr.91; Pl. Ex. 36]

91. During her time at Sam's Club, Ms. Powers was twice nominated by her coworkers as employee of the month for the store, and won the award each time. [Dec. 9, 2013 Tr.92; Dec. 11, 2013 Tr. 83]

F. **Ms. Powers was successfully employed with Jobin Realty**

92. In 2005, Ms. Powers and her husband bought a house in West Virginia, and Ms. Powers left her job at Sam's Club when she moved. [Dec. 9, 2013 Tr. 92]

93. Ms. Powers found a job closer to her new home with Jobin Realty as an administrative assistant. [Dec. 9, 2013 Tr. 92]

94. In this job, Ms. Powers' duties included general secretarial work like answering telephones, filing, making sure there was an adequate supply of needed forms, and accepting certified mail for agents who were receiving certified checks. Ms. Powers also entered information about contracts into the office database. [Dec. 9, 2013 Tr. 92 - 93]

95. Within a year, as a result of the downturn in the economy, Jobin Realty essentially went out of business and Ms. Powers was laid off. [Dec. 9, 2013 Tr. 93 - 94]

G. **Ms. Powers was successfully employed with Ralph Lauren**

96. In April 2009, Ms. Powers began working for Ralph Lauren in Martinsburg, West Virginia. [Dec. 9, 2013 Tr. 94, 97 - 98]



97. Ms. Powers was the coordinator of order fulfillment for Ralph Lauren. [Dec. 9, 2013 Tr. 94]

98. As a coordinator of order fulfillment, Ms. Powers helped process orders for customers of Ralph Lauren. The process worked like this. A Ralph Lauren analyst would send to Ms. Powers, via email, an order placed by a customer, for example, for Macy's. When she received the order, Ms. Powers entered the information into a spreadsheet which contained rows and columns for type of garment, number of units requested, style, color, size, etc. Ms. Powers then simplified the spreadsheet by eliminating columns which did not apply to the order. Ms. Powers called the result a pivot table. [Dec. 9, 2013 Tr. 94 - 95]

99. After creating the pivot table, Ms. Powers checked to see if the customer had minimum numbers of garments, which the ordering company would accept in the event the full order could not be filled. Then, she contacted the inventory people, or audit people, to determine whether the necessary units of product were in stock in the warehouse. If not, she contacted logistics, the shipping people, to see when new stock of the product would be arriving in the port and sent to the warehouse. Then she relayed that information to the analyst to see what the customer wanted to do, that is, whether it wanted to keep the order open for additional product to arrive at the warehouse, or whether it only wanted its minimum order. If the order was kept open, Ms. Powers continued to check with logistics about the status of a new shipment of product and relayed that information to the analyst, so the analyst could inform the customer. [Dec. 9, 2013 Tr. 95 - 97]

100. Because of the number of orders, which came to her, the Ralph Lauren job was fast paced. [Dec. 9, 2013 Tr. 97]

101. Ms. Powers was able to keep up with the pace of the job. [Dec. 9, 2013 Tr. 99]

102. While the process for doing the job was the same for each order, each order was different, as each customer and each company had different requirements, different demands, and wanted different styles. [Dec. 9, 2013 Tr. 98 - 99]

103. The job at Ralph Lauren required complete accuracy, a standard Ms. Powers met. [Dec. 9, 2013 Tr. 100]

104. Ms. Powers did well at the Ralph Lauren job. Her coworkers, people in the warehouse, her director, senior director, and office analysts chose her for the honor of spotlight employee after she had worked for about six months, an honor which was acknowledged in the company magazine. Mr. Powers saw a Ralph Lauren company mailing in which Ms. Powers was recognized for her good job performance. [Dec. 11, 2013 Tr. 87; Dec. 9, 2013 Tr. 97 - 98]

105. At the time Ms. Powers was hired, she told the company that she learned by doing and through repetition, and that she asked a lot of questions. Ralph Lauren provided her with training that met her needs. [Dec. 9, 2013 Tr. 99 - 100]

106. Throughout her employment with Ralph Lauren, Ms. Powers asked questions, often the same questions over and over. Her manager and coworkers did not get upset, but answered her questions. [Dec. 9, 2013 Tr. 100]

107. While at Ralph Lauren, Ms. Powers received additional training in subjects like use of Excel, Power Point displays, time management, and business conflict, solutions and organization through Blue Ridge Community College. The college sent instructors to the Ralph Lauren office to conduct the courses, and the company paid for the training. [Dec. 9, 2013 Tr. 101 - 102; Pl. Ex. 12]

108. Ms. Powers also received first responder training from the American Red Cross, and obtained a CPR certificate. [Dec. 9, 2013 Tr. 101]

109. Ms. Powers lost her job at Ralph Lauren at the end of May 2009, when her position was transferred to Greensboro, North Carolina. The Ralph Lauren plant in Martinsburg eventually closed completely. [Dec. 9, 2013 Tr. 102, 104]

110. Ms. Powers does not recall specifically mentioning her brain injury to any of her employers before DMV. She did not need to, because once she told them how she learned things, the employer accommodated her needs. [Dec. 9, 2013 Tr. 106]

111. Ms. Powers did not hide the fact of her injury, and could not, as she had to ask the same questions over and over in order to learn the jobs, and had the problem with her speech. [Dec. 9, 2013 Tr. 106]

**IV. Ms. Powers' employment at the DMV**

**A. Ms. Powers looked for employment after Ralph Lauren.**

112. After being laid off from Ralph Lauren, Ms. Powers received unemployment compensation while she looked for work. [Dec. 9, 2013 Tr. 103]

113. Through WV Workforce, Ms. Powers took a test, after which the counselor asked Ms. Powers if she had ever had an injury. When Ms. Powers replied in the affirmative, she was referred to the Dept. of Health and Human Resources (DHHR) for assistance. [Dec. 9, 2013 Tr. 103 - 105]

114. Ms. Powers met with Pamela Lockard of the DHHR. Ms. Lockard gave Ms. Powers a pamphlet about Traumatic Brain Injury and asked Ms. Powers a series of questions. This was the first time that Ms. Powers had a name for her learning disability. [Dec. 9, 2013 Tr. 104 - 105]

115. Ms. Lockard also referred Ms. Powers to Terry Cunningham of the Center for Excellence and Disabilities, and Ms. Powers contacted Ms. Cunningham by telephone in December 2009. [Dec. 9, 2013 Tr. 107 - 108; Dec. 10, 2013 Tr. 6-7]

116. Ms. Powers learned about the DMV job through WorkForce, and applied for it. [Dec. 9, 2013 Tr. 113 - 115; Pl. Ex. 5, 10]

117. Ms. Powers took, and passed, a test required of applicants for the DMV position. [Dec. 9, 2013 Tr. 116]

118. Around the time she was applying to work at the DMV, Ms. Powers also filled out at WorkForce an Equal Employment Opportunity form, checking the box indicating that she had a disability. [Dec. 9, 2013 Tr. 116 - 117; Pl. Ex. 7]

119. The Equal Employment Opportunity form was sent to the DMV and placed in the DMV personnel file for Ms. Powers. A copy of that file is also kept by the Department of Transportation. [Dec. 11, 2013 Tr. 106 - 123; [Dec. 13, 2013 Tr. 75 -76,104]

120. The customer service representative (CSR) job is described in two documents prepared by the respondent. DMV described the nature of the CSR job, in part, as "clerical/public contact work: and said that "Work is characterized by regular and recurring tasks requiring knowledge and interpretation of motor vehicle and driver registration license laws, policies and procedures." Pl. Ex. 5.

121. Ms. Powers first interviewed for a position in the Martinsburg DMV office, but did not get that position. [Dec. 9, 2013 Tr. 117 - 118]

122. Ms. Powers was called back for a second interview, this time for the position in the Charles Town/Kearneysville office. She was interviewed by Christine McIntyre (now Frick), Lorraine from the Martinsburg office, and Pete Lake. [Dec. 9, 2013 Tr. 118]

123. Ms. Powers was hired for the Kearneysville office job. She reported for her first day of work on March 16, 2010. [Dec. 9, 2013 Tr. 118]

**B. First week of work - March 16 to 19, 2010**

124. Ms. Powers spent her first day of work behind closed doors with Christine Frick and paperwork. [Dec. 9, 2013 Tr. 119 - 120, 121 - 122; Pl. Ex. 14]

125. On one of the forms which Ms. Powers filled out on her first day of work was a box which contained the question: "Do you have any physical defects that would exclude you from performing certain kinds of work." Ms. Powers answered that question with a "no." [Dec. 9, 2013 Tr. 119; Pl. Ex. 8]

126. Ms. Powers gave the "no" answer because she does not have a physical defect, which would prevent her from doing the job. Instead, she has a learning disability. [Dec. 9, 2013 Tr. 120; Pl. Ex. 8]

127. During orientation for the DMV job, Ms. Powers told Ms. Frick that she learned through a very structured format, with hands on work, with repetition, and through asking a lot of questions. [Dec. 9, 2013 Tr. 120]

128. Ms. Frick did not ask any questions about why Ms. Powers learned in the manner she stated. Rather, Ms. Frick merely acknowledged the information. [Dec. 9, 2013 Tr. 120 -121]

129. During her first week of employment, the week of March 16, 2010, Ms. Powers filled out paperwork and observed work in the office. [Dec. 12, 2013 Tr. 144 - 145]

**C. Training with Ms. Kuykendall- March 22 - 26, 2010**

130. The next week, Ms. Powers began training to become a CSR with Angie Kuykendall. [Dec. 9, 2013 Tr. 122]

131. Ms. Whittington assigned trainers to Ms. Powers, along with Ms. Frick. [Dec. 12, 2013 Tr. 254 - 255; Feb.10, 2014 Tr. 226, 227, 260 - 261, 261]

132. At first, Ms. Powers sat and observed Ms. Kuykendall working on transactions for customers. She asked questions, and Ms. Kuykendall showed her various computer screens and gave Ms. Powers information on how to do other aspects of the job. [Dec. 9, 2013 Tr. 122 - 124]

133. Ms. Powers was assigned to a window. Ms. Kuykendall helped Ms. Powers set up her work station, and gave Ms. Powers code sheet and prices. [Dec. 9, 2013 Tr. 123-124]

134. Ms. Powers took notes of what she was being shown by Ms. Kuykendall. [Dec. 9, 2013 Tr.127]

135. One day during that first week, Ms. Powers was asked to sit with Kathy, another CSR. She did. Ms. Powers observed that Kathy wrote tag information on the top of a title. Ms. Powers had not seen Ms. Kuykendall do that, and so asked Kathy why she did

it, and whether it was a requirement. Kathy said that it was not a requirement, but helped her process the transaction. [Dec. 9, 2013 Tr. 124 - 125]

136. Ms. Powers resumed working with Ms. Kuykendall. Ms. Powers was helping a customer with a title and started to write the tag number in the top corner, left-hand corner of the title, as she had seen Kathy do. Ms. Kuykendall saw Ms. Powers making the notation, and asked: "What are you doing"? Ms. Powers responded that Kathy had showed that to her, to which Ms. Kuykendall replied, in a negative tone of voice: "I didn't show you that you do it the way I told you." [Dec. 9, 2013 Tr. 125]

137. At times while Ms. Powers was being trained by Ms. Kuykendall, Ms. Kuykendall would do something and then tell Ms. Powers not to do what she was doing, as it was one of her bad habits. [Dec. 9, 2013 Tr. 126; Dec. 11, 2013 Tr. 41; Resp. Ex. 38, p. 0008]

138. These incidents caused Ms. Powers to wonder if the notes she was taking included things that were not proper procedure. [Dec. 9, 2013 Tr. 126]

139. Ms. Powers was also confused because her managers would accept a document from a customer one day, then not accept the same document on another day. Another CSR named Heather told Ms. Powers that it just depended on the day. [Dec. 11, 2013 Tr. 43, Resp. Ex. 38, p. 00019]

140. Ms. Powers told Ms. Frick that she needed to do tasks in the same order all the time, but Ms. Frick replied that the order did not matter. [Dec. 12, 2013 Tr. 155 - 156]

141. Ms. Powers asked many questions of Ms. Kuykendall. At first Ms. Kuykendall was very helpful. However, when Ms. Powers asked the same questions over again, Ms. Kuykendall became annoyed. Ms. Powers' frequent questioning caused a problem with her training with Ms. Kuykendall. [Dec. 9, 2013 Tr. 128; Dec. 10, 2013 Tr. 225; Dec. 12, 2013 Tr. 148; Feb. 10, 2014 Tr. 58]

142. Ms. Kuykendall does not know what Ms. Powers did the week before she began training with Ms. Kuykendall. [Feb. 10, 2014 Tr. 61]

143. Ms. Powers was instructed by Ms. Frick not to discuss her disability, or how she learned with anyone, Ms. Frick said those things were "none of their business." So, Ms. Powers did not talk about her learning problems with Ms. Kuykendall. [Dec. 9, 2013 Tr. 128 -129]

144. Ms. Powers was told that if business was slow, she should be productive and do things like take clipboards up to the information desk so customers could use them when filling out applications, or replace information forms, and to do these things without being asked. She also spent time getting her station ready so she would be prepared when she started to work on her own. [Dec. 9, 2013 Tr. 127 - 128; Dec. 11, 2013 Tr. 41 - 42; Resp. Ex. 38, p. 0009]

**D. Training with Ms. Calhoun - March 29 to April 6, 2010**

145. After one week with Ms. Kuykendall, Ms. Powers was shifted to Danetta Calhoun for training. [Dec. 9, 2013 Tr. 129; Pl. Ex. 4]

146. Ms. Powers was comfortable with the renewals, but Ms. Calhoun instructed her to use an extra step for checking information that Ms. Kuykendall did not do. Ms. Powers talked to Ms. Calhoun about the extra step, and said that Ms. Kuykendall had not showed her that step. Ms. Powers wanted to make sure she had the correct procedure. [Dec. 9, 2013 Tr. 129 - 130]

147. In the Weekly Evaluation dated April 5, Ms. Calhoun criticized Ms. Powers for saying that "Angie did not show me this way." Although Ms. Calhoun said the outcome was the same, whichever way the task was done, she did not let Ms. Powers do the task the way she had been shown by her first trainer because "That's not the way I was trained, and I was told to train her the way that I learned ... " [Feb. 10, 2014 Tr.143 - 144, Resp. Ex. 23, Weekly Evaluation dated April 5]

148. Ms. Calhoun did not know how Ms. Kuykendall trained Ms. Powers to do things, and does not know whether the instructions she gave to Ms. Powers were consistent

with those given to Ms. Powers by Ms. Kuykendall. [Feb. 10, 2014 Tr. 133 - 134,144 - 145]

149. Ms. Calhoun made no effort to find out if the instructions she gave to Ms. Powers were consistent with those given by Ms. Kuykendall, as Ms. Calhoun did not view that as her job. [Feb. 10, 2014 Tr. 146]

150. Ms. Powers had been instructed by Ms. Frick that no altered checks could be accepted. Ms. Calhoun agreed that this was DMV policy. [Dec. 9, 2013 Tr. 131; Feb. 10, 2014 Tr. 139 - 140]

151. One day, while training with Ms. Calhoun, a person presented as payment for a transaction a check with the wrong date written on it. The incorrect date had been marked off or scratched, and Ms. Powers regarded it as having been altered. Ms. Calhoun told Ms. Powers to have the customer initial the change and accept the check, and Ms. Powers replied that management had told her not to accept an altered check. [Dec. 9, 2013 Tr. 131 - 132]

152. Ms. Calhoun does not know what Ms. Power was told by any prior trainer, or by management, about alterations on checks, but criticized Ms. Powers for not wanting to accept the altered check. [Feb. 10, 2014 Tr. 139 - 140; Resp. Ex. 23, Weekly Evaluation dated April 1]

153. After this incident, Ms. Powers talked to Ms. Frick about what had happened. [Dec. 9, 2013 Tr. 132]

154. Ms. Powers asked a lot of questions of Ms. Calhoun, sometimes the same question over and over. Ms. Powers did not feel that Ms. Calhoun was approachable, as Ms. Calhoun spent most of the training time sitting behind Ms. Powers and doing other paperwork. [Dec. 9, 2013 Tr. 132 - 133]

155. Ms. Powers kept notes as best she could while still waiting on customers, and did what Ms. Calhoun told her to do. [Dec. 9, 2013 Tr. 133, 137]



156. Ms. Powers did not talk about how she learned with Ms. Calhoun, because she had been told not to. [Dec. 9, 2013 Tr. 133 - 134]

157. Ms. Powers went to Ms. Frick and told her that she was confused. Ms. Powers was confused because one CSR would do a transaction one way, and another CSR would do it a different way or add steps to the transaction, or go into extra detail. Ms. Powers needed the trainers to give her one, two, three, four, five steps of how to do a given transaction. She did not know which notes to take about a procedure. [Dec. 9, 2013 Tr. 134]

158. Ms. Frick said that Ms. Powers' questions about why Ms. Kuykendall does things one-way but Ms. Calhoun does it a different way caused a problem. Ms. Frick told Ms. Powers that it did not matter in what order things were done, as long as the information was there, because then the outcome was the same. [Dec. 9, 2013 Tr. 135; Dec. 12, 2013 Tr. 159 - 160, 170 - 171]

159. Ms. Frick told Ms. Powers that she wanted Ms. Powers to see that a transaction could be done in different ways and still have the same outcome, so the exact procedure did not matter. [Dec. 9, 2013 Tr. 135]

160. While she was being trained by Ms. Calhoun, Ms. Powers told Ms. Frick that she had a brain injury. [Dec. 12, 2013 Tr. 165 - 166; Pl. Ex. 4, entry for March 28 to April 1, 2010]

161. Ms. Powers said she needed structured and repetitive training because that was how her brain worked as a result of her injury, that she needed to be shown the same way over and over, and that she needed to ask questions over and over. [Dec. 9, 2013 Tr. 135 - 136]

162. Ms. Powers told Ms. Frick that she found the training confusing. Ms. Powers told Ms. Frick that she wanted to be shown the correct way, established by the state agency, to do a transaction. Later on she could adjust to different ways. [Dec. 9, 2013 Tr. 135 - 136; Dec. 12, 2013 Tr. 159 - 160]

163. Ms. Frick reiterated that she wanted Ms. Powers to learn that the exact way of doing a process does not matter as long as the outcome is the same. [Dec. 9, 2013 Tr. 136]

164. Ms. Powers was not offered a Reasonable Accommodation Request form when she told Ms. Frick during the period of March 28, 2010 to April 1, 2010 that she had a brain injury that prevented her from retaining information, even though Ms. Powers had expressed a disability and an impairment of a major life function. [Feb. 11, 2014 Tr. 162 - 164, Pl. Ex. 4]

165. On April 5, 2010, Ms. Powers again discussed her brain injury with Ms. Frick. Ms. Powers was not offered a Reasonable Accommodation Request form on April 5, 2010, even though Ms. Frick reported that Ms. Powers was not retaining information, and even though, respondent's ADA advisor, Mr. Patrick, agreed the April 5 notation was an indication that the supervisor had observed a disability. [Feb. 11, 2014 Tr. 164 - 166, Pl. Ex. 4]

166. The April 5 evaluation appeared to have some parts blocked out, and words were cut off at the edges. Ms. Calhoun does not know if anything was blocked out from the original of this document, but knew the original did not have the ends of words cut off at the edge of the paper. [Feb. 10, 2014 Tr. 141 - 143, Resp. Ex. 23, Weekly Evaluation dated April 5]

167. On the evaluation for April 6, the word "Not" is written at an angle before the phrase "very on point." Ms. Calhoun said that the word "not" does not look like her handwriting, and could have been written after she wrote the document. However, she cannot tell without looking at the original. [Feb. 10, 2014 Tr. 148 - 149, Resp. Ex. 23, Weekly Evaluation dated April 6]

168. Ms. Calhoun thought that Ms. Powers was "trying very hard" to learn the job. [Feb. 10, 2014 Tr. 157]

**E. Training with Ms. Graves - April 7 to April 8, 2010.**

169. Theresa Graves was the next person assigned to train Ms. Powers. [Dec. 9, 2013 Tr. 142]

170. The way which Ms. Graves showed Ms. Powers to do transactions was different from the way taught by Ms. Calhoun, and different from the way taught by Ms. Kuykendall. [Dec. 9, 2013 Tr. 144]

171. Ms. Graves did not ask Ms. Calhoun or Ms. Kuykendall how they had told Ms. Powers to do any task. Ms. Graves trained Ms. Powers to do tasks the way she did them because that was what she was told to do. [Feb. 10, 2014 Tr. 198, 206 - 207]

172. Neither Ms. Frick nor Ms. Whittington instructed Ms. Graves to make sure that she taught Ms. Powers how to do a task in the same way that Ms. Calhoun or Ms. Kuykendall had taught the task. [Dec. 13, 2013 Tr. 36; Feb. 10, 2014 Tr. 262]

173. While with Ms. Graves, Ms. Powers again questioned why Ms. Graves did things differently from Angie or from Danetta. As Ms. Frick put it, "Angie collected information this way and [Ms. Powers] would go down the line of how Angie did it. Danetta did things this way and [Ms. Powers] would go down the line of how Danetta did it, ... " Again, Ms. Frick just said that everyone does things in a different way ... it doesn't matter how you collect the information." [Dec. 12, 2013 Tr. 172]

174. In her notes, Ms. Frick repeated, and agreed with, the criticism of Ms. Graves that "Renee seems to have it in her mind of how the job should be done and wants to do things her way instead of the correct DMV way." [Dec. 13, 2013 Tr. 37, Pl. Ex. 4, entry for April 11 to 16]

175. Ms. Frick said that Ms. Kuykendall, Ms. Calhoun and Ms. Graves each did transactions differently, but each was the correct DMV way. [Dec. 13, 2013 Tr. 39 - 40]

176. Ms. Powers did not talk about how she learned with Ms. Graves because Ms. Frick had told her not to talk about that. [Dec. 9, 2013 Tr. 144]

177. Ms. Powers again spoke with Ms. Frick about her training. Ms. Powers told her that the training was confusing, and that the other CSRs seemed negative to her because she asked questions over and over. [Dec. 9, 2013 Tr. 144]

178. Ms. Powers said that she did not know which notes were correct, because each of her trainers did things differently. She asked for some training material that would tell her the one way to do transactions. Ms. Frick again told Ms. Powers the even if someone does it a different way, the outcome is the same. [Dec. 9, 2013 Tr. 146 - 147]

**F. The written reprimands - April 9, 2010.**

179. Ms. Powers received two written warnings for incidents which occurred while she was training with Ms. Graves. [Dec. 9, 2013 Tr. 148; Pl. Ex. 15, 16]

180. The disciplinary form used by the DMV has three levels of action before suspension for dismissal: verbal warning, written warning and written reprimand. A verbal warning is usually given for a less serious offense or a first occurrence. The warning is recorded so there will be no dispute about whether the warning occurred, and a copy kept in the employee's files. The record also helps with supervision and with evaluations. Written warnings are given for more serious offenses or for reoccurrences, and are also kept in the employee files. The written reprimand is the third, and most severe action, before suspension or dismissal. [Dec. 12, 2013 Tr. 257 - 259; Feb. 10, 2014 Tr. 253 - 255; Pl. Ex. 15]

181. One written reprimand involved a customer who made a rude and racist remark. Ms. Powers was working at the information desk. She asked a man who was seeking a title whether he had a notarized bill of sale. As Ms. Powers was reaching for a service queue number to give to the man, he started walking away. Ms. Powers said: "Sir, your number." The man replied: "All these government agencies [are] hiring these foreigner and chinks." As she was handing the number to the man, Ms. Powers said, in a nice tone of voice: "At least I didn't say 'here's your sign,'" to diffuse the situation with some

humor. No other customers expressed displeasure to Ms. Powers about how she had handled the situation. [Dec. 9, 2013 Tr. 148 - 149]

182. No customer filed a written complaint about Ms. Powers; the customer involved did not orally complain to Ms. Frick, and she does not remember to whom he complained. Ms. Frick does not know how other customers reacted, but agreed that nothing bad happened in the office as a result of Ms. Powers' comment. [Dec. 12, 2013 Tr. 330 - 333]

183. Ms. Powers had no verbal warnings before the April 9, 2010, "here's your sign" incident. Nor is there any record of any prior written warning. [Feb. 10, 2014 Tr. 312 - 313, Pl. Ex. 15]

184. Ms. Powers reported the incident to the lead CSR, Gloria "Becky" Hedden, who just smiled and laughed and said next time just watch what you say, to which Ms. Powers agreed. [Dec. 9, 2013 Tr. 149 - 150]

185. The second written reprimand involved an incident, which occurred when Ms. Powers was working by herself because Ms. Graves had duties away from her window. A customer had an issue with a tag which Ms. Powers did not know how to process. So, Ms. Powers asked Ms. Whittington for advice. Ms. Whittington told her how to process the transaction, and Ms. Powers followed the instructions. A new tag and tag number had to be issued to the customer. Ms. Whittington told Ms. Powers to give the customer the new tag and to put the paper work in Ms. Hedden's office, which she did. Later in the day, Ms. Hedden thought a plate was missing. After some searching, it was discovered that Ms. Powers had put the paperwork in the wrong basket. No tag or other inventory was missing. [Dec. 9, 2013 Tr. 150 -155; Feb. 10, 2014 Tr. 204 - 205]

186. For each of these incidents, Ms. Powers was given a written reprimand on the same day, April 9, 2010. [Dec. 9, 2013 Tr. 155 - 156, Pl. Ex. 15, 16]

187. Ms. Powers first learned of the two written reprimands when she was called into Ms. Frick's office by Ms. Whittington. [Dec. 9, 2013 Tr. 156]

188. Ms. Powers attempted to explain her side of each incident, but her explanations were rejected. She was told she had to sign each write up. Regarding the misfiling of a document related to a license tag, Ms. Whittington said that any kind of state inventory was the person's responsibility regardless of what level of training she had received. [Dec. 9, 2013 Tr. 156 - 159]

189. Ms. Powers had not received any previous written warnings during her time at the DMV. [Dec. 9, 2013 Tr. 159]

190. When Ms. Powers asked Ms. Whittington why she was receiving a written warning, and not a verbal warning, Ms. Whittington said that Ms. Powers' orientation had been her verbal warning. [Dec. 9, 2013 Tr. 159]

191. Within a day or two of the write-ups, Ms. Graves stopped being Ms. Powers' trainer and Ms. Powers was on her own. [Dec. 9, 2013 Tr. 164]

192. Ms. Powers took notes during her training, and respondent knew that Ms. Powers had taken these notes. The pages in Pl. Ex. 33 are not Bates numbered. Respondent did not put any Bates numbers on any of the documents it furnished in discovery; each of the documents furnished in discovery by complainant bears a Bates number in the lower right-hand corner. Thus the documents, which comprise Pl. Ex. 33, are documents which were produced by respondent. [Dec. 9, 2013 Tr. 225 - 230; Pl. Ex. 33; Dec. 10, 2013 Tr. 167 - 177, Resp. Ex. 40]

193. Ms. Powers asked for written, step-by-step instructions so she could learn to do her job. Those were not provided to her. Instead, she was only given coding sheets, descriptions of various license types, and a description of requirements for a CDL license. These sheets did not give any instruction on how to do a task. [Dec. 9, 2013 Tr. 225 - 230; 231 -236; Pl. Ex.33]

194. Ms. Powers was confused about what notes to take and follow because she was told different ways to do the same task. [Dec. 10, 2013 Tr. 196 - 198]

**G. Additional notice to DMV of Ms. Powers' disability - April 18 to May 21, 2010**

195. During the period of April 18 to 23, 2010, Ms. Powers again told Ms. Frick that she had a brain injury that prevented her from retaining information. Ms. Powers was not offered a Reasonable Accommodation Request form, even though Ms. Powers had expressed that she had a disability and an impairment of a major life function. [Feb. 11, 2014 Tr. 166 - 167, Pl. Ex. 4]

196. During the period of May 16 to 21, 2010 Ms. Powers again told Ms. Frick that she had a brain injury that prevented her from retaining information. Ms. Powers was not offered a Reasonable Accommodation Request form, even though Ms. Powers had expressed that she had a disability and an impairment of a major life function. [Dec. 12, 2013 Tr. 290 - 291, Pl. Ex. 4, entry for May 16 to 21; Feb. 11, 2014 Tr. 167-168, Pl. Ex. 4]

**H. 60 day evaluation - May 27, 2010**

197. After she was working on her own, Ms. Powers continued to ask questions, but directed them to her managers, Ms. Whittington and Ms. Frick, or to the lead CSR, Ms. Hedden. [Dec. 9, 2013 Tr. 164 - 165]

198. After receiving the written reprimands Ms. Powers continued to talk to Ms. Frick about her disability, that she found the training she had been given to be confusing, and that she needed more training. [Dec. 9, 2013 Tr. 165]

199. The first evaluation Ms. Powers received was her 60-day evaluation. The evaluation was presented at the same time as a meeting agenda. [Dec. 9, 2013 Tr. 166; Pl. Ex. 17, 18]

200. The goals section on the 60-day meeting agenda is a condensed version of the CSR job description. [Dec. 13, 2013 Tr. 49 - 50, Pl. Ex. 5, Resp. Ex. 26]

201. Ms. Powers was called into a meeting in Ms. Frick's office. Ms. Whittington was also present and did most of the talking, and read the evaluation to Ms. Powers. Ms. Powers had not seen the evaluation or the agenda before the meeting. Ms. Powers became emotional and started crying when she saw "Does not meet expectations;" she

had never before received a negative evaluation at any job. [Dec. 9, 2013 Tr. 166 - 167, 171; Feb. 10, 2014 Tr. 274 - 275]

202. During the meeting, Ms. Powers told Ms. Whittington about her injury and her disability. When Ms. Whittington read the part about Ms. Powers asking a lot of the same questions day after day, Ms. Powers told her that this was caused by her disability. [Dec. 9, 2013 Tr. 167 - 168; Pl. Ex. 17; Feb. 10, 2014 Tr. 235]

203. Ms. Powers said that if the other CSRs were told why she was always asking questions, if they had a better understanding of how she learned, that she retained information about how to do a transaction by doing it over and over and asking the same questions so it stays in her mind, that then they would know that Ms. Powers was not questioning their knowledge. [Dec. 9, 2013 Tr.168 - 169]

204. Ms. Frick and Ms. Whittington responded by saying "Nope, don't tell them it's none of their business you just come to us from now on for any of your questions." [Dec. 9, 2013 Tr. 168 - 169]

205. The evaluation warned: "However, if it is legitimate situations that you cannot handle then at that time follow your chain of command but keep in mind if management feels it was unnecessary to come get one of us we will deal with that situation accordingly." Neither Ms. Frick nor Ms. Whittington explained what was meant by that sentence. Ms. Powers took the sentence as a threat. [Dec. 9, 2013 Tr. 172; Pl. Ex. 18]

206. The evaluation criticized Ms. Powers for asking questions, and said that Ms. Powers needed to "pick up the pace" when dealing with customers, and said that Ms. Powers was "not learning [her] job as quickly as [she] should." [Pl. Ex. 18]

207. Ms. Frick did not tell Ms. Powers the number of transactions she needed to perform in order for her job performance to be deemed acceptable. [Dec. 13, 2013 Tr. 50]



208. Neither of the supervisors asked Ms. Powers for any medical documentation. [Dec. 9, 2013 Tr. 169 - 170]

209. Ms. Powers was not given a copy of her evaluation at the meeting. [Dec. 9, 2013 Tr. 170, 175; Dec. 10, 2013 Tr. 107]

210. Ms. Powers called her sister, Ms. Richardson, for advice. Following the call, Ms. Powers wrote out a series of questions to ask her managers about what she was supposed to learn, and at what level she should be by the next evaluation. [Dec. 9, 2013 Tr. 174 - 175, 177 - 178, Pl. Ex. 32]

211. Ms. Powers approached Ms. Whittington and asked for a meeting to discuss her questions. Ms. Whittington replied, "You should have asked your questions yesterday you had a hour of our time." [Dec. 9, 2013 Tr. 175]

212. On May 28, 2010, Ms. Powers again told Ms. Frick that she had a brain injury that prevented her from retaining information. Ms. Powers was not offered a Reasonable Accommodation Request form even though Ms. Powers had expressed that she had a disability and an impairment of a major life function. [Dec. 12, 2013 Tr. 304; Feb. 11, 2014 Tr. 169 - 170, Pl. Ex. 4]

213. Ms. Frick said it was not her job to suggest to Ms. Powers that she talk to someone in the Department of Transportation personnel office about whether there was anything that could help her learn the job. [Dec. 12, 2013 Tr. 306]

214. After her 60-day evaluation, Ms. Powers was essentially working on her own. [Dec. 9, 2013 Tr. 175 - 176]

215. At the end of May, Ms. Powers asked for more training. Ms. Powers said that she had not been trained right, and that she wanted repetition, and wanted to know what the state guidelines were. Ms. Frick said that repetition was not possible, that "It's consistently inconsistent." [Dec. 12, 2013 Tr. 208 - 209]

216. Ms. Frick told Ms. Powers to write down everything she needed to learn and to bring the list in the next day. [Dec. 9, 2013 Tr. 176]

I. Training with Ms. Hedden - May 31 to June 11, 2010

217. Ms. Powers made the list and brought it in the next day. Ms. Frick announced to the office employees that for the next four weeks, Ms. Hedden would be assigned solely to work with Ms. Powers. [Dec. 9, 2013 Tr. 176 - 177; Pl. Ex. 32]

218. It was near Memorial Day weekend. Ms. Powers gave Ms. Hedden the list of things she needed to learn. However, the next week Ms. Hedden said she had not had time to go over the list. [Dec. 9, 2013 Tr. 178 - 179]

219. Ms. Powers explained that she was confused because her prior trainers had all done transactions in different ways. Ms. Hedden replied: "Renee, even if they do it different if the outcome at the end the client gets what they come to ask for it doesn't matter." [Dec. 9, 2013 Tr. 179 - 180]

220. Although Ms. Hedden was supposedly assigned to Ms. Powers for four weeks, Ms. Hedden actually spent only a few days with Ms. Powers. [Dec. 9, 2013 Tr. 180 - 181; Dec. 10, 2013 Tr. 221; Dec. 12, 2013 Tr. 211 - 212; Pl. Ex. 4, entry for June 6 to June 10, 2010]

221. Ms. Powers noticed that sometimes Ms. Hedden reported to work with alcohol on her breath. [Dec. 9, 2013 Tr. 181]

222. On one of the days Ms. Hedden was supposed to be training Ms. Powers, Ms. Hedden came in late and was sent home early by Ms. Frick. [Dec. 9, 2013 Tr. 181 - 182]

223. During the brief time Ms. Powers had with Ms. Hedden, Ms. Hedden told Ms. Powers that she thought Ms. Powers was doing well. [Dec. 9, 2013 Tr. 184]

224. Although each trainer of a new employee was required to complete a Weekly Evaluation form about the trainee, there is no evaluation of Ms. Powers by Ms. Hedden. [Feb. 10, 2014 Tr. 127]

225. Ms. Powers was not offered a Reasonable Accommodation Request form when she told Ms. Frick during the period of June 6 to 11, 2010 that she had a brain injury that prevented her from retaining information, even though Ms. Powers had expressed that

she had a disability and an impairment of a major life function. [Dec. 12, 2013 Tr. 306; Pl. Ex. 4; Feb. 11, 2014 Tr. 170 - 171, Pl. Ex. 4]

226. Shortly thereafter, Ms. Frick told Ms. Powers that Ms. Hedden had stepped down from her position as lead CSR and would no longer be training Ms. Powers. [Dec. 9, 2013 Tr. 182]

227. One day, three state troopers, in uniform, came to the Kearneysville DMV office. The troopers put Ms. Hedden in handcuffs and led her out of the building. Ms. Powers never saw Ms. Hedden again. [Dec. 9, 2013 Tr. 182 - 183]

228. Ms. Powers worked essentially on her own in the period between her 60 and 90 day evaluations, although she continued to ask questions of her management when necessary. However, she was becoming more comfortable with her job, so the frequency of questions decreased. [Dec. 9, 2013 Tr. 183 -184]

229. During this 30-day period, Ms. Frick said that she noticed that Ms. Powers' confidence was up, and Ms. Whittington commented that she had seen improvement in Ms. Powers. [Dec. 9, 2013 Tr. 184]

230. During the 30-day period between evaluations, Ms. Powers received no written or verbal warnings. [Dec. 9, 2013 Tr. 185 - 186]

231. However, there was an incident when Ms. Frick threatened to write up Ms. Powers because Ms. Powers gave a number to a person who wanted to take a driving test, but had arrived too late in the day for test. Ms. Frick did not follow up on the threat. [Dec. 9, 2013 Tr. 185 - 186]

**J. 90 day evaluation - July 12, 2010**

232. For her 90-day evaluation, Ms. Powers was called into Ms. Frick's office to meet with Ms. Frick and Ms. Whittington. [Dec. 9, 2013 Tr. 187 - 188]

233. Ms. Powers regarded the evaluation as overwhelmingly negative, and contrary to the positive comments she had been receiving since her prior evaluation. [Dec. 9, 2013 Tr. 187; Pl. Ex. 19 and 20]

234. The 90 day evaluation said: "You still need to learn how to deal with new and conflicting situations." No one explained to Ms. Powers exactly what was meant by this comment. [Dec. 9, 2013 Tr. 188; Pl. Ex. 20]

235. The 90 day evaluation also said, as had the 60 day evaluation: "However, if it is a legitimate situation that you cannot handle then at that time follow your chain of command but keep in mind if management feels it was unnecessary to come get one of us we will deal with that situation accordingly." [Dec. 9, 2013 Tr. 188 - 189, Pl. Ex. 20]

236. Neither the evaluation, nor Ms. Frick, nor Ms. Whittington gave any guidance to Ms. Powers about what might be necessary or unnecessary. [Dec. 9, 2013 Tr. 189]

237. Ms. Powers reasonably took the phrase "if management feels it's not legitimate" as a threat. [Dec. 9, 2013 Tr. 189]

238. Ms. Powers was also confused because in meetings Ms. Frick would say, "use your best judgment." However, Ms. Frick would also then say "but don't use your judgment you need to come to us to make sure that the form is suitable." [Dec. 9, 2013 Tr. 189 - 190]

239. In response to the evaluation, Ms. Powers said that she thought she was doing what they had asked of her. She did not understand why she was given the below expectations rating. Ms. Powers asked where she was supposed to be at 60 days, and at 90 days. Ms. Whittington replied that it was up to her to determine where Ms. Powers should be, based upon their years of service. Ms. Whittington said the expected level was just where she or Ms. Frick said it should be. [Dec. 9, 2013 Tr. 191 - 192]

240. Ms. Powers felt the need to ask questions frequently because each of her trainers showed her a different way to do the same task, and Ms. Powers was confused. She wanted to know the right way to do the task. [Dec. 10, 2013 Tr. 147]

241. Ms. Powers was not given a copy of her 90-day evaluation at the meeting. [Dec. 9, 2013 Tr. 192]

242. After her 90 day evaluation, Ms. Powers asked for a copy of each of her evaluations. Ms. Frick told her: "You'll get it when I tell you you'll get it." [Dec. 9, 2013 Tr. 170-171]

**K. Final two months of employment at DMV - July 13 to September 30, 2010.**

243. Following her 90 day evaluation, Ms. Powers called her traumatic brain injury counselor, Terry Cunningham. At the instruction of Ms. Cunningham, Ms. Powers asked Ms. Whittington to call Ms. Cunningham so that Ms. Cunningham could talk with Ms. Whittington about how people with a traumatic brain injury learn. Ms. Cunningham gave Ms. Powers her business card to give to Ms. Whittington. [Dec. 9, 2013 Tr. 193 - 195; Dec. 10, 2013 Tr. 18, 22]

244. The day after meeting with Ms. Cunningham, Ms. Powers walked into Ms. Whittington's office, extended her hand with Ms. Cunningham's business card in it, and said: "Ms. Whittington, my traumatic brain injury coordinator would like to speak with you." Ms. Whittington responded: "I'm not going to call her. I'll never call her." Ms. Powers put Ms. Cunningham's business card in her pocket and left the office. [Dec. 9, 2013 Tr. 195 - 196]

245. Ms. Frick said there was a policy preventing her from calling. Ms. Frick had never seen such a written policy, but said she was told that by Ms. Huggins. [Dec. 12, 2013 Tr. 312 - 315, Pl. Ex. 4]

246. Neither the DOT nor the DMV has any policy which prohibited Ms. Frick from contacting Ms. Powers' counselor, as Ms. Powers had requested. [Feb. 11, 2014 Tr. 172 - 173, Pl.Ex.4]

247. No one from the DMV called Ms. Cunningham about Ms. Powers in July 2010. [Dec. 10, 2013 Tr. 18]

248. Ms. Cunningham testified that, had the DMV office called her, she would have volunteered to come and do some training with them, and could have facilitated the provision of resources like job coach for Ms. Powers. [Dec. 10, 2013 Tr. 19]

249. Ms. Powers reported back to Ms. Cunningham. At the suggestion of Ms. Cunningham, Ms. Powers contacted the State ADA Director of Compliance, Penny Hall. Ms. Powers told Ms. Hall about her situation, and asked for help. Ms. Hall promised to call Ms. Frick. [Dec. 9, 2013 Tr. 197 - 199]

250. Ms. Frick was called by Penny Hall of the State ADA office on July 22. Ms. Frick told Ms. Hall that she could not do anything without proper documentation from Ms. Powers. [Dec. 12, 2013 Tr. 323 - 324, Pl. Ex. 4]

251. Ms. Powers believes that Ms. Hall did call Ms. Frick, because the attitudes of Ms. Frick and Ms. Whittington toward her changed for the better. [Dec. 9, 2013 Tr. 199]

252. When working by herself, Ms. Powers collected money from DMV customers, for which she had to account. At the end of each day, she, and other CSRs, did a self-audit, which was checked by the office manager. [Dec. 9, 2013 Tr. 223 - 224]

253. Ms. Powers felt she was proficient in renewals and drivers' licenses after her evaluations. [Dec. 10, 2013 Tr. 156]

254. Meanwhile, Ms. Powers thought that she was doing well at work. She had not been called into the office or reprimanded, and was doing transactions, although she knew she still had a lot to learn. [Dec. 9, 2013 Tr. 209 - 210]

255. Ms. Whittington was out on medical leave, and a woman named Tabitha was taking her place. Ms. Powers asked Tabitha how she was doing, and Tabitha told her: "You're doing a great job." Ms. Powers also said to Tabitha: "I was told that I asked too many questions, you know," and Tabitha replied: "No, I have people there ten years still ask the same questions so I'd rather -- I'd rather my employees asked me the questions so that they don't have to deal with conflict or issues down the line." [Dec. 9, 2013 Tr. 211 - 212]

256. Ms. Stake worked about two windows away from Ms. Powers. [Dec. 10, 2013 Tr. 82 - 83]

257. Ms. Stake said that Ms. Powers was a good worker that she worked hard and tried hard. [Dec. 10, 2013 Tr. 83]

258. Ms. Stake said that she did not recall Ms. Powers just wandering around the office. [Dec. 10, 2013 Tr. 83]

259. Ms. Stake observed that Karrie Whittington did not like Ms. Powers, that Ms. Whittington has something against Ms. Powers and looked for reasons to write Ms. Powers up or take other disciplinary action against her. [Dec. 10, 2013 Tr. 88, 91 - 92]

260. Ms. Powers had two days on which her count was not exactly accurate. One time, she had a check, which had a discrepancy between the numerically written amount and the verbally written amount. Ms. Powers did not catch the error and, as a result, her drawer was off by ten cents. [Dec. 9, 2013 Tr. 224 - 225]

261. Another day, Ms. Powers forgot to give a customer change, so that her drawer was five dollars over. [Dec. 9, 2013 Tr. 225]

262. Ms. Powers was not reprimanded, either verbally or in writing, for either error. [Dec. 9, 2013 Tr. 224 - 225]

263. Each incident occurred prior to the issuance of her termination letter. [Dec. 9, 2013 Tr. 224 - 225]

264. Director Lake keeps weekly statistics on customer wait times, volume of customers, and volume of transactions done in an office, and the processing times for CSRs. However, none were produced at trial. [Feb. 11, 2014 Tr. 19 - 20]

265. The failure of respondent to produce the statistics, which Director Lake said were maintained, indicates that Ms. Powers was handling as many transactions as other CSRs.

**L. The ADA Review Committee and Ms. Powers, July 22 to September 15, 2010**

266. After her telephone conversation with Ms. Hall, Ms. Frick sent an email about the call to Director Lake, who in turn forwarded to Ray Patrick of the DOT ADA Review Committee. [Feb. 11, 2014 Tr. 22 - 23, 24, 87, Resp. Ex. 12]

267. Shortly after her conversation with Ms. Hall, Ms. Powers received a hand delivered letter dated July 27, 2010, and signed by Jeff Black, Director, Human Resources Division, WV Department of Transportation. The letter told Ms. Powers that she could apply for a "reasonable accommodation under the ADA." [Dec. 9, 2013 Tr. 201; Pl. Ex. 21]

268. Mr. Patrick agreed that it was the call from Ms. Hall which caused the referral of her case to the ADA Review Committee, and not any expression of disability by Ms. Powers to any of her supervisors. [Feb. 11, 2014 Tr. 180]

269. At the request of Mr. Patrick, Leslie Stagers, a DOT employee, met with Ms. Powers on July 30, 2010. Ms. Stagers helped Ms. Powers fill out a series of forms: a Request for Reasonable Accommodation, a Medical Provider List, and a Medical Authorization. [Dec. 9, 2013 Tr. 201 - 206; Pl. Ex. 22, 23, 24]

270. During the meeting with Ms. Stagers, Ms. Powers explained the difficulty in getting her medical records. She explained that her medical records had been given to her mother, who died in 1990, and that she did not know what happened to the records. [Dec. 9, 2013 Tr. 204 - 205]

271. Ms. Stagers took the completed documents with her. [Dec. 9, 2013 Tr. 208]

272. Prior to July 30, 2010 no one from either the Division of Motor Vehicles or from the Department of Transportation had requested that Ms. Powers sign a medical authorization form. [Dec. 9, 2013 Tr. 206]

273. The Committee sent requests for information to each of the persons Ms. Powers had listed on the Medical Provider form, except Penny Hall. [Feb. 11, 2014 Tr. 98 - 106, 175 - 176, Resp. Ex. 30]

274. The request form sent to Ms. Cunningham was the first contact the DMV had with Ms. Cunningham regarding Ms. Powers. [Dec. 10, 2013 Tr. 10 - 12]

275. Sometime after the meeting with Ms. Stagers, Mr. Patrick again called Ms. Powers. He said that the letter sent to Ms. Lockard had been returned, and that he had



only received part of the documents from Ms. Cunningham. Mr. Patrick asked Ms. Powers to contact Ms. Lockard and Ms. Cunningham. [Dec. 9, 2013 Tr. 206]

276. Ms. Powers tried to contact Ms. Lockard, and learned that she was no longer with the DHHR. She also contacted Ms. Cunningham about the incomplete documents. [Dec. 9, 2013 Tr. 206 - 207]

277. Ms. Cunningham completed the two page form which DMV sent to her and faxed both pages back to the ADA team. However, Ms. Cunningham was told that the ADA team got only one page, so she faxed both pages to them a second time. [Dec. 10, 2013 Tr. 12 - 13, 15 - 16; Pl. Ex. 39, 72]

278. Ms. Cunningham provided the ADA Review Committee with a letter from a doctor that said that records of Ms. Powers' injury and treatment no longer exist. [Feb. 11, 2014 Tr. 180 - 181, Pl. Ex. 38]

279. Ms. Cunningham brought, pursuant to a subpoena, her file regarding Ms. Powers. In the file was the DOT ADA form, which she had filled out. The writing on the form brought to the hearing by Ms. Cunningham was in blue ink. [Dec. 11, 2013 Tr. 4 - 5; Pl. Ex. 72]

280. Ms. Powers had told Ms. Cunningham that she needed consistent repetition of task in order to learn it. Ms. Cunningham did not include that information on the DMV form because Ms. Powers had already told that to DMV. [Dec. 10, 2013 Tr. 16 - 17]

281. Ms. Powers reported back to Mr. Patrick, and also told him that she had been trying to get her medical records but had learned that they had been destroyed. She also told him that her medical files had been given to her mother, but that she had passed and Ms. Powers did not know what happened to the medical records. [Dec. 9, 2013 Tr. 207 - 208]

282. After this telephone conversation with Mr. Patrick about the documents, no one from either the Division or Motor Vehicles or the Department of Transportation called

or met with Ms. Powers about her request for accommodation, or about whether she thought the training she had received met her needs. [Dec. 9, 2013 Tr. 208 - 209]

283. After Ms. Powers made her request for an accommodation, Ms. Frick asked Ms. Powers for her notes so she could make copies and send them to Mr. Patrick. Ms. Powers gave Ms. Frick what she had, as she thought Ms. Frick was trying to help her. [Dec. 9, 2013 Tr. 230 - 231, Pl. Ex. 33]

284. Ms. Powers was not asked to undergo an independent medical examination or a functional capacity evaluation. [Feb. 11, 2014 Tr. 149 - 150]

285. Mr. Patrick interviewed Ms. Frick over the telephone, then completed the Manager Interview Form. [Feb. 11, 2014 Tr. 95,150, Resp. Ex. 10, Pl. Ex. 25]

286. Mr. Patrick did not talk with Ms. Powers after he conducted the interview with Ms. Frick, and did not talk with anyone else to see if the information Ms. Frick conveyed was correct. [Feb. 11, 2014 Tr. 151, 152, 162, Pl. Ex. 25]

287. Mr. Patrick does not know whether each of the trainers for Ms. Powers gave identical instructions on how to do a task, and did not talk to any of the trainers as part of the accommodation review. [Feb. 11, 2014 Tr. 153]

288. Mr. Patrick does not know if Ms. Powers really had eight trainers, as is recorded in the Manager Interview form. [Feb. 11, 2014 Tr. 151, Pl. Ex. 25]

289. On the Manager Interview form, it is recorded that Ms. Powers received "one-on-one training over six months." Mr. Patrick took that to mean that one person was assigned to assist her in performing the functions of the position on a daily basis for six months. [Feb. 11, 2014 Tr. 152, Pl. Ex. 25]

290. Other than the documents the committee reviewed, it had no knowledge of what training was provided to Ms. Powers. [Feb. 12, 2014 Tr. 25]

291. Nothing in the documents the committee received contained any information about exactly what Ms. Kuykendall, or Ms. Calhoun, or Ms. Graves or Ms. Hedden did

when she was training Ms. Powers, or of whether that training was likely to be effective for a person with a brain injury. [Feb. 12, 2014 Tr. 26 - 27]

292. Mr. Patrick did nothing to see if the training trainers provided to Ms. Powers was appropriate for an employee in trouble. [Feb. 11, 2014 Tr. 182]

293. Before reaching a decision on Ms. Powers' request for accommodation, neither Mr. Patrick nor any other member of the review committee did anything to ascertain whether the training provided to Ms. Powers was ineffective because the trainers gave inconsistent instructions. [Feb. 11, 2014 Tr. 157]

294. Mr. Patrick does not know whether the resources supposed provided to Ms. Powers by the local office were of the sort which would be useful for a person with a learning disability caused by a brain injury. [Feb. 11, 2014 Tr. 157 - 158]

295. Mr. Patrick does not know whether Ms. Frick knew if the resources supposed provided to Ms. Powers by the local office were of the sort, which would be useful for a person with a learning disability caused by a brain injury. [Feb. 11, 2014 Tr. 157 - 158]

296. Mr. Patrick does not know whether Ms. Frick talked to the trainers about Ms. Powers' expressed need for repetition. [Feb. 11, 2014 Tr. 198 - 199]

297. The ADA Review Committee did not make any inquiry to see if Ms. Frick had done anything to help the trainers understand how to deal with Ms. Powers' learning disability. The Committee just relied upon the daily notes of Ms. Frick. [Feb. 11, 2014 Tr. 199 - 200, Pl. Ex. 4]

298. By letter dated September 15, 2010, Ms. Powers' request for accommodation was denied. [Dec. 9, 2013 Tr. 210 - 211, Pl. Ex. 27]

299. Part of the decision to deny Ms. Powers any further accommodation was the understanding that Ms. Powers had received one-on-one training and supervision every day for a six month period. [Feb. 11, 2014 Tr. 159 - 160, 161 - 162, Pl. Ex. 26]

300. If Ms. Powers did not receive the daily one-on-one training for the six month period, then Mr. Patrick conceded that "the basis for the decision may potentially be an error." [Feb. 11, 2014 Tr. 162]

301. Neither Mr. Patrick, nor anyone else on the ADA Review Committee, nor Ms. Frick, nor Ms. Huggins, nor any of the people who trained Ms. Powers had any knowledge of, or training on, how to teach a person with a learning disability caused by a brain injury. [Feb. 11, 2014 Tr. 196; Feb. 12, 2014 Tr. 25]

302. Although the DMV contacts experts when making structural repairs to comply with the disability discrimination statutes, it did not contact any experts regarding Ms. Powers' disability because "It did not come up that we felt we needed additional information." [Feb. 12, 2014 Tr. 29 - 31]

303. Whether or not Ms. Powers had a disability was not a factor in the decision to deny an accommodation to Ms. Powers. [Feb. 11, 2014 Tr. 139]

**M. The termination of Ms. Powers' employment - September 16, 2010**

304. By letter dated September 16, 2010, Ms. Powers was notified that her employment with the DMV was being terminated, effective September 30, 2010. [Dec. 9, 2013 Tr. 212-213; Pl. Ex. 28]

305. Ms. Powers was called into Ms. Frick's office and handed the letter of termination. [Dec. 9, 2013 Tr. 212 - 213]

306. Ms. Powers worked through September 30, 2010, at the information desk. [Dec. 9, 2013 Tr. 213]

307. On November 18, 2010, the Division of Personnel informed Ms. Powers that her name had been permanently removed from certifications of eligible applicants for any position with the DMV. [Dec. 11, 2013 Tr. 61, 145, Pl. Ex. 69]

**N. The training provided by DMV to Ms. Powers was not a reasonable accommodation for her disability.**

308. Mr. Patrick agreed that, for an accommodation to be reasonable, the accommodation must have some chance of success. [Feb. 11, 2014 Tr. 197]

**1. Respondent did not provide the training by repetition which Ms. Powers needed.**

309. Ms. Powers told Ms. Frick that she learned by repetition, by doing things herself and through taking notes. [Dec. 12, 2013 Tr. 135]

310. Ms. Powers' request for training by repetition was set out on the first page of the Manager Interview form, on which Ms. Powers' disability is described as "My learning process is affected in that I learn by repetition and through detailed step-by-step procedures." [Dec. 12, 2013 Tr. 230, Resp. Ex. 10]

311. Instead of step-by-step written instructions, Ms. Powers was mostly given code sheets and fee schedules. [Dec. 10, 2013 Tr. 157 - 159; Pl. Ex. 33]

312. Dr. Petrick opined that had Ms. Powers been given consistent and repetitive instruction over a period of time, her chances of succeeding at the DMV job would have been "substantially" increased. [Pl. Ex. 75, Petrick Dep., 28 -29, 35 -36]

313. The notes of respondent's trainers show inconsistent training, which made it difficult for Ms. Powers to process the information she was being given. [Pl. Ex. 75, Petrick Dep., 27 -28, 30 - 34, 36, 88 - 89; Pl. Ex. 3, 4/5/10 notes; Pl. Ex. 4]

314. Telling Ms. Powers that the order of doing a task did not matter, as long as the result is right, was not a method of training which was consistent with Ms. Powers' needs. [Pl. Ex. 75, Petrick Dep., 33 - 34, Pl. Ex. 4, entry for June 6, 2010 to June 11, 2010]

315. Respondent's expert, Dr. Blair, testified that to train a person who has the cognitive and mental flexibility deficits demonstrated by Ms. Powers in the tests performed by Dr. Petrick, you would need to "do the same steps as you did before, you

just do them somewhat slower and repeat them a couple more times." [Dec. 12, 2013 Tr. 93]

316. One of the accommodations, which Ms. Frick could have provided, would be to instruct the trainers on how to present information to the employee. Mr. Patrick did not see any evidence that this was done. [Feb. 12, 2014 Tr. 39 - 40]

317. Because of their respective positions of office manager and office supervisor, Ms. Frick and Ms. Whittington could have instructed each of Ms. Powers' trainers to teach a task in the same order. [Dec. 13, 2013 Tr. 32 - 33; Feb. 10, 2014 Tr. 264, 266 - 267]

318. Neither of the office supervisors, Ms. Frick or Ms. Whittington, instructed any of the trainers to teach Ms. Powers to process paperwork in the same manner as other trainers. [Dec. 13, 2013 Tr. 32 - 34; Feb. 10, 2014 Tr. 261 - 263]

319. Ms. Whittington said that each of the trainers did tasks the right way, even though each did a task in a different order, "Because that's not how it runs." [Feb. 10, 2014 Tr. 263]

320. Ms. Whittington says that DMV trainers teach things step-by-step. By that she meant that there are several steps when entering information into a computer for a process. The steps do not always have to be in the same order, but all the steps must be there. [Feb. 10, 2014 Tr. 225]

321. Had Ms. Whittington instructed each trainer to train Ms. Powers to do a task with the same steps in the same order that would have ensured repetition, and might have helped Ms. Powers learn. [Feb. 10, 2014 Tr. 265]

322. Ms. Whittington agreed that if a CSR were taught to do a task in the same order, each time, and in no other order, that person could be a successful CSR. [Feb. 10, 2014 Tr. 331]

323. Dr. Blair, respondent's expert, testified that the reason for a person's behavior could make a big difference to those around her. Dr. Blair said that it makes a difference if the reason was thought to be part of a personality, or the result of a neurological

condition. If it is viewed as a personality problem, said Dr. Blair, then people must just think the person was nuts. However, if the behavior is viewed as being the result of an injury, others may have more understanding. [Dec. 12, 2013 Tr.104-105]

324. Dr. Petrick reviewed the April 1 notes of Danetta Calhoun regarding Ms. Powers' refusal to accept a slightly altered check. Dr. Petrick said that Ms. Powers was simply "following the rules, as she knows them." [Pl. Ex. 75, Petrick Dep., 26 - 27; Pl. Ex. 3]

325. That Ms. Powers went to her manager and raised questions about what she was told by a trainer was, said Dr. Petrick, consistent with her disability. [Pl. Ex. 75, Petrick Dep., 72 - 73]

326. Rather, the training she was given was inconsistent of her needs as a result of her disability. As a result, her chances of success were greatly decreased. [Pl. Ex. 75, Petrick Dep., 31]

327. As Dr. Petrick put it, a procedure for processing a driver's license or checking documentation is a procedure, and does not change from day to day. However, if Ms. Powers were taught a different way to do the procedure each day, then it would be difficult for her to learn the task. [Pl. Ex. 75, Petrick Dep., 49]

328. When asked if "the ordinary meaning of repetition is doing the same thing over and over the same way each time," Mr. Patrick said that was "potentially" one definition, and that it could "possibly" be the way ordinary people use the word in conversation. [Feb. 11, 2014 Tr. 156]

329. Mr. Patrick said he had no indication that Ms. Powers was using the word in "repetition" in any way other than the common, ordinary way, and he did not ask Ms. Powers to find out if she meant anything different than the ordinary meaning. [Feb. 11, 2014 Tr. 157]

2. **Respondent made no effort to educate Ms. Powers' coworkers about the effects of her disability.**

330. Had Ms. Powers' co-workers been educated about the nature of her disability and what she needed to learn, Ms. Powers' chances of success at the DMV job would have been increased. [Pl. Ex. 75, Petrick Dep., 34, 35]

331. Ms. Frick never discussed Ms. Power's disability with any of the trainers, never asked Ms. Powers for permission to discuss her disability with the trainers, and never requested that Ms. Powers sign a release which would allow her to discuss her disability with the trainers. It is Ms. Frick's position that she will not discuss the disability of an employee with anyone. [Dec. 13, 2013 Tr. 10]

332. When asked if it would have helped if the DMV had consulted someone who had knowledge about how to train a person with a brain injury, Dr. Petrick replied, "If they wanted this person employed there, yes." [Pl. Ex. 75, Petrick Dep., 36]

333. Neither Ms. Frick, Ms. Whittington, nor any of Ms. Powers' trainers, knew that Ms. Powers' need to ask questions over and over, her seeming fixation on little things, or her apparent trouble learning were a result of her disability. [Dec. 12, 2013 Tr. 274 - 275, Pl. Ex. 4 entry for April 8, 2010; 276 - 277, Pl. Ex. 4, entry for April 11 to 16; 284, Pl. Ex. 4, entry for April 25; 286 - 287, Pl. Ex. 4, entry for May 2 to May 7; 289, Pl. Ex. 4, entry for May 9 to 14; Resp. Ex. 23; Feb. 10, 2014 Tr. 132 - 133, 167; Feb. 10, 2014 Tr. 200, 203, Resp. Ex. 23, Weekly Evaluation of April 8; Feb. 10, 2014 Tr. 275 - 276; Resp. Ex. 26]

334. Ms. Frick did not consider it to be her job to find out if Ms. Powers' apparent fixation on these little things was part of her disability. [Dec. 13, 2013 Tr. 34 - 35]

335. That Ms. Powers continued to ask the same questions daily did not indicate to Ms. Whittington that asking questions was something Ms. Powers had to do in order to learn. [Feb. 10, 2014 Tr. 283 - 284, Resp. Ex. 25]



336. Ms. Whittington, Ms. Kuykendall and Ms. Calhoun each testified that, had she known that Ms. Powers had a disability that affected her ability to learn, each would have tried to find a way to teach Ms. Powers in a different manner so she could learn. [Feb. 10, 2014 Tr. 88, 159 - 160, 268]

3. **The assignment of Ms. Hedden to train Ms. Powers was not a reasonable accommodation.**

337. Ms. Frick had Ms. Hedden train Ms. Powers as a form of accommodation to Ms. Powers. [Dec. 12, 2013 Tr. 343; Feb. 11, 2014 Tr. 185 - 186, Pl. Ex. 4]

338. Neither Mr. Patrick nor any other member of the review committee checked to see if Ms. Hedden was an appropriate trainer for Ms. Powers [Feb. 11, 2014 Tr. 186 - 187]

339. At the time Mr. Patrick and the review committee reached its decision to deny an accommodation to Ms. Powers:

- i. It did not know whether Ms. Hedden had a serious punctuality problem;
- ii. It did not know how many days Ms. Hedden showed up for work during the period she was assigned to Ms. Powers;
- iii. It did not know that Ms. Hedden had been disciplined for excessive tardiness and excessive use of leave;
- iv. It did not know that Ms. Hedden had been evaluated as needing improvement in the area of working well with others to achieve organizational goals;
- v. It did not know that Ms. Hedden had been evaluated as needing improvement in the area of addresses conflict and problem situations with patience and tact;
- vi. It did not know that Ms. Hedden had been evaluated as needing improvement in the area that work satisfies organizational goals;
- vii. It did not know that Ms. Hedden had been evaluated as needing improvement in the area of employee who is a dependable team member;
- viii. It did not know that Ms. Hedden had been evaluated as needing improvement in the area of provides clear direction and purpose;

- ix. It did not know that Ms. Hedden had been evaluated as needing improvement in the area of acts to motivate, coach and develop subordinates;
- x. It did not know that Ms. Hedden had been evaluated as needing improvement in the area of encourages and provides opportunities for subordinates to obtain and apply new skills and knowledge;
- xi. It did not know that on April 7, 2010, Ms. Hedden had been given a written warning for being late for work;
- xii. It did not know that on April 14, 2010, Ms. Hedden had been suspended for three days for making an insubordinate remark about a superior;
- xiii. It did not know that on May 5, 2010, Ms. Hedden had reported to work with alcohol on her breath, in a disheveled condition, stumbling and slurring her words;
- xiv. It did not know that Ms. Hedden had been suspended for one day for being unfit to perform her duties;
- xv. It did not know that Ms. Hedden had committed embezzlement from the Department of Motor Vehicles. [Feb. 11, 2014 Tr. 187 - 195; Pl. Ex. 52 - 64]

340. Ms. Frick was fully aware of these disciplinary actions, as she had participated in many of them. [Dec. 12, 2013 Tr. 343 - 362, Pl. Ex. 52 - 64]

341. If a person had been disciplined for excessive absenteeism and abuse of leave, Director Lake would not want that person training Ms. Powers. [Feb. 11, 2014 Tr. 49]

342. Director Lake would not want a person who had shown up at work smelling of alcohol and in a disheveled condition, slurring her words, to be a trainer of Ms. Powers. [Feb. 11, 2014 Tr. 49 - 50, 68]

343. Director Lake does not want someone who made the insubordinate remarks made by Ms. Hedden, and recorded in Pl. Ex. 56, training Ms. Powers. [Feb. 11, 2014 Tr. 50 - 51, Pl. Ex. 56]

344. Director Lake signed off on the discipline of Ms. Hedden on the same date he signed off on the discipline of Ms. Powers. [Feb. 11, 2014 Tr. 52 - 54, Pl. Ex. 15, 16, 56]

345. Director Lake was aware that Ms. Hedden was arrested for embezzlement. Those charges do not exhibit the character of a person Mr. Lake would want training an employee who, like Ms. Powers, was in trouble on the job. [Feb. 11, 2014 Tr. 54 - 55, Pl. Ex. 64]

**4. The training provided to Ms. Powers was ineffective**

346. Mr. Patrick agreed that the training provided to Ms. Powers was not effective in allowing her to maintain her job. [Feb. 11, 2014 Tr. 156]

347. None of the job duties for a DMV CSR appeared in and of themselves, very difficult for Ms. Powers, in Dr. Petrick's opinion. [Pl. Ex. 75, Petrick Dep., 58]

348. Dr. Petrick summarized his position in response to a question from respondent's counsel: "[Ms. Powers is] at a disadvantage relative to other individuals without such injuries. Her capacity to learn efficiently is reduced. She has cognitive deficits. So she's starting off, you know, if this was a football game, instead of starting her drive off on the 20, she's starting at the 10, and with every play she's getting penalized by her employer. Now she's back down to the 2 yard line. She's not moving forward. She's moving backward." [Pl. Ex. 75, Petrick Dep., 90- 91]

**V. DMV had no system to assure implementation of the disability provisions of the W.Va. Human Rights Act**

349. Monica Price is the Human Resources Manager for the Division of Motor Vehicles, and has been for the last six years. Her office is in Charleston, WV. [Dec. 13, 2013 Tr. 74- 75]

350. The DMV Human Resources Department has no specific written policies regarding the disability discrimination provisions of the WV Human Rights and the ADA. Instead, DMV relies upon DOT policies. However, Ms. Price does not know if the DOT has any such policies. [Dec. 13, 2013 Tr. 95 - 98]

351. Ms. Price's office is not involved in the ADA process. If there is an issue, her office can refer it to Mr. Patrick and the ADA review team. [Dec. 13, 2013 Tr. 87 - 88]

352. However, Jill Dunn, General Counsel for the DMV, testified that Ms. Price processes paperwork for ADA accommodations. [Dec. 11, 2013 Tr. 93, 134 - 135]

353. About four years ago, she and other HR managers attended a training session about disability issues, but she had no other training about those issues. [Dec. 13, 2013 Tr. 90]

354. Ms. Price is not familiar with the term "interactive process." [Dec. 13, 2013 Tr. 92]

355. Ms. Price is not familiar with the DOT forms for requesting an accommodation, for obtaining medical authorization, the ADA Review Form or the Manager Interview Form, and has never seen those forms. [Dec. 13, 2013 Tr. 92 - 94, Pl. Ex. 22, 24, 25]

356. Ms. Price did not know whether it was necessary for a person who says she has a brain injury and is having trouble on the job to present medical documentation of the injury before her problem is referred to Mr. Patrick. [Dec. 13, 2013 Tr. 102 - 103]

357. Mr. Patrick provided verbal training to Ms. Price with the "hope" that she would pass the information down to the local offices. He provided no training to the local offices. [Feb. 11, 2014 Tr. 140 - 141]

358. Mr. Patrick does not know what, if any, information Ms. Price passed on to the local offices, and he did not follow-up to see if Ms. Price had conducted additional training. [Feb. 11, 2014 Tr. 144 - 145]

359. Ms. Price provided no training about the ADA process to regional coordinators or office managers. [Dec. 13, 2013 Tr. 90]

360. There are no written guidelines for a regional Human Resources person about what matter should be sent to the review committee. [Feb. 11, 2014 Tr. 140]

361. The Return to Work Policy and Accommodation Policy for the Department of Motor Vehicles is the only written policy for the DMV on those subjects. [Feb. 11, 2014 Tr. 145 - 146, Pl. Ex. 51]

362. The Request for Reasonable Accommodation Form is not available to an employee in the local office, except upon request. [Feb. 11, 2014 Tr. 147, Pl. Ex. 22]

363. Mr. Patrick does not know if employees in local offices know that the Request for Reasonable Accommodation Form exists, or if it is in the Employee Handbook for the DOT. An employee only knows about the Request for Reasonable Accommodation Form when it comes from the review committee. [Feb. 11, 2014 Tr. 147 - 148, Pl. Ex. 22]

364. Ms. Frick did not offer Ms. Powers a Request for Accommodation Form at the end of April 2010, because she did not know the form existed, and because Ms. Powers had not produced any documentation that she had been diagnosed with a disability. [Dec. 12, 2013 Tr. 285 - 286]

365. It is Ms. Frick's understanding that before a person can even request an accommodation for a disability, that person must first present documentation of the disability. Ms. Frick dealt with Ms. Powers with that understanding. [Dec. 12, 2013 Tr. 286, 287]

366. According to Mr. Patrick, there is no requirement that an employee present specific documentation in order to initiate response to an employee's request for an accommodation. Rather, once an employee says she had a disability affecting her ability to work, the employer has an obligation to address the request for assistance, according to Mr. Patrick. [Feb. 12, 2014 Tr. 38 - 39]

367. Mr. Patrick knows of no policy, which requires an employee to supply specific documentation of a disability before a supervisor discusses her disability, contrary to the notation in Ms. Frick's notes. [Feb. 12, 2014 Tr. 36, Pl. Ex. 4]

368. If privacy of medical information was an issue, Ms. Frick could have given Ms. Powers a medical release form, and told Ms. Powers that if she signed it, then the counselor could be contacted. [Feb. 12, 2014 Tr. 35 -36]

369. A supervisor in a local office could get a medical authorization form from Mr. Patrick's office with a telephone call. [Feb. 11, 2014 Tr. 173]

370. Mr. Patrick said that neither the employee, nor the local office manager may know of the existence of the medical authorization form, as the only person who was trained was Monica Price. [Feb. 11, 2014 Tr. 173]

371. Ms. Whittington thought she had no duty to do anything regarding Ms. Powers' disability until she had been instructed by her superiors. It was not her job. [Feb. 10, 2014 Tr. 273 - 274]

372. It was Director Lake's expectation that, if the local office had been told by Ms. Powers in March 2010, that she had a brain injury that affected her ability to learn that he would have been notified. To the best of his recollection, Director Lake did not learn of Ms. Powers' disability until July 2010. The failure of the local office to notify him of Ms. Powers' claim of disability in March is a failure to act in accordance with his expectations. [Feb. 11, 2014 Tr. 56- 57]

VI. **Neither DMV nor DOT personnel had knowledge of the disability provisions of the WV Human Rights Act and its regulations at the time of Ms. Powers' employment and termination from employment.**

373. As of November 15, 2013, Mr. Patrick had not read the Human Rights Commission regulations on accommodations for persons with disabilities. [Feb. 11, 2014 Tr. 116]

374. Mr. Patrick does not know why the Manager Interview Form includes in a footnote a quotation from the United States Code about what a reasonable accommodation may include, and does not know why no comparable language from the

West Virginia Human Rights Act or its regulations is included. [Feb. 11, 2014 Tr. 197 - 198, Pl. Ex. 25]

375. In particular, Mr. Patrick does not know why the form does not say: "The preparation of fellow workers for the individual with a disability, to obtain their understanding of the limitations of the disability and their cooperation in accepting other reasonable accommodations for the individual with a disability." [Feb. 11, 2014 Tr. 198; 77 C.S.R. 1-4.5.4.]

376. At the time the ADA Review Committee reached its decision on Ms. Powers, the Committee was not aware of the WV HRC rule that one of the specified accommodations of a disability is to inform fellow workers in a way that prepares them to deal effectively with the new employee. [Feb. 12, 2014 Tr. 43 - 44]

**VII. DMV engaged in the spoliation of evidence.**

377. Between the time Ms. Powers received her 90-day evaluation and September 16th letter saying that she was fired, Ms. Powers received no verbal or written reprimands, or any other writing about her job performance. [Dec. 9, 2013 Tr. 214]

378. Ms. Powers filed a grievance over her termination, as was her right. [Dec. 9, 2013 Tr. 214 - 215; Pl. Ex. 28, 29; Dec. 11, 2013 Tr. 39]

379. The grievance was received by the W.Va. Public Employees Grievance Board on September 28, 2010. [Pl. Ex. 29]

380. On September 30, 2010, the Grievance Board wrote to Ms. Powers, to Jill Dunn, General Counsel of the DMV, and to Joe E. Miller, Commissioner, regarding setting a date for the grievance hearing. [Dec. 9, 2013 Tr. 215 - 217; Pl. Ex. 30]

381. On October 14, 2010, Gretchen A. Murphy, Assistant Attorney General, entered an appearance in Ms. Powers' grievance proceeding on behalf of the DMV, and mailed a copy of the Notice of Appearance to Ms. Powers. [Dec. 9, 2013 Tr. 216, 217; Pl. Ex. 31]

382. Shortly after this, Ms. Murphy called Ms. Powers about the grievance. When Ms. Powers told Ms. Murphy that she was seeking counsel, Ms. Murphy said she had to end the conversation, and did. [Dec. 9, 2013 Tr. 216 - 217]

383. At some time between her 60 day and 90 day evaluations, there were staff meetings at which customer comment cards were discussed. Ms. Frick instructed the staff to ask customers of the DMV to fill out cards regarding the service the customers received. [Dec. 9, 2013 Tr. 220, 222 - 223]

384. Ms. Powers requested almost every customer to whom she provided service to fill out a customer comment card. [Dec. 9, 2013 Tr. 220]

385. After the customer filled out the card regarding Ms. Powers, the customer returned the card to Ms. Powers, who in turn gave them to Ms. Frick. [Dec. 9, 2013 Tr. 221 - 222]

386. Ms. Powers read the customer comment cards before turning them in to Ms. Frick, because she wanted to make sure she was doing good work. All of the cards made positive comments about Ms. Powers' service. Ms. Frick said some of the comments were favorable. [Dec. 9, 2013 Tr. 221; Dec. 12, 2013 Tr. 185]

387. Ms. Frick made copies of the comment cards regarding Ms. Powers, and put the copies in file on Ms. Powers which she kept in her office. It was her standard practice to keep copies of the comment cards in her employee file in her office. [Dec. 13, 2013 Tr. 21 - 22, 24-26, 30 - 31]

388. There were no lines cut off or blocked out on the original Weekly Evaluations [Dec. 13, 2013 Tr. 17 - 20; Feb. 10, 2014 Tr. 302 - 305, Resp. Ex. 23]

389. The Weekly Evaluations were prepared by the trainers, and then given to Ms. Frick. She kept the originals in a file in her office, a file, which pertained only to Ms. Powers. All the documents, which Ms. Frick received about Ms. Powers, were put in the one file. [Dec. 13, 2013 Tr. 12 - 15, Pl. Ex. 3]



390. Ms. Frick continued to keep notes about Ms. Powers after July 25 until the time she was terminated. [Dec. 12, 2013 Tr. 236 - 237, 327 - 329]

391. The computer on which Ms. Frick typed her notes was still in her office at the time she left the Kearneysville office. [Dec. 12, 2013 Tr. 329]

392. Ms. Frick "assumes" that she printed out her post July 25 notes. [Dec. 12, 2013 Tr. 329]

393. Ms. Frick did not delete any files from her computer before she left. [Dec. 12, 2013 Tr. 329]

394. Ms. Frick's file on Ms. Powers was in her office when she left Kearneysville at the end of December 2010. [Dec. 13, 2013 Tr. 15]

395. When Ms. Frick returned to her office in January 2011, the file was gone. It was apparently shredded by the new manager, Lorraine Van Gosen. [Dec. 12, 2013 Tr. 237 - 238; Dec. 13, 2013 Tr. 15 - 16]

396. From September 30, 2010, the last day of Ms. Powers' employment, to the time Ms. Frick left the Kearneysville office, no one asked her to preserve her file on Ms. Powers, or gave her other instructions about what to do with the file. [Dec. 13, 2013 Tr. 32]

397. Director Lake knew that Ms. Powers filed a grievance promptly after her discharge, but Director Lake does not recall whether he asked the local office to gather evidence to deal with Ms. Powers' grievance. [Feb. 11, 2014 Tr. 35]

398. However, Ms. Kuykendall wrote a memorandum dated October 14, 2010, about Ms. Powers because she was requested by one of her "higher-ups" to write it in response to something DMV had received about accusations made against the CSRs who trained Ms. Powers. Ms. Kuykendall remembered reading that Ms. Powers was suing the state. [Feb. 10, 2014 Tr. 91 - 94, Resp.Ex.35]

**VIII. Almost none of the changes in DMV policies and procedures were changes of the steps needed to complete a task, were in writing, and were not so frequent that Ms. Powers could not have adapted had she been provided a reasonable accommodation for her disability.**

399. Almost all of the changes in DMV policies and procedures were changes about what documents could be accepted, and not in the steps needed to complete a procedure. [Dec. 13, 2013 Tr. 53 - 54]

400. The changes for a driver's license, which Ms. Kuykendall described, were changes in what documents were acceptable to prove identity and citizenship, and whether documents were scanned or photocopied, and not changes in procedure. [Feb. 10, 2014 Tr. 64 - 65, 69 - 70]

401. The steps for processing an application for a drivers' license are always the same. Step one is get proof of identity from a document on a list; step two is proof of residency, getting a document on a list or a document approved by management; step three is entering the information into the computer, and step four is taking money. [Dec. 12, 2013 Tr. 297 - 298; 54 - 55]

402. When there are changes in DMV procedures, the CSRs get memoranda or booklets explaining the new documents or steps to follow. [Feb. 10, 2014 Tr. 155; Feb. 11, 2014 Tr. 39 - 41]

403. It was not common for DMV policies to change every month, although it has happened, according to Ms. Whittington. [Feb. 10, 2014 Tr. 309 - 310]

404. Ms. Whittington said that, on average, there were about two changes each year in DMV procedures. [Feb. 10, 2014 Tr. 310 - 311]

405. Director Lake would not say that changes in procedures change daily, as daily changes would make it hard to run an office. There are periods of time when there are no changes, and on occasion, a series of changes are needed in a relatively short period of time. [Feb. 11, 2014 Tr. 42 - 43]

406. Kimberly Stake is employed at the Kearnyesville DMV office as a customer service representative, and was employed in that office when Ms. Powers worked there. [Dec. 10, 2013 Tr. 81 - 83]

407. Ms. Stake said that, from time to time, there were changes in procedures or requirements for documents for DMV services. Ms. Stake estimated that the changes occurred, on average, about once a month. [Dec. 10, 2013 Tr. 84 - 85]

**IX. Four of respondent's witnesses lack credibility.**

408. Some of Respondent's witnesses gave testimony at trial, which conflicted with the sworn statements made in pretrial discovery proceedings. In each case, the testimony given at trial favored the position of the Respondent, while the pre-trial statements were contrary to Respondent's interests. As a result of these inconsistencies, combined with observation of the demeanor of the witnesses at trial, the testimony of these witnesses is not entitled to credibility when it conflicts with the testimony of Complainant or other witnesses.

**A. Christine Frick**

409. At trial, Ms. Frick testified that she gave Ms. Powers a two to three inch binder, which contained written, step-by-step procedures for each type of transaction. Ms. Frick said that each new employee was given one. There was, she said, more than one copy of the notebook in her office. [Dec. 12, 2013 Tr. 137 - 138, 246]

410. However, the verified of Respondent's Response to Complainant's First Request for Production of Documents, number 6, which asked for "all manuals, handbooks or other training materials provided by Respondent to Renee L. Richardson-Powers", was only the Employee Handbook. The response was verified by Jill C. Dunn, the General Counsel for DMV. The employee handbook does not contain any instructions on how to perform tasks at the DMV. [Dec. 11, 2013 Tr. 94 - 95, 126; Dec. 12, 2013 Tr. 246 - 249]

411. Ms. Frick testified at trial that she told Ms. Powers what type of documentation was required. However, at her pre-hearing deposition, Ms. Frick had testified that she

had not told Ms. Powers what documentation was required, that Ms. Huggins took care of that. [Dec. 12, 2013 Tr. 316-320]

412. At trial, Ms. Frick said that she collected customer comment cards and sent them to Charleston, without making copies for employee files, and that she did not make copies of the customer comment cards relating to Ms. Powers. But at her pre-hearing deposition, Ms. Frick said that she made copies of the comment cards regarding Ms. Powers, and put the copies in the file on Ms. Powers, which Ms. Frick kept in her office. At her deposition, Ms. Frick also said it was her standard practice to keep copies of the comment cards in her file on an employee in her office. [Dec. 13, 2013 Tr. 21 - 26, 30 - 31]

413. Ms. Frick testified that she had asked Ms. Powers several times for documentation of her injury. But none of those requests is reflected in her otherwise detailed daily notes. [Dec. 12, 2013 Tr. 315 - 316]

414. Ms. Frick testified that when she used capital letters in her notes saying that she told Ms. Powers to "STOP" coming to her office all the time, she used capital letters to indicate she "was very firm" with Ms. Powers. She said she used capital letters for emphasis. However, when Ms. Frick wrote in her notes that "NOW [its] that [Ms. Powers] has a brain injury that prevents her from retaining information." then the capital letters were merely a "reference point." [Dec. 12, 2013 Tr. 181 -182,277 - 278, Pl. Ex. 4, entries for April 8 and April 18 to 23]

415. Ms. Frick claimed that Ms. Powers changed her story about her brain injury, although her daily notes do not mention any change in story. In part, Ms. Frick based her claim on her view that if a person says he has a disease, like cancer, before seeing a doctor, and then later says he has not been diagnosed as having cancer, then the person has changed his story; even if he actually has cancer. [Dec. 12, 2013 Tr. 283] This view is neither reasonable nor credible.

**B. Danetta Calhoun**

416. At trial, Ms. Calhoun testified that before she began training Ms. Powers, she knew that Ms. Powers was having difficulty. However, at her pretrial deposition, Ms. Calhoun said that before she began training Ms. Powers, she did not know how Ms. Powers was working out as an employee. [Feb. 10, 2014 Tr. 130 - 132]

**C. Theresa Graves**

417. At trial, Ms. Graves denied that she ever saw Ms. Hedden come to work intoxicated. However, at her pre-trial deposition, Ms. Graves testified that she saw Ms. Hedden come to working looking like she was intoxicated "once or twice." Ms. Graves later clarified that Ms. Hedden could have been intoxicated from either drugs or alcohol. She also said it made no difference whether she was high on drugs or alcohol. [Feb. 10, 2014 Tr. 185 - 188, 210, 212- 213]

418. At trial, Ms. Graves was asked if she thought that a good training program for a new employee consists of consistent instructions on how to do a task. She responded at trial by saying "In DMV, there is no consistency." However, at her pre-trial deposition she had answered that question with an unequivocal "yes." [Feb. 10, 2014 Tr. 192]

419. At trial, Ms. Graves said that she thought Ms. Powers was an unpleasant person. However, she testified the opposite way at her pre-trial deposition. [Feb. 10, 2014 Tr. 194]

**D. Karrie Whittington**

420. At trial, Ms. Whittington has trained seven to ten new CSRs. She trained each one the way she was trained. However, at her pretrial deposition, Ms. Whittington testified that she had trained only three or four people." [Feb. 10, 2014 Tr. 221,256 - 257]

421. At trial, Ms. Whittington said that Ms. Powers never told Ms. Whittington that she learned by repetition. However, during her pretrial deposition, Ms. Whittington testified: "I do remember [Ms. Powers] saying that she learned on repetition ... " [Feb. 10, 2014 Tr. 226, 251]

422. At trial, Ms. Whittington said that repetition is "something you do repetitively, yes, but it doesn't have to be in the same way each time" did not mean that something had "to be in the same step each time." However, at her pretrial deposition, Ms. Whittington testified that repetition meant doing the same thing, the same way, every day. [Feb. 10, 2014 Tr. 259 - 260]

423. At trial, Ms. Whittington said she did not recall whether, upon learning about Ms. Powers' brain injury, she asked if there was anything she needed to do with Ms. Powers. However, at her pretrial deposition, Ms. Whittington said she had not asked that question. [Feb.10, 2014 Tr. 273]

**X. Ms. Powers has suffered a significant loss of past and future earnings and other damages.**

**A. Ms. Powers suffered a loss of earnings after termination of her DMV employment.**

424. After DMV terminated her employment, Ms. Powers looked for work. On October 1, 2010, she went to the WV Workforce office, applied for unemployment compensation, and began the work search process. [Dec. 9, 2013 Tr. 237 - 238; Dec. 11, 2013 Tr. 55 - 58]

425. Ms. Powers also applied for Social Security Supplemental Security Income benefits. She never told anyone at Social Security that she could not work. Instead, she was seeking benefits based upon her disability, but benefits, which would allow her to work full time, as she felt she could work and wanted to work. [Dec. 9, 2013 Tr. 238 - 239; Dec. 11, 2013 Tr. 69]

426. Pamela Lockard, has worked for the W.Va. Division of Rehabilitation Services, and is familiar with Supplemental Security Income (SSI) benefits. Ms. Lockard said that a person who receives SSI benefits can work while receiving benefits, although there are income limits. Therefore, applying for SSI while looking for work; and, claiming that one

can perform a job with the proper accommodation are not inconsistent. [Dec. 13, 2013 Tr. 111 - 112, 152 - 153]

427. Ms. Powers got a job as an administrative assistant with Century 21 Braddock Realty in Inwood, WV, where she is still employed. The job began in January 2011. Her wage rate was, and is, ten dollars per hour, with no fringe benefits. [Dec. 9, 2013 Tr. 239 - 241]

428. When Ms. Powers began work at Century 21, she got 20 hours of work each week. In August 2012, this was decreased to 12 hours each week because business and profits have been down. [Dec. 9, 2013 Tr. 240 - 241]

429. Since the termination of her job at the DMV, the only earnings from employment, which Ms. Powers has received, are her wages from Century 21. [Dec. 9, 2013 Tr. 244]

430. Ms. Powers testified that she is not currently looking for other employment. [Dec. 11, 2013 Tr. 59]

431. Thomas C. Borzilleri, Ph.D., is an economist and an economic consultant, to whom Respondent did not object as being qualified as an expert witness for the purpose of calculating damages. [Dec. 10, 2013 Tr. 56, 70]

432. Dr. Borzilleri based his calculations on a review of the DMV answers to interrogatories, Ms. Powers' income tax returns, and pay statements of Ms. Powers from her new job. [Dec. 10, 2013 Tr. 63 - 64, Pl. Ex. 41 - 46]

433. Ms. Powers would have earned a monthly salary of \$1,706.00 with monthly benefits of \$1,138.60 had she remained employed with Respondent for one year. Lost wages and benefits are \$2,844.60 for each month of 2010 for which Ms. Powers was not employed after her termination from October through December 2010, totaling \$8,533.80. [Pl. Ex. 42, Ans. To Interrog. No. 4]

434. Year by year calculations are set out in the report prepared by Dr. Borzilleri. Dr. Borzilleri calculated that the present value of lost wages for 2010, at \$11,270 and present value of losses for 2010, at \$12,906. Calculating a doubling of the estimated

wage and benefits for 2011, 2012, 2013, and 2014, and subtracting from Dr. Borzilleri's estimated total loss gives a back pay and front pay of \$11,259 for 2011, \$6,912 for 2012, \$13,248 for 2013, and \$15,433 for 2014. [Pl. Ex. 40]

435. Respondent did not present evidence that substantially equivalent employment opportunities exist in the geographic vicinity. Respondent's termination of Complainant resulted in the West Virginia Division of Personnel disqualifying Complainant from applying for any positions with the West Virginia Division of Motor Vehicles. [Pl. Ex. 69]

**B. General Damages**

436. When Ms. Powers was hired by the DMV she was very excited. Her twin sister said that Ms. Powers was "probably the happiest I'd ever heard her be that she actually got a good job." [Dec. 10, 2013 Tr. 104]

437. She was elated, as she had been without work for a year and it was a good job. [Dec. 11, 2013 Tr. 88]

438. The happiness did not last, as Ms. Powers was not sure how to do her job, in part because she had a series of different trainers. [Dec. 10, 2013 Tr. 105 - 106]

439. Ms. Powers' twin sister described Ms. Powers as "mortified" after her first evaluation. [Dec. 10, 2013 Tr. 107]

440. Mr. Powers said that after the first review, Ms. Powers would come home crying because she did not understand what was going on at work. [Dec. 11, 2013 Tr. 88]

441. After the first evaluation, Ms. Powers was always upset and cried when talking to her twin sister about the job at the DMV. [Dec. 10, 2013 Tr. 107 - 108]

442. Ms. Powers called her twin sister after she was terminated by the DMV. Her sister described Ms. Powers as "devastated," as she had never before been fired or received bad evaluations. [Dec. 10, 2013 Tr. 108 - 109]

443. Ms. Kundy talks with Ms. Powers at least every two weeks. They have been close throughout their lives. [Dec. 10, 2013 Tr. 127, 129]



444. Ms. Kundy has never known her sister to be fired from a job or get a bad review prior to the DMV. [Dec. 10, 2013 Tr. 129]

445. Ms. Kundy said the Ms. Powers was upset when she lost her job with the DMV, as she was without a job, was unemployed and had a family to take care of. [Dec. 10, 2013 Tr. 130]

446. Timothy Powers has been married to Renee Richardson-Powers since June 2002. [Dec. 11, 2013 Tr. 79]

447. According to Mr. Powers, his wife is not shy about telling people what she needs in order to learn. [Dec. 11, 2013 Tr. 80]

448. Ms. Powers told her husband that her supervisor at the DMV had instructed her not to tell anyone about her brain injury. [Dec. 11, 2013 Tr. 80 - 81]

449. Mr. Powers met some of Ms. Powers' co-workers at Sam's Club, and found that she was highly regarded. [Dec. 11, 2013 Tr. 82]

450. Mr. Powers described his wife as being devastated when she was fired by the DMV, and came home crying hysterically. [Dec. 11, 2013 Tr. 88 - 89]

## V DISCUSSION

W. Va. Code Ann. § 5-11-9(1) (West) The West Virginia Human Rights Act forbids discrimination against persons on the basis of disability. West Virginia Code §5-11-9(1) makes it unlawful, "For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or disabled: . . ." W. Va. Code Ann. § 5-11-9(4) makes it unlawful, "For any employer . . . controlling apprentice training programs to: . . . (C) Discriminate against any individual in his or her pursuit of such programs or to discriminate against such a person in terms, conditions or privileges of such programs." W. Va. Code Ann. § 5-11-3(h) (West) defines discriminate or discrimination as "to exclude from, or fail or refuse

to extend to, a person equal opportunities because of . . . disability . . .” W. Va. Code Ann. § 5-11-3(m) (West) defines “disability” to mean: “(1) A mental or physical impairment which substantially limits one or more of such person’s major life activities. The term ‘major life activities’ includes functions such as . . . hearing, speaking . . . learning and working; . . .” W. Va. Code Ann. § 5-11-9(7) makes it unlawful, “For any person, employer . . .to: . . . (C) 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.”

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

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

Syllabus Point 3, Conaway v. E. Associated Coal Corp., 178 W. Va. 164, 358 S.E.2d 423 (1986). Mayflower Vehicle Sys., Inc. v. Cheeks, 218 W. Va. 703, 713-714, 629 S.E.2d 762, 772 - 773 (2006). “. . . , to establish a *prima facie* case of disability discrimination, the plaintiff must show that he is a disabled person within the meaning of the law, that he is qualified to perform the essential functions of the job (either with or without reasonable accommodation), and that he has suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises.” (Internal citations omitted). Footnote 22, Skaggs v. Elk Run Coal Co., Inc., 198 W. Va. 51, at 81, 479 S.E.2d 561, at 582 (1996).

To state a claim for breach of duty of reasonable accommodation under the West Virginia Human Rights Act, W. Va. Code Ann. § 5-11-9, a plaintiff must allege the following elements: (1) The plaintiff is a qualified person with a disability; (2) the

employer was aware of the plaintiff's disability; (3) the employee required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the employer knew or should have known of the plaintiff's need and of the accommodation; and, (6) the employer failed to provide the accommodation. Syllabus Point 2, Skaggs, 198 W. Va. 51

The West Virginia Human Rights Commission's Rules Regarding Discrimination Against Individuals With Disabilities, provides at W. Va. C.S.R. § 77-1-4.2:

"Qualified Individual with a Disability" means an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job, and if an employer has prepared a written job description before advertising or interviewing applicants for the job, this may be considered evidence of the essential functions of the job. A job function may be considered essential for several reasons, including but not limited to, the following:

4.2.1. The function may be essential because the reason the employment exists is to perform that function;

4.2.2. The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

4.2.3. The function may be essential because the amount of time spent on the job performing the function.

Under the West Virginia Human Rights Act, W. Va. Code Ann. § 5-11-9, in a disparate treatment case involving an employee with a disability, an employer may defend against a claim of reasonable accommodation by disputing any of the essential elements of the employee's claim or by proving that making the accommodation imposes an undue hardship upon the employer. Undue hardship is an affirmative defense, upon which the employer bears the burden of persuasion. Syllabus Point 3, Skaggs, 198 W. Va. 51

Under the West Virginia Human Rights Act, W. Va. Code Ann. § 5-11-9, once an employee requests a reasonable accommodation, an employer must assess the extent

of an employee's disability and how it can be accommodated. Syllabus Point 4, Skaggs, 198 W. Va. 51

Under the West Virginia Human Rights Act, W. Va. Code Ann. § 5-11-9, reasonable accommodation means reasonable modifications or adjustments to be determined on a case by case basis which are designed as attempts to enable a person with a disability to be hired or remain in the position for which he or she was hired. The West Virginia Human Rights Act does not necessarily require an employer to offer the precise accommodation an employee requests, at least as long as the employer offers some other accommodation that permits the employee to perform the job's essential functions. Syllabus Point 1, Skaggs, 198 W. Va. 51

In Skaggs, 198 W. Va., 68, 69, the court made several observations about the process that should occur in determining and adopting reasonable accommodations as follows:

The process by which accommodations are adopted ordinarily should engage both management and the affected employee in a cooperative, problem solving exchange. The federal regulations implementing the ADA state:

"To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3) (1995).

Similarly, the appendix to 29 C.F.R. § 1630.9 at 414(1995), provides: "[T]he employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." Neither the West Virginia statute nor the federal law assigns responsibility when the interactive process is not meaningfully undertaken, **but we infer that neither party should be able to cause a breakdown in the process. The trial court**

should look for signs of failure to participate in good faith or to make reasonable efforts to help the other party determine what specific accommodations are necessary and viable. A party that obstructs or delays the interactive process or fails to communicate, by way of initiation or response, is acting in bad faith. When information necessary for an accommodation only can be provided by one party, the failure to provide that information is considered an obstruction. The determination must be made in light of the circumstances surrounding a given case. [Emphasis supplied]

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, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); and, adopted by the West Virginia Supreme Court in Shepherdstown Volunteer Fire Dep't v. State ex rel. State of W. 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 may establish his prima facia case. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 1866, 52 L. Ed. 2d 396 (1977). The plaintiff may meet his 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 Const. Corp., 57 L. Ed. 2d 957.

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. W. Virginia Inst. of Tech. v. W. Virginia Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway, 178 W. Va. 164 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 Ctr. v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (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 Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology v. West Virginia Human Rights Comm’n, 181 W. Va. 525, 383 S.E.2d 490, fn. 11 (1989) “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 v. Sundale Nursing Home, 193 W. Va. 475, 485, 487, fn.16 fn.18, 457 S.E.2d 152, 162, 164 (1995).

The Complainant is a qualified individual with a disability. W. Va. Code Ann. § 5-11-3(m)(1) (West) defines “disability” to mean: “A mental or physical impairment which substantially limits one or more of such person’s major life activities. The term ‘major life activities’ includes functions such as . . . hearing, speaking . . . learning and working; . . .” Complainant has proven that she is a person with a disability under the West Virginia

Human Rights Act through the evidentiary deposition testimony of James Douglas Petrick, Ph. D. in clinical psychology. Dr. Petrick saw Ms. Powers on August 25, 2010, on a consult for the West Virginia Center for Excellence in Disabilities Traumatic Brain Injury Program operated by West Virginia University in Morgantown. Dr. Petrick testified that he can determine whether someone has suffered a traumatic brain injury with some degree of confidence through patient history and examination of the neuropsychological data. Dr. Petrick obtained a medical, developmental, family, school and work history from Ms. Powers, and performed a behavioral exam. Dr. Petrick administered a series of different psychometrics to assist measuring cognitive styles. Dr. Petrick's conclusion was that Complainant had suffered a head trauma with traumatic brain injury secondary to a fall when she was eight years old. Diagnostics in his report listed cognitive disorder not otherwise specified secondary to traumatic brain injury and mood disorder not otherwise specified.

The Boston Naming Test and Controlled Oral Word Association Test (FAS) showed impairments in Complainant's ability to understand what is being said and to make her thoughts known to others. This impacts Complainant's learning and memory which makes communicating with others not impossible but more difficult. There was dysnomia (word finding) which reduced verbal fluency. The Trail Making Test indicated cognitive speed and efficiency were moderately impaired. Mental flexibility and sequencing skills were mildly impaired. The Complainant is able to do things, it just takes her longer. There was suggestion of clinical perseverative tendencies, which can come across as obsessive to the average person, and which prevents flexibility in thinking. The Complainant is not incapable of problem solving there is just a decreased efficiency. Complainant exhibited noticeable but not profound tangential nonlinear thinking.

Dr. Petrick determined that these findings clearly show Complainant has cognitive deficits, as a result of which she requires structure, repetition and consistency

to learn. Anyone with a cognitive impairment will do better with consistency; changing the sequence in which a task is done contributes to frustration and decreases learning and task completion. Dr. Petrick's conclusions are that it is not that Complainant cannot learn but that decreased mental flexibility and perseverative tendencies ultimately have a negative impact on her performance. Changing the order in which the steps necessary to complete a task are presented causes Complainant emotional distress decreasing her chances of successfully learning the task contributing to confusion and frustration. This in turn will affect Complainant's interactions with co-workers, supervisors and trainers. These findings by Dr. Petrick indicate that Ms. Powers has mental impairments, which substantially limit her major life functions such as speaking and learning.

Respondent makes repeated references to the supposed inconsistencies in the reports of how Ms. Powers' injury occurred. Those inconsistencies appear only after the fact in discovery of the recorded histories of various agencies. These supposed inconsistencies are simply not relevant to the issues in this case. The evidence is uncontroverted concerning the existence of cognitive impairments impacting major life functions of learning and speaking. The etymology of those mental impairments has no bearing on the elements of the causes of action to be decided in this matter. Were this a workers compensation case where the attribution of the causation of those impairments to a work place injury such arguments by Respondent would be relevant, in this instant action they have no legally significant relevance to the issues herein.

Ms. Richardson-Powers has demonstrated that she is capable of performing similar customer service jobs in the past, when she has explained her learning problems to her co-workers. These include jobs with extended periods of multiple year employment in these jobs: a bank teller, Budget Rent-a-Car Customer Service Agent at Washington Dulles Airport, and Sam's Club, in various capacities. Immediately prior to her employment with Respondent, Complainant worked, from April 2007 until May 2009, as an order fulfillment coordinator for Ralph Lauren at the Martinsburg children's



wear warehouse in Martinsburg, West Virginia. That employment terminated as a result of transferal of the job duties to another state and the ultimate closure of the Martinsburg facility. The evidence established that she has a record of helpful courteous interaction with those prior employers' customers as recognized and documented by the prior employers. The preponderance of the evidence suggests that with accommodation, Ms. Powers is able to perform the duties of customer service representative with Respondent, DMV. The evidence established that she met all pre-employment criteria established by the DMV.

Ms. Powers has suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises. By letter dated September 15, 2010, from Jeff Black, Human Resources Director, West Virginia Department of Transportation, Ms. Richardson-Powers' request for reasonable accommodation was denied. Pursuant to the review, the letter states, "the information submitted demonstrated that the local DMV office previously made multiple attempts to assist you in learning the duties of customer service representative in ways consistent with the recommendations of Ms. Cunningham." It concludes that, "based upon these unsuccessful attempts it is apparent that no reasonable accommodation would enable you to perform the essential duties of your job", and informs Complainant that she would not be considered for review by the Reasonable Accommodation Team. By letter dated September 16, 2010, from Joe Miller, Commissioner of the West Virginia Division of Motor Vehicles, Complainant was notified of her non-retention by the DMV and that her employment would be terminated effective September 30, 2010. The weight of the evidence, as discussed elsewhere in this decision, indicate that the duty of reasonable accommodation was not met by Respondent in this instance, which constitute circumstances of unlawful discrimination leading to her termination.

Further, circumstance gives rise to the inference of unlawful discriminatory motive on the part of Complainant's supervisors. Ms. Frick's Daily Log for Renee

Richardson-Powers notes for the week of March 28 through April 1, 2010, indicate that: "She is now stating that she has a brain injury which prevents her from retaining information." On April 9, 2010, Ms. Powers received written reprimands in her personnel file under questionable situations. One instance involved a purported complaint from a customer making loud racist remarks in line when Ms. Powers told him, "At least I didn't say here's your card." There had never been any prior verbal warnings or coaching. The other instance was for her having placed a tag reissue in the wrong basket leading to the mistaken fear that a tag was missing from the window inventory where Ms. Powers had been training that day.

The foregoing discussion leads to the conclusion that the Complainant has met all the elements to make out a prima facie case of disability discrimination as set forth in Skaggs, Supra. Ms. Powers has demonstrated that she is a disabled person within the meaning of the law, that she is qualified to perform the essential functions of the job with a reasonable accommodation, and, that she suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arose.

Similarly, Complainant has established the elements of a breach of reasonable accommodation as set forth in Skaggs, Supra. The foregoing discussion and findings of fact indicate that the Complainant is a qualified person with a disability as those terms are defined under the statute and regulations of the Human Rights Act.

The Respondent DMV was aware of Complainant's disability. When Complainant began her employment at the Kearneysville DMV office (sometimes also referred to in testimony as the Charles Town office in the record), she discussed her disability with the manager of the field service office, Christine McIntyre Frick. Complainant, Ms. Richardson-Powers, explained to Ms. Frick that she learns by step-by-step repetition and that she took longer to learn as a result. Complainant in the past explained to her co-workers that she had a disability and that this was the reason for her constantly asking the same questions over and over. Ms. Frick advised her that, she, Ms. Frick, would not

tell her co-workers because it was none of their business. Later, as Ms. Powers began experiencing difficulties with the way she was being trained; she specifically told Ms. Frick that she had a traumatic brain injury. This was set forth in Ms. Frick's daily log she was keeping on Ms. Powers in entries for the period of March 28-April 1, April 18-23, May 10-21, on May 28, and also June 6-11. Following her 90-day evaluation, which was again negative, after her feedback since the bad 60-day evaluation had been positive in nature, Complainant talked to her Traumatic Brain Injury Specialist, Terrie Cunningham. Ms. Cunningham instructed her to give her business card to Ms. Whittington, the supervisor, and ask her to talk to her about how Ms. Powers learns. Ms. Whittington refused to talk to Ms. Cunningham. The State ADA Director of Compliance, Penny Hall, contacted Ms. Frick about the refusal to meet with the Traumatic Brain Injury Specialist and was told she would have to take the matter up with Ms. Frick's superior in Charleston.

Ms. Powers clearly required an accommodation to perform the essential functions of the job. Further, a reasonable accommodation existed which met Ms. Powers' needs. That accommodation was the same that had been extended by her previous employers. It included their being patient with her repeatedly asking the same questions over and over a number of times. It included being shown the same task repeatedly in the same step-by-step format. Given the information in this format, Ms. Powers has demonstrated that she can successfully learn these types of customer service job functions. Dr. Petrick opined that had Ms. Powers been given consistent and repetitive instruction over a period of time, her chances of succeeding at the DMV job would have been "substantially" increased. Respondent's expert, Dr. Blair, testified that to train a person who has the cognitive and mental flexibility deficits demonstrated by Ms. Powers in the tests performed by Dr. Petrick, would need to . . . "do the same steps as you did before, you need to just do them somewhat slower and repeat them a couple of more times." The reasonableness of providing these accommodations is

demonstrated by the fact they have been provided to Complainant by her prior employers with success. None of Respondent's witnesses' testimony, or argument by counsel, that the trainers cannot be instructed to teach the transactions by repeating the steps in the same order each time, makes any sense. In fact, some of the testimony from its own witnesses, including that of Ms. Whittington, makes it clear that this can be done.

Respondent, DMV, knew and should have known of Ms. Powers' need for the accommodations described above. Respondent has argued that it was never made aware of the need to have the steps shown to Ms. Powers in the same sequence. This argument does not comport with the documents in evidence. There are numerous entries to the effect that Respondent's supervisor, manager and trainers explained that it did not matter what order the steps are completed as long as the information that was needed was all obtained. Clearly, Ms. Powers was telling them that they were training her in the wrong fashion, i.e. each doing a procedure in a different order or a different manner, with different steps. Once Ms. Frick was aware that Ms. Powers had a brain injury, she should have taken some steps to ascertain what that meant in terms of how Ms. Powers needed to be trained in order to learn tasks.

Ms. Frick testified that she asked for documentation of Ms. Powers' disability. This is not believable in light of the notations in her log, which did not document that such a request was made. Instead, Ms. Frick, when informed that Ms. Powers had a brain injury, after consulting with Ms. Huggins, was instructed to ask why did you not tell us this when we interviewed you. At no time in the first 90 days of Ms. Power's employment, did either Ms. Frick or Ms. Whittington, instruct Ms. Powers to fill out a Request for Accommodation form and file it with the Department of Transportation ADA Committee. Indeed, neither Ms. Frick nor Ms. Whittington had any knowledge that such a form existed. Neither did anyone at the Kearneysville office undertake to learn anything about traumatic brain injuries, or how to assist those with such injuries to cope

with learning. Having been told by Ms. Powers that she needed to be shown the steps in the same order, Ms. Frick would have been aware that the requested accommodation existed. Other evidence indicates that Ms. Powers told Ms. Whittington and Ms. Frick that if the trainers were told about how she learns and the need to ask the same questions repeatedly, the trainers would not react so negatively toward her.

The Respondent's supervisor and manager at the Kearneysville field office refused to discuss Ms. Powers' disability with her coworker trainers in regard to her asking the same questions or her obsessive need for order. Both insisted that she had to learn the way everyone else was shown. This was done based upon their belief that she had to be shown that it does not matter in what order the transaction is completed. The law does not require the Respondent to provide the accommodation that the Complainant requested, as long as it provides an accommodation, which will allow the employee to perform the essential functions of the job. The Respondent undertook to provide what it deemed to be sufficient. Respondent has offered no evidence that the accommodations it concluded it had already provided were designed to, or would, allow Ms. Powers to learn successfully how to perform the essential functions of the customer service representative job. The Respondent failed to provide Complainant with the reasonable accommodation, which she needed in order to perform the essential functions of the job. Respondent has breached the duty it owed Ms. Powers to provide a reasonable accommodation.

The law also requires that Respondent, DMV, engage in the interactive process to determine a suitable accommodation. It is undisputed that by March 28 - April 1, 2010, and again on April 23, 2010, Complainant told the manager, Ms. Frick that she had a brain injury, which prevented her from retaining information. This information was discussed with Ms. Frick's direct superior, Carol Huggins. She was instructed to ask why Complainant had not informed them of the brain injury when interviewed. Notes for the week of May 16 to May 21, 2010, indicate that Complainant complained about the way

each trainer does things and that with the brain injury she cannot retain information. Complainant again told Ms. Frick that she had the brain injury that prevents her from retaining information and requested additional training on May 28, 2010, after meeting with Ms. Whittington and Ms. Frick the day before, when the two supervisors and Complainant had met for her evaluation and reviewed goals and established expectations. The Complainant was provided an additional week of training after the matter was discussed with Carol Huggins. After receiving another bad evaluation on July 12, 2010, Complainant asked Ms. Whittington, her supervisor, to meet with Complainant's brain trauma counselor, Terry Cunningham, for one-on-one information about Complainant. Ms. Whittington refused. On July 22, 2010, Ms. Frick received a call from Penny Hall, from the State ADA office, asking why they would not meet with Complainant's brain trauma counselor. Ms. Huggins had told Ms. Frick that is not something they do without specific disability documentation. Ms. Hall was told that any such meeting would have to be approved by Charleston and referred her to Director Pete Lake. Ms. Frick admits that she made no effort at any time of any sort to educate herself about the effects of traumatic brain injury on the learning process or what might be helpful in facilitating Complainant's training.

On July 22, 2010, Ms. Frick sent an email recounting her contact from Ms. Hall with the State ADA office, to Mr. Lake, Director of Regional Offices and Call Centers for the Division of Motor Vehicles. Mr. Lake forwarded the e-mail to Jeff Black, Human Resources Director for the Department of Transportation. The Department of Transportation has an ADA Committee, which conducts a review process once requests for accommodation are requested or come to their attention. If they feel the request is sufficient they will begin the interactive process with the employee. Mr. Black contacted Mr. Ray Patrick, ADA Coordinator, for the West Virginia Department of Transportation to request that he add an employee for the ADA Committee's review meeting. The Department of Transportation ADA Committee is composed of Mr. Patrick, the ADA

Coordinator who gathers the information for the reasonable accommodation request file for the Committee to review; Jeff Black, Human Resources Director for the Department of Transportation; Dreama Smith, the E.E.O.C. Director for the Department of Transportation; and two attorneys from the Division of Highways, Crystal Black and Jason Workman.

The employees at the DMV offices do not have the Request for Accommodation Form available at their work site. The DMV Employee Handbook makes no mention of the availability of the Request for Accommodation Form to request an accommodation for a disability, where to send such a request, or any mention of the Department of Transportation policy regarding requesting reasonable accommodation for disabilities or conducting these reviews. The managers of the Field Service offices do not have the Request for Accommodation Forms. Managers of the offices and other supervisory employees of the DMV have no training regarding what the process is for seeking a reasonable accommodation for a disability. There is no procedure in place for front line supervisors and managers of the DMV offices to follow in these instances and they are not aware of the process of contacting the Department of Transportation ADA Coordinator or the ADA Review Committee. Mr. Patrick testified that no formal training was given to anyone on the Department of Transportation ADA Review Committee and its procedures but that certain high-ranking personnel within the DOT stationed in Charleston received some verbal instructions on the ADA review process. This included some individuals with the DMV who work out of Charleston.

The email chain from July 22, 2010, was deemed sufficient to warrant beginning the interactive process. At that point, a packet was hand delivered from Charleston, West Virginia to the Complainant at the Kearneysville DMV office. The letter was dated July 27, 2010. The Complainant filled out a medical authorization, medical provider contact list and an employee's request for accommodation, signed and dated it on July 30, 2010. The request for accommodation form lists a disability of traumatic brain

injury. It discloses that Complainant's learning process is affected in that she learns through detailed step-by-step procedures and that she can perform the essential job duties if trained in a step-by-step format. She notes that she is to meet with a doctor for a neuro-psych exam on August 25, 2010, in Morgantown, through the Center for Excellence in Disabilities. The Medical Provider List lists George Washington Medical Center; Terry Cunningham, Center for Excellence in Disabilities; Pam Lockard, Department of Rehabilitation Services; Pediatric Associates of Alexandria; and, Penny Hall, Compliance Director with the State's ADA office. The DOT ADA Coordinator sent out letters to the identified medical providers with the exception of Penny Hall, with a Medical Provider Response Form and the authorization to release information executed by Complainant. The ADA Coordinator did not make any attempt to obtain the report of the neuro-psych examination conducted on August 25, 2010, by Dr. Petrick. The ADA Coordinator also conducted an interview of the Complainant's manager, Ms. (McIntyre) Frick, on September 15, 2010; and, filled out the Manager Interview Form.

Mr. Patrick, the ADA Coordinator, received page two of the Medical Provider Response Form back from Terry Cunningham, MA, CBIS (Certified Brain Injury Specialist) with some attachments. It instructed that Complainant cannot break down large tasks into small steps, may have trouble following verbal instructions, needs more time to complete tasks, and may need more frequent breaks due to diminished attention span and disability. She went on to opine that Ms. Richardson-Powers could perform the essential functions of the job with reasonable accommodation including: all instructions should be in writing, large tasks broken down to steps, more frequent breaks, and more time to complete a task. The letter addressed to the Pam Lockard, Department of Rehabilitation Services, came back with a notation that she no longer worked there. Responses were not received from the hospital or pediatrics center and no records existed from the 1970s. Mr. Patrick stated that the ADA Committee did not doubt that Ms. Richardson-Powers was a person with a disability and undertook to address the



issue of whether she could be afforded a reasonable accommodation. The ADA Review Committee did not ask for an independent IME.

The Manager Interview Form only lists the employee suggestions that she learn in a step-by-step procedure format and through repetition. It does not include the additional matters raised by Ms. Cunningham including: “. . . [Complainant] can’t break down large tasks into small steps, may have trouble following verbal instructions, needs more time to complete tasks, may need more frequent breaks due to diminished attention span and disability. . .”; and, “all instructions should be in writing, large tasks broken down to steps, more frequent breaks, and more time to complete a task.” Mr. Patrick did not address these issues with Ms. Frick, he did not obtain Ms. Frick’s cooperation for Ms. Frick and Ms. Whittington to meet with Ms. Cunningham to discuss the training requirements of Ms. Powers one-on-one, nor did Mr. Patrick seek the information from the neuropsychological examination of Ms. Powers on August 25, 2010. Neither did Mr. Patrick, nor any member of the ADA Committee, seek any expert opinion or pursue any information regarding the nature of traumatic brain injury on the learning process. No one was familiar with the West Virginia Human Rights Commission’s Legislative Rules Regarding Discrimination Against Individuals With Disabilities, particularly regarding the education of co-workers to prepare them for the accommodations provided to a disabled employee. Those rules are contrary to the instructions given in the DOT policy regarding accommodations. Mr. Patrick relied upon the representations Ms. Frick made in the telephone conversation to complete the Manager Interview Form, utilized in making the determination to deny Ms. Powers’ request for accommodation, and the subsequent decision of the DMV Director to terminate her employment. No attempt was made to verify the information supplied by the manager. No opportunity was given to Ms. Cunningham or Ms. Powers to review that information or respond to that information.

The Respondent failed to provide a reasonable opportunity to Ms. Powers to engage in a meaningful interactive dialogue to ascertain the appropriate accommodation for Ms. Powers in her training. This failure occurred initially in Ms. Frick not allowing Ms. Powers to discuss how she learns with her trainers so that they would be prepared for her repeating the same questions multiple times. It continued when Ms. Frick failed to understand the importance of being shown the tasks in the same order for Ms. Powers to learn. Additionally, there were problems of a generic systemic nature in how the Respondent goes about addressing requests for accommodations within the DMV. The handbook does not give any notice regarding the applicability of the DOT ADA Committee process or the availability of its Request for Accommodation Forms. This problem is compounded by the fact that the existence of the forms and the ADA process are unknown to the supervisory personnel at the DMV offices. In the instant case, Ms. Powers' manager was made aware of her need for accommodation and later of her traumatic brain injury on several occasions over a prolonged period of time without her being informed of or requested to fill out a request for accommodation form. When the Human Resources person in Charleston was initially informed of the matter, she instead instructed the manager to quiz the employee about why the brain injury was not disclosed during her interview. There is no notation that the Complainant was ever asked to document her disability until after the State ADA office inquired as to why the local supervisor refused to meet with Ms. Powers' brain injury specialist for one on one consultation.

This case raises the larger issue, given the process of referral of the requests for accommodation to the DOT ADA Committee in Charleston from the local worksites, when an employee, medical professional or other vocational specialist requests to meet with local supervisory personnel to discuss accommodations, how is any meaningful interactive process possible. Assuring that requests are handled consistently is laudable and nothing is per se wrong with this approach. However, in undertaking the process

the ADA Coordinator and the ADA Committee need to find some way to ensure that meaningful interaction occurs. In the instant case it was clear to Ms. Powers that her need for having steps repeated in sequence and for exact steps to be written down were not being understood by Ms. Whittington or Ms. Frick; this is what led to her request that Ms. Whittington speak with her brain injury specialist, Ms. Cunningham. That dialogue never took place prior to the ADA Committee unilaterally making a decision regarding the accommodation request and without their ever undertaking any education regarding the effects of brain injury and what to expect. Mr. Patrick opined that the Respondent complied with ADA and HRA, but that opinion is misplaced. No effort was made to obtain the report of Dr. Petrick, although Ms. Powers' appointment with the neuro-psychiatrist at the Center for Excellence in Disabilities in Morgantown was disclosed in the paperwork submitted. Mr. Patrick was unaware of the Legislative Rules for Disabilities at the time the decision was made. His expertise in ADA consists of a couple of seminars on on-line course work for HR professionals.

Respondent argues that Ms. Powers is the one who failed to engage in the interactive process in good faith by failing to meet with her Rehab counselor, Ms. Lockard, after she purportedly received an email. Ms. Powers explained that her email connectivity had a period of issues. Moreover, Ms. Lockard was not available to meet except during hours when Ms. Powers was working. Ms. Lockard was located in Martinsburg and Ms. Powers worked in Kearneysville. The drive would exceed her half hour lunch. When Ms. Powers called to enquire why Ms. Lockard's records had not been sent to Mr. Patrick, she was informed that she no longer worked at Rehab. The Respondent further alleges that Ms. Powers somehow withheld a report of the Rehab psychiatrist. There is no evidence that indicates that the report was in fact in Ms. Powers' possession prior to July, or even thereafter, only that the report was left at the desk in Martinsburg for Ms. Powers. Moreover, Respondent does not indicate why this report containing many inaccuracies would have been relevant.

As a factual matter, copies of handwritten trainer's notes, primarily consisting of six weekly evaluations for new employees forms, are cut off in places and obscured making them incomplete and illegible in portions. Complainant repeatedly sought originals in the discovery process to no avail. The evidence establishes that the originals of these documents, along with others, such as copies and original customer comment cards for Complainant, or the computer reports of Ms. Frick regarding Complainant for the period after July, were destroyed by Respondent in December 2010, while Ms. Frick was out on sick leave and another manager, filling in at the Kearneysville DMV field office, got rid of the file Ms. Frick was maintaining documenting Ms. Richardson-Powers' employment problems with DMV. Respondent contends that all the files for employees kept by Ms. Frick were thrown out. The computer records of Ms. Frick in this matter, including the other primary documentary evidence consisting of Ms. Frick's weekly summaries in her Daily Log for Renee Richardson-Powers, CSRT-2010, which runs from March 22 through July 22, 2010, and included other entries thereafter of which no copies exist, were destroyed when the computers at the Kearneysville, DMV were replaced. The spoliation of this evidence took place during a period subsequent to the filing of the request for accommodation by Complainant, her subsequent termination from employment by Respondent, and the appearance of counsel for the DMV, appearing on behalf of Respondent in a Grievance filed by Ms. Richardson-Powers in relation to the matters at issue herein. Neither, Ms. Frick, nor the manager who filled in for her in December 2010, at the Kearneysville office, were instructed to preserve the originals or other evidence regarding Ms. Richardson-Powers by anyone including the ADA Committee at the Department of Transportation, Ms. Dunn, General Counsel for Respondent, DMV, who received notice from the Grievance Board when Complainant filed her grievance, nor any other DMV upper management.

## SPOILATION OF EVIDENCE

Respondent has destroyed or altered documents relating to Complainant's job performance. Complainant contends that those documents would have shown Complainant was capably performing the duties of her job and that Respondent should be sanctioned for the destruction of the evidence with: 1) an adverse inference that customer comment cards and daily log notes for July 23, 2010, forward would have shown Complainant was performing her job with the Respondent in a satisfactory manner, 2) Respondent should be prohibited from presenting any testimony or other evidence regarding the content of customer comment cards or any of the Daily Log Notes for July 23, 2010, to the end of Complainant's employment with Respondent, 3) the ALJ should infer that the portions of the Weekly Evaluation reports which have been obscured contain information about Complainant's job performance which is favorable to her, and 4) Respondent should be prohibited from presenting any testimony regarding Complainant's job performance after July 22, 2010.

In Tracy v. Cottrell, 206 W. Va. 363, 524 S.E.2d 879, (1999) at Syllabus Pt. 2, the West Virginia Supreme Court of Appeals held that:

2. Before a trial court may give an adverse inference instruction or impose any other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence.

Examining the factors listed, it is clear that Respondent had complete control over the records and evidence, which was destroyed. Although it can be argued that some of the inferences that Complainant requests are not warranted, it is clear that the

Complainant herein has been significantly prejudiced by the destruction of the evidence at issue. The evidence sought was highly relevant to the issue of whether Ms. Powers was satisfactorily performing her duties. This is true both regarding the cut off and obscured portions of the copies of the trainer notes which might have shown positive progress in addition to the negative aspects. However, more importantly, the destruction of the documentary evidence of performance after July 23, 2010, permits the Respondent to make uncontroverted assertions regarding her progress and performance thereafter through the testimony of its supervisory personnel. Complainant was unable to examine the notes to test the veracity of those assertions. Complainant's counsel had to expend a great deal of effort to obtain the discovery of these primary original documents of critical importance to the issues of the case. It was only through the expenditure of considerable time and resources that the circumstances concerning the disappearance of the documents were ultimately forthcoming. Thus, Complainant herein has been highly prejudiced by the destruction of this primary source documentation in this case. Respondent was on notice that the evidence was critical at the time of its destruction by Respondent. The Complainant herein had already filed a grievance over her termination, citing the grounds that form the gravamen of the instant action before the West Virginia Human Rights Commission prior to the time during which the spoliation of evidence occurred. The Respondent is entirely at fault for the destruction of the evidence. Respondent had been served with a copy of the grievance, both upon its Commissioner, Joe Miller and upon its in house counsel, Jill Dunn. An Assistant Attorney General had made an appearance of record in the matter. This all occurred prior to Ms. McIntyre-Frick being out of her office for the month of December 2010. During this period no one was instructed to preserve the records at issue. It is unlikely that the Respondent would allow evidence that would be beneficial to its position in the grievance to be destroyed. It is also not in character with its management style that a person would go into a manager's office and "get rid of all the

files” without being instructed to do so by someone in authority to give such instructions. There is a high degree of fault upon the Respondent, DMV, in the disappearance of these documents and the failure to preserve the computer files of Ms. Frick.

The Complainant is entitled to an inference that her performance after July 23, 2010, was as portrayed by her testimony and not that of Ms. Frick or Ms. Whittington. Similarly, Complainant is entitled to an inference that no written step-by-step instructions existed, as those were never produced by Respondent in discovery or at Public Hearing. Complainant is entitled to an award of attorney’s fees and costs in seeking discovery and sanctions for the spoliation of the evidence in this matter. Those costs and attorney’s fees are included in the remedy given for prevailing upon the merits of this cause of action. Thus, the undersigned makes no separate determination of their amount, as sanctions imposed on account of the Respondent’s spoliation of evidence are not to be collected twice.

#### **DAMAGES**

The Complainant is entitled to such relief as will effectuate the purposes of the West Virginia Human Rights Act and “make persons whole for injuries suffered on account of unlawful employment discrimination.” Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (U.S.N.C. 1975). The injured party is to be placed as near as possible to the situation he would have occupied had he not been discriminated against.

It is well settled that discrimination complainants have a duty to mitigate their damages by accepting equivalent employment. Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990). However, the burden of raising the issue of mitigation is on the employer. Mason Cnty. Bd. of Educ. v. State Superintendent of Sch., 170 W. Va. 632, 295 S.E.2d 719, 719 (1982). The Court held at Syllabus Point 2:

Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

In Syllabus Point 4, Vorhees v. Guyan Machinery Company, 191 W. Va. 450, 446 S.E.2d 672 (1994), the Court held that:

If anything has occurred to render further association between the parties offensive or degrading to the employee, an offer of employment will not diminish the employee's recovery if the offer is not accepted.

This holding was applied in the context of a West Virginia Human Rights Act case in Burke-Parsons-Bowlby Corp. v. Rice, 230 W. Va. 105, 736 S.E.2d 338 (2012), where the Court held at Syllabus Point 4:

In a wrongful discharge action filed in circuit court alleging a violation of The West Virginia Human Rights Act, W. Va. Code 5-11-1 [1967], et seq., the circuit court may submit the question of reinstatement to employment versus award of front pay to the jury, where the facts and inferences concerning those remedies are in conflict.

Subsequent to her discharge from the DMV, Complainant filed for Social Security Supplemental Security Income benefits to assist in obtaining training benefits and to supplement part time work. Complainant's last day of work at the DMV was September 30, 2010. When Complainant found part time work in January 2011, she stopped looking for full time employment. The Respondent did not put on evidence concerning the availability of comparable employment in this case. Additionally, the Respondent's unlawful discrimination resulting in Complainant's termination resulted in Ms. Powers being banned from applying for any position with the DMV by the Division of Personnel.



It is clear that Complainant is entitled to a back pay award for the period of 2010, during which she was unemployed following her last day of work with Respondent, DMV. Ms. Powers clearly was seeking comparable employment during that time and ultimately found part time employment thereafter. Lost wages and benefits are \$2,844.60 for each month of 2010, for which Ms. Powers was not employed after her termination from October through December 2010, totaling \$8,533.80. Year by year calculations are set out in the report prepared by Dr. Borzilleri. Dr. Borzilleri calculated that the present value of lost wages for 2010, at \$11,270 and present value of losses for 2010, at \$12,906. Calculating a doubling of the estimated wage and benefits for 2011, 2012, 2013, and 2014, and subtracting from Dr. Borzilleri's estimated total loss gives a back pay and front pay of \$11,259 for 2011, \$6,912 for 2012, \$13,248 for 2013, and \$15,433 for 2014. Ms. Powers is entitled to an award of back pay of \$12,906 for the present value of her lost wages and benefits for 2010, and post judgment interest. Pre judgment interest should not accrue for periods prior to the present value calculation.

Ms. Powers does not seek reinstatement; and, instead has sought to claim lifetime diminution of earnings as a result of the unlawful failure to provide reasonable accommodation for her disability. The evidence in this case does not arise to a level that indicates anything has occurred to render further association between the parties offensive or degrading to the employee, Ms. Powers. Therefore, the undersigned is going to order reinstatement of Ms. Powers to the next available Customer Service Representative position with DMV in the area.

The issue of back pay and front pay after Ms. Powers accepted part time employment is problematic. On the one hand her own testimony indicates that she was not seeking other employment from that which she has obtained, upon which her expert calculated actual and estimated losses of Ms. Powers. On the other hand, no evidence was submitted by Respondent concerning available comparable employment opportunities. Also, Ms. Powers is precluded from applying for any positions with

Respondent, DMV, and may have been intimidated by the letter banning her application for those jobs by the West Virginia Division of Personnel, so as to question the efficacy of applying for any job with the State of West Virginia. The undersigned is unwilling to give the Complainant an award for back pay and front pay, which grants a windfall for considering the part time earnings of Ms. Powers only. The undersigned has therefore sought to award losses based on calculating a doubling of the estimated wage and benefits for each of the years for which those losses are calculated by Dr. Borzilleri for back pay awards for 2011, 2012, 2013, and 2014.

The Complainant is entitled to incidental damages with respect to her claim against DMV. State Human Rights Comm'n v. Pearlman Realty Agency, 161 W. Va. 1, 239 S.E.2d 145 (1977); Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989). Bishop Coal provides that the \$2,500 cap on incidental damages may be adjusted from time to time to conform to the Consumer Price Index. Bishop Coal Co., 380 S.E.2d at 247. In keeping with this language, the West Virginia Human Rights Commission has periodically raised the cap on incidental damages. Currently the cap for emotional distress is \$6,000.00 for each claim. The Complainant is entitled to such damages from the Respondent in no less than this amount. The Commission takes the position that in virtually all cases where discrimination has occurred, the Complainant has suffered injury well in excess of the constitutionally capped amount awarded by the Commission for such injuries. Accordingly, Respondent should be charged with the maximum available award.

The Commission and the Complainant are entitled to a cease and desist order. The Commission in its cease and desist order may make provisions which will aid in eliminating future discrimination. The cease and desist order may require an affirmative action program and a sworn affirmation from a responsible officer of the Respondent that the Commission's order has been implemented and will continue to be implemented. Whittington v. Monsanto Corp., Docket No. ES-2-77, and Pittinger, et al.

v. Shepardstown Volunteer Fire Dep't, Docket No. PAS-48-77; see also Shepherdstown Volunteer Fire Dep't, 172 W. Va. 627.

The Respondent will be ordered to cease and desist from engaging in unlawful discriminatory practices in keeping with these provisions of the law. Respondent needs to implement a one day training program on the Department of Transportation's policies and process for ADA Committee review of requests for accommodations for all of Respondent, Division of Motor Vehicle, Human Resource and supervisory employees, including, but not limited to, top management, local office managers, as well as any supervisors of Respondent's employees. Respondent shall be required to include the Department of Transportation ADA Committee process for requests of reasonable accommodation in the DMV personnel handbook, and the Request for Accommodation forms shall be made available to its field service and regional DMV offices. Respondent shall provide a sworn affidavit from a responsible officer of the Respondent that the Commission's order has been implemented and will continue to be implemented.

The Administrative Law Judge is authorized to award such other equitable relief as will make the Complainant whole, including but not limited to, an award of attorney's fees and costs. C.S.R. § 77-2-9.3.c. Complainant is entitled to an award of attorney's fees and costs. The West Virginia Supreme Court of Appeals has set forth a twelve-factor test for determining reasonableness of the attorney's fees set forth in Aetna Cas. & Sur. Co. v. Pitrolo, 176 W. Va. 190, 342 S.E.2d 156 (1986); See also, Brown v. Thompson, 192 W. Va. 412, 452 S.E.2d 728 (1994). Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the question presented; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (5) the customary fee charged in similar cases; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and the length

of the professional relationship with the client; and, (12) awards in similar cases. Considering the foregoing factors, it is noted that although the novelty or difficulty of the question presented is not great, the time, labor and skill necessary to properly present the case were. Respondent contested every aspect of the case, including asserting Complainant is not “a person with a disability”, when its DOT ADA Coordinator testified that the ADA Committee did not doubt that Ms. Powers is “a person with a disability”. Complainant’s counsel had to expend considerable resources to try to obtain evidence which had been destroyed by Respondent and to prove the spoliation occurred. Given the attorneys’ experience, reputation and ability, the \$350 per hour rate requested is appropriate and in line with the customary fee charged in similar cases. Given the contingent nature of the fee this case precluded other employment by the attorney because of the extensive time ultimately required of him in undertaking the case. The length of the client relationship is not a factor in this case. The undesirability of the case is a factor to the extent that the Complainant was undertaking to enforce the public’s right to ensure that unlawful discrimination is not permitted in the workplace, as well as the interest of his own client. Representing the interests of the West Virginia Human Rights Commission by Complainant’s counsel in this instance required difficult litigation against the State of West Virginia with all the resources available to defend against these claims aggressively. In the context of a probable cause determination the West Virginia Human Rights Commission is the actual party before the Commission’s Administrative Law Judge seeking enforcement of the Human Rights Act. Obtaining an injunction against such unlawful discrimination by Complainant and her award of reinstatement, back pay, front pay, and incidental damages for humiliation, embarrassment, emotional distress and loss of personal dignity constitute prevailing on all important substantive issues in the case. The amount petitioned for is entirely reasonable and properly documented by Complainant’s counsel, the undersigned is granting the award of attorney’s fees of \$149,870.00, paralegal fees of

\$4,185.00 and costs of \$19,751.86; totaling \$173,806.86, as set forth and documented in the attached Statement of Time and Services, Complainant's Petition for Award of Attorney's Fees and Costs, and Affidavits attached as Exhibit 1. The West Virginia Human Rights Commission is entitled to award of its costs in the amount of \$12,181.33, incurred in the prosecution of this matter as set forth in the attached invoices for Court Reporting services incurred in this matter as Exhibit 2 and the travel reimbursements and lodging expenses incurred as set forth in the Travel Expense Account Settlements attached as Exhibit 3.

## VI CONCLUSIONS OF LAW

1. The Complainant, Renee Richardson-Powers, is an individual aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act, W. Va. Code Ann. § 5-11-10 (West).

2. The Respondent, West Virginia Division of Motor Vehicles, is a "person" and an "employer" as those terms are defined under W. Va. Code Ann. § 5-11-1 *et seq.* (West), 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 section pursuant to W. Va. Code Ann. § 5-11-9 *et seq.*

4. The Complainant has established a *prima facie* case of disability discrimination in her employment with Respondent. The Complainant has proven by a preponderance of the evidence that Complainant was a disabled person within the meaning of the West Virginia Human Rights Act. Complainant is capable of performing the essential functions of Customer Service Representative for the DMV, when provided with appropriate reasonable accommodation; and, the Respondent took adverse employment actions

against her under circumstances, which give rise to an inference of unlawful discrimination.

5. The Respondent breached its duty to provide a reasonable accommodation to Complainant. Complainant has proven by a preponderance of the evidence that she is a qualified individual with a disability. Respondent was aware of Complainant's disability. The Complainant required a reasonable accommodation to learn to perform the essential functions of the job. A reasonable accommodation existed to allow Complainant to learn how to perform the essential functions of the job, the Respondent employer knew, or should have known of the Complainant's need for the reasonable accommodation, and the Respondent employer failed to provide the accommodation.

6. Respondent, DMV, failed to engage in the interactive process in an effective manner designed to allow for that interaction to take place to ascertain the nature of Complainant's learning disability and an appropriate way in which to provide an effective accommodation for that disability.

7. Complainant suffered humiliation, embarrassment, emotional distress and loss of personal dignity, as a result of Respondent's illegal disability discrimination.

8. Complainant suffered lost earnings and benefits as a result of Respondent's illegal disability discrimination.

9. Complainant and the West Virginia Human Rights Commission are entitled to an award of costs and attorney's fees incurred in the prosecution of this case.

10. Complainant and the West Virginia Human Rights Commission are entitled to an award of injunctive relief to make Complainant whole and to cease and desist from the unlawful discriminatory conduct of the Respondent, DMV.

## VII RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED**:

1. The above named Respondent shall cease and desist from engaging in unlawful discriminatory practices. Within 180 days from issuance of this order, Respondent shall implement a one day training program on the Department of Transportation's policies and process for ADA Committee review of requests for accommodations for all of Respondent, Division of Motor Vehicle, Human Resource and supervisory employees, including but not limited to, top management, local office managers, as well as any supervisors of Respondent's employees. Respondent shall be required to include the Department of Transportation ADA Committee process for requests of reasonable accommodation in the DMV personnel handbook, and the Request for Accommodation forms shall be made available to its field service and regional DMV offices. Respondent shall provide a sworn affidavit from a responsible officer of the Respondent that the Commission's order has been implemented and will continue to be implemented.

2. Within 31 days of the receipt of the undersigned's order, the Respondent shall pay the reasonable costs and attorney's fees of the Complainant, totaling \$173,806.86, and, the reasonable costs of the West Virginia Human Rights Commission totaling \$12,181.33, incurred in the prosecution of this matter.

3. Within 31 days of receipt of the undersigned's order, the Respondent shall pay the Complainant incidental damages in the amount of \$6,000.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination, plus statutory post judgment interest.

4. Respondent shall reinstate the Complainant to the next available position as CSR in the Martinsburg/Kearneysville area. Prior to beginning training for the position, Complainant and her supervisors and managers shall meet with her Traumatic Brain Injury Specialist, to determine the best methods to utilize, for trainers instructing Complainant, to assure that they are aware of what to expect and how to provide training to Complainant.

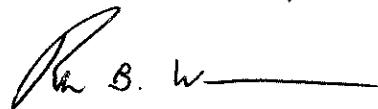
5. Within 31 days of receipt of the undersigned's order, the Respondent shall pay the Complainant back pay damages in the amount of \$12,906.00 for the present value of loss for the period of unemployment following her termination in September 2010 through the end of December 2010, suffered as a result of respondent's unlawful discrimination, plus statutory post judgment interest. Respondent shall pay back pay and front pay in the amount of \$11,259.00 for 2011, \$6,912.00 for 2012, \$13,248.00 for 2013 and \$15,443.00 for 2014, representing the estimated value of lost income and benefits for those periods if doubling the estimated income and benefits for those years to estimate the mitigation if Complainant were working full time instead of part time, plus statutory post judgment interest.

6. In the event of failure of the Respondent to perform any of the obligations hereinbefore set forth, Complainant is directed to immediately advise the West Virginia Human Rights Commission, Compliance Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 11th day of September 2014.

**WV HUMAN RIGHTS COMMISSION**



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**ROBERT B. WILSON**  
**CHIEF ADMINISTRATIVE LAW JUDGE**  
**1321 Plaza East, Room 108-A**  
**Charleston, West Virginia 25301**  
**Ph: 304-558-2616 / Fax: 304-558-0085**



BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RENEE L. RICHARDSON-POWERS,

Complainant,

v.

Docket No. EDS-94-12  
EEOC No. 17J-2011-00352

WV DIVISION OF MOTOR VEHICLES,

Respondent.

CERTIFICATE OF SERVICE

I, **Robert B. Wilson, Chief Administrative Law Judge** for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing *Final Decision* on the following parties by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 11th day of September 2014, addressed as follows:

Renee L. Richardson-Powers  
2002 Alonzo Drive  
Martinsburg, WV 25401  
*Complainant*

WV Division Of Motor Vehicles  
Attn: Legal Division  
24 Roland Road  
Kearneysville, WV 25430  
*Respondent*

Garry G. Geffert, Esq.  
114 South Maple Avenue  
P. O. Box 2281  
Martinsburg, WV 25402  
*Counsel For Complainant*

Mary M. Downey, Esq.  
Assistant Attorney General  
1900 Kanawha Blvd., East  
Building 1, Room W-435  
Charleston, WV 25305  
*Counsel for the Respondent*

Office Of Attorney General  
Civil Rights Division  
P. O. Box 1789  
Charleston, WV 25326  
*Counsel for the Commission*

Jill C. Dunn, Esq.  
General Counsel  
WV DOT / DMV  
P. O. Box 17200  
Charleston, WV 25317  
*Counsel for the Respondent*

  
\_\_\_\_\_  
**ROBERT B. WILSON**  
**CHIEF ADMINISTRATIVE LAW JUDGE**

# EXHIBIT 1

Complainant's Petition for Attorney's Fees and Costs

Affidavit of Garry G. Geffert:  
**Statement of Time and Services for Garry Geffert, Esq. and  
Paralegal, Marianne Thomas Attached**

Affidavit of Jane E. Peak, Esquire

Affidavit of David M. Hammer, Esq.

Affidavit of Harley O. Staggers, Jr.

Affidavit of Harry P. Waddell

Pre-Judgment Interest on Back Wages  
for Renee Richardson-Powers

Supplemental Affidavit of Garry G. Geffert

WEST VIRGINIA HUMAN RIGHTS COMMISSION

RENEE L. RICHARDSON-POWERS,

Complainant,

vs.

Docket No. EDS-94-12  
EEOC No. 17J-2011-00352

WV DIVISION OF MOTOR VEHICLES,

Respondent.

**COMPLAINANT'S PETITION FOR ATTORNEY'S FEES AND COSTS**

Complainant submits this petition for an award of attorney's fees and costs.

A prevailing complainant in a proceeding before the Human Rights Commission is entitled to an award of attorney's fees and costs. Bishop Coal Co. v. Salyers, 181 W. Va. 71 (W. Va. 1989), Syl.Pt. 3.

The factors to be considered in connection with an award of attorney's fees was set out in Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190 (1986), Syl.Pt 4, and reiterated in Bishop Coal, at Syl.Pt. 3. That nearly 30 year old standard is still the one to be applied. Multiplex, Inc. v. Town of Clay, 231 W.Va. 728 (2013), Syl.Pt. 7. Each of the factors will be addressed below.

**A. Complainant should receive an award of attorney's fees based upon an hourly rate of \$350.00.**

This case was initiated over three years ago. There has been extensive discovery, many motions, and nearly eight days of hearings before the Administrative Law Judge. As is set out in the proposed findings and conclusions submitted by complainant, complainant contends she has prevailed.

Complainant now seeks an award of attorney's fees in the amount of \$149,870, paralegal fees in the amount of \$4,185.00 plus costs of \$19,751.86. The factors to be examined by the

Administrative Law Judge are:

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.

Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190 (1986), Syl.Pt 4. Complainant will address each of these factors.

1. **The time and labor required.**

Attached to this motion is the affidavit of counsel, with which is statement of his time and services. The affidavit shows that Garry G. Geffert spent 428.2 hours working on this matter. Pl.Ex. A, Geffert Affidavit.

The time spent is entirely reasonable. Jane E. Peak, is an experienced employment law attorney of widely recognized excellence. Pl.Ex. B, Peak Aff., ¶¶ 1 - 9. Ms. Peak states that Human Rights Act cases "are labor intensive, requiring substantial attorney time and effort, particularly during the pretrial phase as discovery is often contentious." Ms. Peak also avers: "In my experience, employers do not give up information easily." Pl.Ex. D, Peak Aff., ¶ 11.

Ms. Peak's observation is consistent with the proceedings in this case. This matter was filed in early 2011. There have been hearings over discovery disputes, the authenticity of documents, and the authenticity and existence of various documents was litigated. Mediation was attempted, but was unsuccessful. Counsel had to view thousands of pages of documents.

Just the documents which respondent presented at trial comprised over two thousand pages. The amount of time spent by complainant's counsel was necessary to successfully prosecute the her claim, and is entirely reasonable.

The 46.5 hours for which compensation is sought for the work of Ms. Thomas is also reasonable. This work consists of preparing a spreadsheet so that counsel could compare complainant's trial exhibits with the set of exhibits presented by respondent, and with assistance at trial.

**2. The novelty and difficulty of the questions.**

The questions of law were not particularly novel. The factual issues, however, presented significant challenges. Testimony was conflicting, and respondents destroyed original documents.

**3. The skill requisite to perform the legal service properly.**

Complainant submit that significant skill was necessary to litigate this matter. While the issues were not novel, respondents presented a vigorous factual defense, disputing virtually every element of Ms. Powers' claim. defenses. Most importantly, significant analysis of documents, and assembly of facts, was necessary to prevail at trial. Complainant had to show that some of respondent's witnesses were not being honest, a task which is not easy. Significant skill was required to prepare and present the testimony of the Ms. Powers, who suffers from a learning disability and a word deficit disability, and to show through cross-examination of the some of the respondent's witnesses that their direct testimony was not forthright. In particular, counsel had to be prepared to refute two false contentions which were raised for the first time at the hearing. The first was respondent's attempt to assert at trial that the EEO survey form which Ms. Powers

completed prior to applying for work at DMV had never been in the possession of the DMV, when in fact it had been in the personnel file for Ms. Powers which was maintained by the DMV and the DOT. The second was the assertion at trial that Ms. Frick had prepared and given to Ms. Powers a binder containing step-by-step instructions for each task performed by a CSR. No such binder existed, and only careful preparation allowed complainant to show that no such binder existed.

**4. The preclusion of other employment by the attorney due to acceptance of the case.**

Except that the time spent in litigating and trying this matter was time which could not be devoted to other employment, this was not a significant factor for this case.

**5. The customary fee.**

Garry G. Geffert seeks a fee award at the rate of \$350.00 per hour for this contingency case work. Mr. Geffert has been awarded fees at this rates. Pl.Ex. A, Geffert Aff., ¶ 8.

Mr. Geffert also seeks an award of fees at \$90.00 per hour for paralegal work done by Marianne B. Thomas.

In support of these hourly rates, plaintiffs submit the affidavits of four experienced employment law attorneys, Jane E. Peak of Morgantown, WV, David M. Hammer of Martinsburg, WV, Harley O. Staggers, Jr. of Keyser, WV and Harry P. Waddell of Martinsburg, WV. Pl.Ex. B, C, D and E. Ms. Peak, who is with the firm of Allan N. Karlin & Associates, has been practicing in Morgantown, WV since 1996. Pl.Ex. B, Peak Aff., ¶ 1. Mr. Hammer has been practicing with his current firm, Hammer, Ferretti and Schiavoni, since 1992. Pl.Ex. C, Hammer Aff., ¶ 1. Mr. Waddell has been in practice since 1981, and Mr. Staggers since 1977.

Pl.Ex. E, Waddell Aff., ¶ 1; Pl.Ex. D, Staggers Aff., ¶ 1.

Each of these four experienced attorneys have knowledge of the ability of Mr. Geffert, and each is familiar with employee-side work in employment litigation. Each is of the opinion that a rate of \$350.00 per hour for the work of Mr. Geffert is appropriate. Pl.Ex. B, Peak Aff., ¶¶ 10 - 12; Pl.Ex. C, Hammer Aff., ¶¶ 14, 16; Pl.Ex. D, Staggers Aff., ¶¶ 6, 8; Pl.Ex. E, Waddell Aff., ¶¶ 10, 11.

These rates are no higher than, and may be less than, the rates charged by other employment lawyers in the area. Attorney David Hammer's affidavit shows that the regular billing rate for his firm for this type of case is \$350.00 per hour. Pl.Ex. C, Hammer Aff., ¶¶ 11, 13.

Ms. Peak, Mr. Hammer and Mrs. Staggers each are of the opinion that \$90.00 per hour is a reasonable rate for paralegal work. Pl.Ex. B, Peak Aff., ¶ 12; Pl.Ex. C, Hammer Aff., ¶ 15; Pl.Ex. D, Staggers Aff., ¶ 7.

**6, Whether the fee is fixed or contingent.**

Counsel undertook this litigation on a contingency fee basis. If complainant does not prevail, counsel will not be entitled to any fee. As Ms. Powers is litigating the loss of her job, and has suffered a significant loss of income, it is likely she could not have afforded to pursue her claims if counsel had required payment by retainer, or on any basis other than a contingency fee.

As Mr. Waddell has stated, cases filed pursuant to fee-shifting statutes are risky, difficult to prosecute, and require significant skill and knowledge. These factors make the number of attorneys willing to take employment cases a relatively small number. Pl.Ex. E., Waddell Aff., ¶ 8.

7. **Time limitations imposed by the client or the circumstances.**

Except that the time spent in litigating and trying this matter was time which could not be devoted to other employment, this was not a significant factor for this case.

8. **The amount involved and the results obtained.**

The complaint's lost wages, both before trial and for the future, are significant sums. Complainant's expert witness, Dr. Borzilleri calculated that past losses were \$86,928.00, and that future lost earnings as much as \$679,700.00, a total loss of earnings of as much as \$766,628.00.

This amount is a full recovery, and of great benefit to Ms. Powers, if she prevails.

9. **The experience, reputation, and ability of the attorneys.**

Mr. Geffert has been practicing for over 35 years, and has extensive experience litigating wage cases. Twenty years ago, the late U.S. District Judge Broadwater said that Mr. Geffert was even then "highly experienced in the litigation of employment and wage matters." Kidrick v. ABC Television & Appliance Rental, Inc., 138 Lab.Cas. ¶ 33,920 (N.D.W.Va. 1999). He has litigated individual and class action cases in both the state and federal courts. *See, e.g., Jones v. Tri-County Growers, Inc.*, 366 S.E.2d 726 (W.Va. 1985); Rowe v. Tri-County Growers, Inc., 465 S.E.2d 1 (W.Va. 1995); Williams v. Tri-County Growers, Inc., 747 F.2d 121 (3<sup>rd</sup> Cir. 1984); Donaldson v. U.S. Dept. Of Labor, 930 F.2d 229 (4<sup>th</sup> Cir. 1991); Frederick County Fruit Growers Ass'n, Inc., v. McLaughlin, 703 F.2d 1021 (D.D.C. 1989), affirmed 968 F.2d 1265 (D.C.Cir. 1992); Hunter v. Sprint Corp., 453 F.Supp.2d 44 (D.D.C. 2006); and other decisions referenced at Geffert Aff. ¶ 3.

Mr. Geffert is currently the President of the West Virginia Employment Lawyers Association, and was the 1992 recipient of the West Virginia College of Law Special



Achievement Award for Public Service.

Ms. Peak has been an adjunct professor for appellate advocacy at the W.Va. University College of Law, has been recognized as Practitioner of the Year by the Women's Law Caucus at that College, and has been recognized as a Super Lawyer for her work in employment law.

Pl.Ex. B, ¶¶ 3 -9. Ms. Peak states that she is familiar with the work of both Mr. Staggers and Mr. Geffert. Ms. Peak says: "Mr. Geffert is one of the most experienced and competent attorneys in West Virginia in the vigorous representation of client in employment matters and in litigating complex cases. In fact, I have turned to Mr. Geffert several times for advice in handling these types of cases." Pl.Ex. D, Peak Aff, ¶ 10.

Mr. Hammer, a former President of the W.Va. Employment Lawyers Association, an appointee of Justice Maynard to the employment law jury instruction project, and frequent presenter at West Virginia Bar meetings on various topics, avers that he knows that Mr. Geffert is "diligent and tenacious lawyers who zealously represent their clients.." Pl.Ex. C., Hammer Aff., ¶ 16.

Former Congressman Staggers avers: "Mr. Geffert is a diligent, tenacious, hard-working attorney who provides invaluable and vigorous services to his clients." Pl.Ex. D, Staggers Aff., ¶ 8.

Mr. Waddell, an experienced employment lawyer who is also a past president of the W.Va. Employment Lawyers Association, says that Mr. Geffert is one of the few attorneys who are both qualified and willing to handle employment cases. Mr. Waddell further states that Mr. Geffert's "quality of representation and his reputation in the field of employment law is well known and excellent." Pl.Ex. E, Waddell Aff, ¶ 10.

In sum, complainant's counsel is an experienced and well-regarded employment law attorney whose work supports a full fee award at the rate of \$350.00 per hour.

**10. The undesirability of the case.**

This factor is not significant in this case.

**11. The nature and length of the professional relationship with the client.**

Counsel has not had any significant professional relationship with the complainant prior to the beginning of this litigation.

**12. Awards in similar cases.**

Two years ago, in an employment case, U.S. District Judge Bailey awarded fees to Mr. Geffert at the rate of \$350.00 per hour. Nolan v. Reliant Equity Investors, Inc., C.A. No. 3:08-cv-62 (N.D. W.Va. March 22, 2011) (\$350.00/hour). In employment cases in earlier years, Mr. Geffert has been awarded fees at the rate of \$300.00 per hour. Fredrick County Fruit Growers Ass'n, Inc., v. Reich, C.A. No. 87-1588 (D.D.C. Order filed Feb. 6, 2004) (\$300.00/hour); Treadway v. BGS Construction, Inc., C.A. No. 5:06-0191 (S.D.W.Va.) (\$300.00/hour); Geffert Aff. ¶ 8.

In sum, plaintiffs request an award of 55,200.00 for Mr. Geffert and \$4,185.00 for Ms. Thomas, a total fee award of \$170,430.00.

**B. Plaintiffs are entitled to an award of their costs**

Counsel shared the costs of this litigation. As is shown by the attached affidavit of Mr. Geffert, complainant's counsel incurred the following costs in the litigation of this matter:

<u>Item</u>	<u>Cost</u>
Postage	\$ 185.62
Photocopies (25 cents/page)	1756.00
Expert Witness - Dr. James D. Petrick	3000.00
Expert Witness - Dr. Thomas Borzilleri	2937.50
Hearing Transcripts	3286.15
Social Security Documents	49.00
Service Fees	97.00
Deposition Costs	7023.61
Facsimiles	738.00
Travel Expenses	<u>678.74</u>
<b>Total Costs</b>	<b>\$19,751.86</b>

These costs were necessary for the ligation of this matter. Pl.Ex. A, Geffert Aff., ¶ 11.

### CONCLUSION

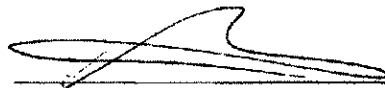
For the reasons stated, complainant should be awarded \$149,870.00 in attorney's fees , \$4,185.00 in paralegal fees, and 19,751.86 in costs for the work of Mr. Geffert and Ms. Thomas, for a total fee and cost award of \$173,806.90.

### CERTIFICATE OF SERVICE

I CERTIFY that I have served a true and correct copy of this document by email and by U.S. mail, postage prepaid, upon Gretchen A. Murphy and Mary M. Downey, Assistant Attorney General, Attorney General's Office, State Capitol Complex, Building I, Room W-435, Charleston, WV 25305, and by U.S. mail, and Jill C. Dunn, General Counsel, WV Dept. of

Transportation, Division of Motor Vehicles, P.O. Box 17200, Charleston, WV 25317-0010, this

21 day of May, 2014.



Garry G. Geffert (WV Bar # 1364)

Counsel for Complainant

114 S. Maple Ave.

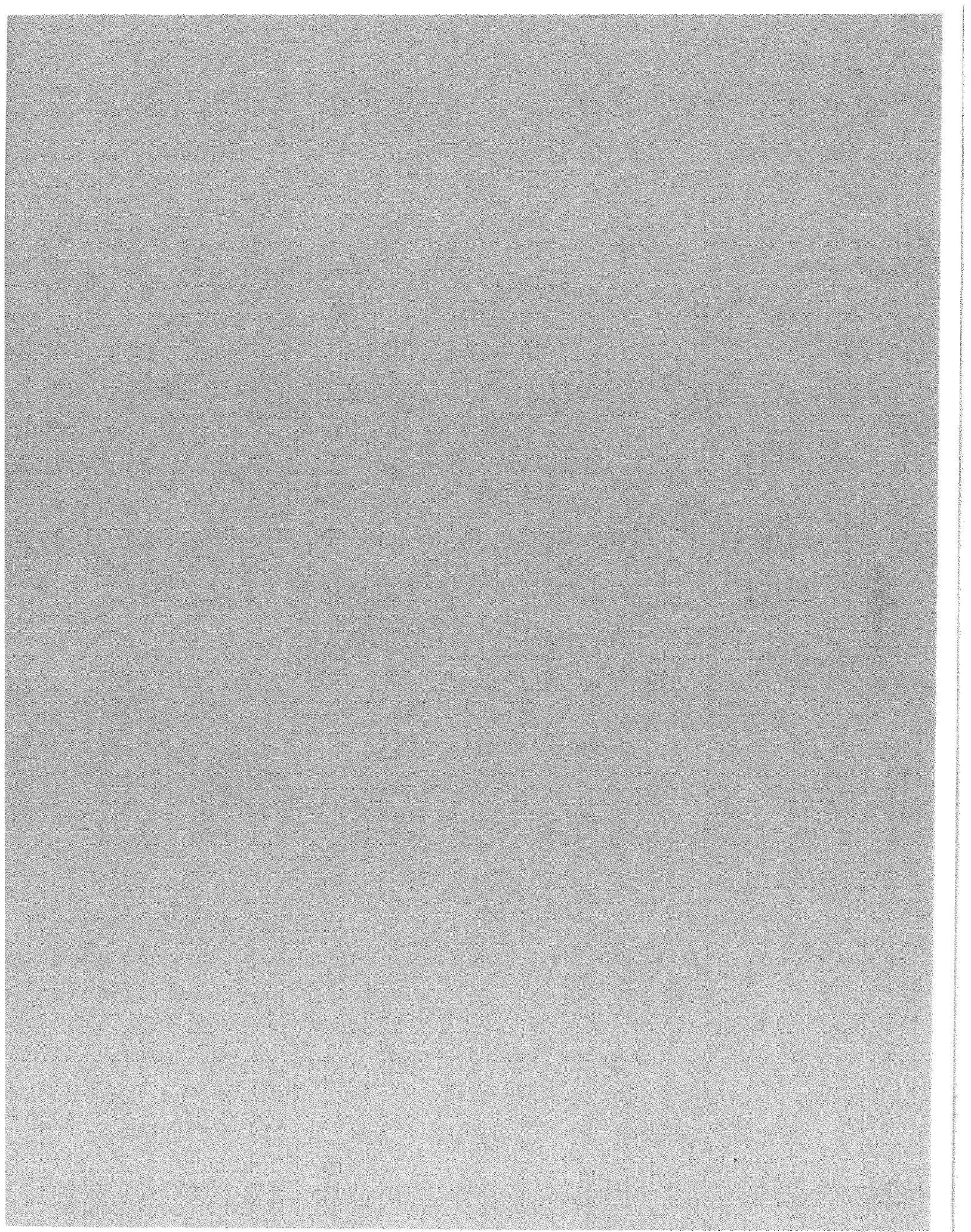
P.O. Box 2281

Martinsburg, WV 25402

Voice: (304) 262-4436

Fax: (304) 596-2474

Email: [geffert@wvdsi.net](mailto:geffert@wvdsi.net)





WPCA); Domer v. Beallair Orchards, Inc., 100 Lab. Cas. (CCH), ¶ 34,513 (Cir.Ct., Berk.Co., W.Va 1984) (WPCA, FLSA); Mills v. Hollis-Lowman Sales Service, Inc., 101 Lab. Cas. (CCH) ¶ 34,556 (Cir. Ct., Berk.Co., W.Va. 1984)(WPCA, FLSA); Donaldson v. U.S. Dept. Of Labor, 930 F.2d 229 (4<sup>th</sup> Cir. 1991) (class action, wage claims); Frederick County Fruit Growers Ass'n, Inc., v. McLaughlin, 703 F.2d 1021 (D.D.C. 1989), affirmed 968 F.2d 1265 (D.C.Cir. 1992) (class action, wage claims); Hunter v. Sprint Corp., 453 F.Supp.2d 44 (D.D.C. 2006) (FLSA collective action); Treadway v. BGS Construction, Inc., 2007 U.S. Dist. LEXIS 71149 (S.D. W.Va. 2007) (FLSA collective action).

4. In a decision awarding fees in a wage class action case, the court recognized that I am “highly experienced in the litigation of employment and wage matters.” Kidrick v. ABC Television & Appliance Rental, Inc., 138 Lab.Cas. ¶ 33,920 (N.D.W.Va. 1999) (FLSA, WPCA).

5. I have twice published articles on the abuse of temporary foreign agricultural workers. “H-2A Guestworker Program: A Legacy of Importing Agricultural Labor,” The Human Cost of Food, Univ. of Texas Press (2002); “The Bias of a Majority of the Commission on Agricultural Workers Led to Recommendations Which Ignore the Factual Findings.” In Defense of the Alien, Center for Migration Studies (1993).

6. I received the West Virginia College of Law Special Achievement Award for Public Service in 1992.

7. I am currently the President of the West Virginia Employment Lawyers Association. I have been a member of that organization, and of the National Employment Lawyers Association, for many years. I have made presentations on wage issues to the West Virginia organization on two occasions. I have testified before several Congressional



Committees on various issues, including the temporary foreign worker program, remedies for individuals cheated of their social security benefits by representative payees

8. Two years ago, I was awarded fees at the rate of \$350.00 per hour by the Honorable John Preston Bailey in Nolan v. Reliant Equity Investors, Inc., C.A. No. 3:08-cv-62 (N.D. W.Va. March 22, 2011) (a copy of this Order is attached). In prior years, I had been awarded fees at the rate of \$300.00 per hour. Frederick County Fruit Growers Ass'n, Inc., v. Reich, C.A. No. 87-1588 (D.D.C. Order filed Feb. 6, 2004). In Treadway v. BGS Construction, Inc., C.A. No. 5:06-0191 (S.D.W.Va.), an FLSA collective action, I was awarded fees at the rate of \$300.00 per hour.

9. Attached to this Affidavit is a schedule of services and time required for work I performed in connection with the representation of the complainant in this matter. Also attached is a schedule of the time and services performed by Marianne B. Thomas, the paralegal in my office. Each statement is a conservative statement of time, and omits time for which compensation could properly be sought.

10. I agreed to represent the complainant in this litigation on a contingency fee basis. Under that agreement, I would receive no payment if the complainant obtained no recovery. I also agreed to advance the costs of litigation for the complainant.

11. In the course of my representation of the complainant in this matter I have incurred the following costs, each of which was necessary for the proper presentation of this case:



<u>Item</u>	<u>Cost</u>
Postage	\$ 185.86
Photocopies (25 cents/page)	1756.00
Expert Witness - Dr. James D. Petrick	3000.00
Expert Witness - Dr. Thomas Borzilleri	2937.50
Hearing Transcripts	3286.15
Social Security Documents	49.00
Service Fees	97.00
Deposition Costs	7023.61
Facsimiles	738.00
Travel Expenses	<u>678.74</u>
<b>Total Costs</b>	<b>\$19,751.86</b>

12. Also attached is a statement of the time and services for paralegal work performed by Marianne B. Thomas. This statement omits many hours of work for which compensation is appropriate.

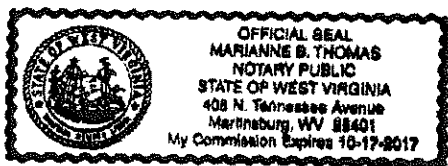


Garry G. Geffert

SWORN TO AND SUBSCRIBED before me this 2<sup>nd</sup> day of May, 2014

MY COMMISSION EXPIRES: 10-17-2017

Marianne B. Thomas  
Notary Public



**GARRY G. GEFFERT**  
**STATEMENT OF TIME AND SERVICES**  
**POWERS V. DIVISION OF MOTOR VEHICLES**

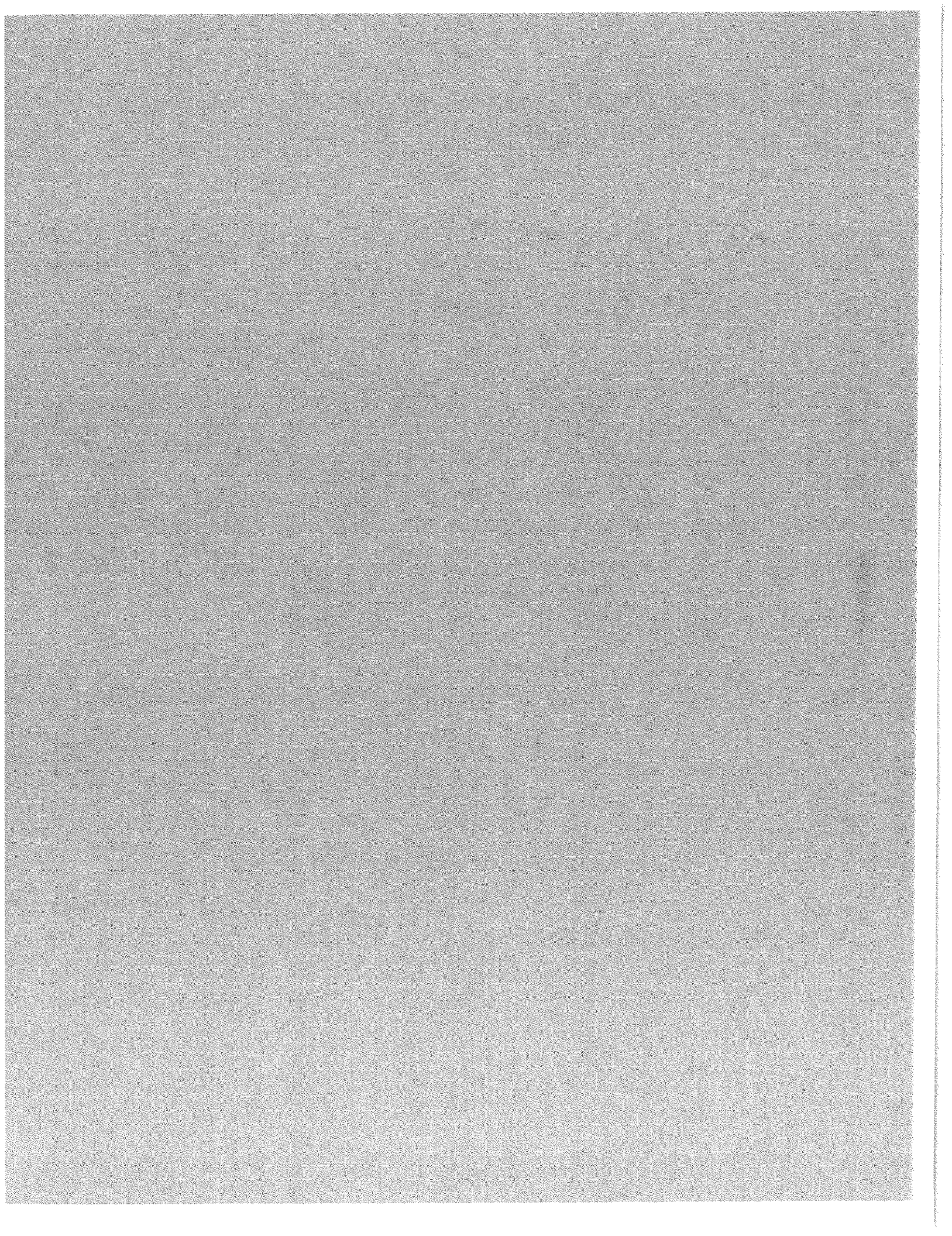
<u>Date</u>	<u>Description of Service</u>	<u>Time</u>
	Powers	
05/19/11	Initial client conference, prepare HRC form	1.5
05/20/11	Letter to Grievance Bd re: location of hearing; letter to HRC	0.2
08/24/11	Client conf.	0.4
08/25/11	Letter to HRC investigatore Slack	0.2
08/29/11	Letter to HRC investigatore Slack	0.1
09/16/11	Client conf. re: HRC docs; letter to HRC	0.7
09/26/11	Client conf. re: HRC docs; letter to HRC	0.4
10/06/11	Letter to HRC	0.1
10/14/11	Letter to HRC	0.1
10/16/11	Review docs. from DMV	1.5
10/17/11	Edit, revise, client statement	0.9
10/18/11	Meet w/client re: statement	0.5
10/19/11	Letter to HRC, submit client statement	0.6
06/07/12	Respond to email from HRC investigator; letter to client	0.2
10/02/12	Wor on request for reconsideration of finding of no probable cause	1.2
10/03/12	Finalize, submit request for reconsideration of finding of no probable cause	1.0
11/05/12	Letter to client re: reconsideration	0.1
11/14/12	Telephone hearing re: reconsideration and prep for call	1.0
11/26/12	Letter to client re: grant of reconsideration request	0.1
12/20/12	Review initial hearing order; letter to client re: same	0.2
12/20/12	Draft and serve first interrogatories, request for production	2.5
12/22/12	Review answer of respondent; draft letter to client re: same.	0.2
01/16/13	Letter to J.Dunn re: discovery requests	0.2
01/25/13	Call to Atty Gen office re: discovery; letter to Dunn re: discovery; call from AG office re: same	0.5
01/29/13	Return call from client	0.1
01/29/13	Review discovery responses; draft letter to G.Murphy	0.8
02/04/13	Meet w/client re: discovery responses and requests	0.5
03/05/13	Work on discovery response; meet w/client re; same	4.5
03/06/13	Work on discovery responses	2.3
03/07/13	Work on discovery responses; meet w/client re:same	4.3
03/07/13	Draft second interrogs, req for production	1.5
03/08/13	Review additional docs; prepare supp response to req for prod	0.4
03/14/13	Research re: attorney as witness	0.5
03/22/13	Tel. conf w/Downey; Letter to Downey re: Powers discovery responses	0.3
03/25/13	Draft joint motion for continuance	0.4
04/09/13	Letter to Downey re: discovery; respond to DMV motion to compel	1.0
04/15/13	Draft supp. discovery response; letter to SSA re: records	0.4
04/18/13	Draft renewed motion to compel	0.5
04/18/13	Draft letter to Downey re: second discovery requests	0.6
04/23/13	initial review def. discovery responses	0.8
04/23/13	Draft third set of discovery requests	1.3
04/30/13	Letters to DHHR for records	0.1
05/08/13	Draft second motion to compel	2.3
05/08/13	Draft discovery response	0.2
05/15/13	Prep for telephone hearing w/Judge Wilson; hearing	1.0
05/16/13	Letter to Downey re: Dunn dep.	0.1
05/20/13	Letter to SSA re: records	0.1
06/14/13	Letter to Downey re: discovery	0.1
06/07/13	Letter to DHHR re: records	0.1
06/18/13	Draft supplemental discovery response	0.2

<u>Date</u>	<u>Description of Service</u>	<u>Time</u>
07/01/13	Tel conf w/Downey re: depositions; letter confirming	0.3
07/03/13	Draft motion for subpoena for Whittington	0.2
07/03/13	Draft dep. notice	0.2
07/08/13	Letter to client re: proceedings	0.1
07/08/13	Draft supp. discovery response	0.1
07/19/13	Meet w/client re: depositions the next week	2.5
07/20/13	Prepare for depositions of DMV witnesses	2.0
07/21/13	Deposition of client; meet with opposing counsel re: other depositions	7.5
07/22/13	Meet w/opposing counsel re: DHR deps	0.5
07/23/13	Prepare for depositions of DMV witnesses	4.3
07/24/13	Depositions of DMV witnesses (2); prepare for depositions for next day	9.9
07/25/13	Depositions of DMV witnesses (2); prepare for deposition for next day	7.9
07/26/13	Prepare for depositions of DMV witness; take deposition	7.7
08/08/13	Tel. conf. w/client	0.1
08/10/13	Work on discovery requests	0.8
08/12/13	Finalize discovery requests	0.5
08/13/13	Work on motion to compel Dunn deposition	0.8
08/14/13	Work on motion to compel Dunn deposition	2.5
09/15/13	Prep for Dunn, Black depositions	2.3
09/17/13	Travel to Charleston, WV for Dunn, Black depositions	4.3
09/18/13	Dunn, Black depositions	5.0
09/18/13	Return travel from Charleston, WV	4.2
09/22/13	Prep. for dep of Dr. Petrick	1.5
09/22/13	Travel to Mt. Lebanon, PA for deposition	3.3
09/23/13	Prep. for dep of Dr. Petrick; Meet w/Dr. Petrick; Depositions of Dr. Petrick	6.0
09/23/13	Return travel from Mt. Lebanon, PA	3.5
09/27/13	Draft motion to compel and exclude witnesses	0.8
09/29/13	Draft letter to Downey re: McIntyre dep	0.1
10/01/13	Draft motion for deposition and subpoena for McIntyre	0.2
10/04/13	Research, draft motion re rule on witnesses	1.0
10/06/13	Research, draft reply re: motion to compel and to preclude expert witnesses	1.1
10/06/13	Correct motion to invoke rule on witnesses	0.3
10/06/13	Prepare proof of service of subpoena on McIntyre	0.1
10/07/13	Draft motion re: mediation location	0.5
10/07/13	Research for reply re: rule on witnesses	0.8
10/08/13	Draft reply re: rule on witnesses	0.5
10/09/13	Prepare deposition notice for McIntyre	0.1
10/14/13	Prepare for McIntyre deposition	1.5
10/15/13	Prepare for McIntyre deposition; Deposition	4.7
10/16/13	Dep. of P.Lockhart	3.0
10/16/13	Research re: duty to preserve evidence	0.5
10/17/13	Letter to Downey re: missing, incomplete documents	0.9
10/21/13	Draft reply re: mediation location	0.4
10/22/13	Review def. second supp response to 4th interrogatories; draft letter to Downey re: same	1.0
10/22/13	Letter to client re: mediation order	0.2
10/22/13	Begin review of docs for trial prep.	1.0
11/04/13	Prepare for Patrick deposition	1.5
11/04/13	Travel to Charleston, WV for mediation, Patrick deposition	5.0
11/05/13	Prepare for mediation, Patrick, deposition	1.0
11/05/13	Prepare for mediation; mediation	2.0
11/05/13	Patrick deposition	3.0
11/05/13	Return travel from Charleston, WV	5.0
11/07/13	Draft motion to compel verification	0.7
11/07/13	Research re: reasonable accomodation	1.3
11/08/13	Review resp. opp to motion for verification; draft reply	0.5
11/08/13	Research re: reasonable accomodation	1.3
11/09/13	Meet w/client for trial prep; work on stipulations, prehearing memorandum; tel. interview w/K.	5.5

<u>Date</u>	<u>Description of Service</u>	<u>Time</u>
03/25/14	Reviewing transcript, drafting proposed findings of fact	2.3
03/26/14	Reviewing transcript, drafting proposed findings of fact	2.5
04/27/14	Reviewing transcript, drafting proposed findings of fact	1.3
05/05/14	Reviewing transcript, drafting proposed findings of fact	1.5
05/06/14	Reviewing transcript, drafting proposed findings of fact	4.0
05/07/14	Reviewing transcript, drafting proposed findings of fact	3.5
05/09/14	Reviewing transcript, drafting proposed findings of fact	2.3
05/10/14	Reviewing transcript, drafting proposed findings of fact	5.7
05/11/14	Research for post-hearing documents	1.8
05/12/14	Reviewing transcript, drafting proposed findings of fact	2.7
05/13/14	Reviewing transcript, drafting proposed findings of fact	3.4
05/14/14	Drafting conclusions	3.1
05/15/14	Drafting conclusions	2.6
05/16/14	Drafting, editing proposed findings of fact	1.0
05/17/14	Drafting, editing proposed findings of fact	5.0
05/18/14	Drafting, editing proposed findings of fact	3.0
05/19/14	Drafting, editing proposed findings of fact	7.2
05/20/14	Prepare fee petition	2.5
05/20/14	Editing, drafting, researching proposed findings and conclusions	7.5
05/21/14	Finalize proposed findings and conclusions	6.0
	<b>TOTAL ATTORNEY HOURS</b>	<b>428.2</b>

**MARIANNE THOMAS**  
**STATEMENT OF TIME AND SERVICES**  
**RICHARDSON-POWERS V. WV DEPARTMENT OF MOTOR VEHICLES**

<u>Date</u>	<u>Description of Service</u>	<u>Time</u>
11/8/13	Prepare spreadsheet for discovery documents	0.5
12/9/13	Attendance at trial	9.0
12/10/13	Attendance at trial	7.5
12/11/13	Attendance at trial	5.0
12/12/13	Attendance at trial	5.0
12/13/13	Attendance at trial	3.0
2/10/14	Attendance at trial	6.5
2/11/14	Attendance at trial	6.0
2/12/14	Attendance at trial	<u>4.0</u>
	<b>TOTAL HOURS</b>	<b>46.5</b>





WEST VIRGINIA HUMAN RIGHTS COMMISSION

RENEE L. RICHARDSON-POWERS,

Complainant,

vs.

Docket No. EDS-94-12  
EEOC No. 17J-2011-00352

WV DIVISION OF MOTOR VEHICLES,

Respondent.

**AFFIDAVIT OF JANE E. PEAK, ESQUIRE**

I, JANE E. PEAK, being first duly sworn upon my oath, hereby come forth and state as follows:

1. I have been a practitioner in Morgantown, West Virginia, since 1996. The primary focus of my practice has been in employment law. My background includes a B.A. from Marshall University in Huntington, West Virginia, in May 1982, and a J.D. from West Virginia University College of Law in May 1996.<sup>1</sup>

2. Since being admitted to the bar, I have participated in at least ten (10) jury trials, in both state and federal court, in public hearings before the West Virginia Human Rights Commission, and in numerous other trials through motion practice, as well as in administrative hearings and

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<sup>1</sup> In between my undergraduate and law school degrees, I worked in the broadcast television industry spending most of that time as a promotion manager at independent and Fox Network affiliated stations in Charleston, West Virginia, Fresno, California, and Cincinnati, Ohio. During my time in television, I won several regional and international awards and served on advisory committees for the Fox Network.



appeals, and in *amicus* briefs, petition and appellate practice before the Supreme Court of Appeals of West Virginia.

3. I am a member of the West Virginia State Bar, the Monongalia County Bar, the American Bar Association, the West Virginia Association for Justice, the American Association for Justice, the West Virginia Employment Lawyers Association, and the National Employment Lawyers Association. During 1999-2000, I served as Chair of the *Amicus* Committee of the West Virginia Employment Lawyers Association. I also served as President of the West Virginia Employment Lawyers Association from 2000-2003.

4. Additionally, I serve on the Board of Directors of the West Virginia Association for Justice and am also the Treasurer for the organization.

5. I have also presented CLEs to other lawyers on employment law, particularly in the area of employment discrimination. Between October 1998 and the present, I have presented ten (10) CLEs to the West Virginia Employment Lawyers Association and at least five (5) to the West Virginia Association for Justice, the most recent being January 16 or 17, 2014. I have also presented CLEs at the West Virginia Continuing Legal Education Seminar at the West Virginia University College of Law, the most recent being September 27 or 28, 2013.<sup>2</sup>

6. During the Fall 2003, 2004, 2005 and 2006 semesters, I was an adjunct professor for Appellate Advocacy at the West Virginia University College of Law.

7. I am currently on the Visiting Committee for the College of Law.

8. In 2005, I was recognized as Practitioner of the Year by the Women's Law Caucus of the West Virginia University College of Law.

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<sup>2</sup> Also, in 2006, I presented a CLE on employment law to the Mountain State Bar.



9. Since 2006, I have been recognized in The Best Lawyers in America for my work in employment law and have been named a Super Lawyer since 2012. Additionally, beginning in 2010, my firm, Allan N. Karlin & Associates, has been recognized as one of the Best Law Firms in the U.S. News and World Report.


10. I am familiar with Garry Geffert through both his outstanding work for his clients and the West Virginia Employment Lawyers Association and National Employment Lawyers Association. Mr. Geffert is one of the most experienced and competent attorneys in West Virginia in the vigorous representation of clients in employment matters and in litigating complex cases. In fact, I have turned to Mr. Geffert several times for advice in handling these types of cases.

11. I have been apprized of the nature of the *Richardson-Powers v. WV Division of Motor Vehicles* lawsuit, Docket No. EDS-94-12, EEOC No. 17J-2011-00352. A case of this type is more than worthy of the base hourly rate of \$350.00 for attorney time and \$90.00 per hour for paralegal time. In fact, in my experience, \$350.00 is at or below the usual hourly rate for an attorney of Mr. Geffert's experience and accomplishment. My opinion is based on my knowledge of the fees charged by myself and other attorneys practicing in the area of their special expertise.

12. Human Rights Act cases are labor intensive, requiring substantial attorney time and effort, particularly during the pretrial phase as discovery is often contentious. In my experience, employers do not give up information easily. Based upon my knowledge, the rate of \$350.00 per hour for Mr. Geffert and \$90.00 per hour for his paralegal, as set forth above, is at or below the market rate for experienced specialists and is the minimum

necessary to ensure that attorneys with expertise in employment law will be willing to continue to take cases representing employees.

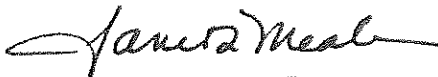
Further, the affiant sayeth not.

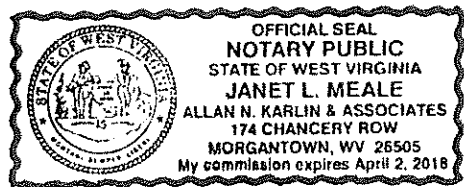
  
\_\_\_\_\_  
JANE E. PEAK (WV BAR # 7213)  
ALLAN N. KARLIN & ASSOCIATES  
174 CHANCERY ROW  
MORGANTOWN, WV 26505  
(304) 296-8266

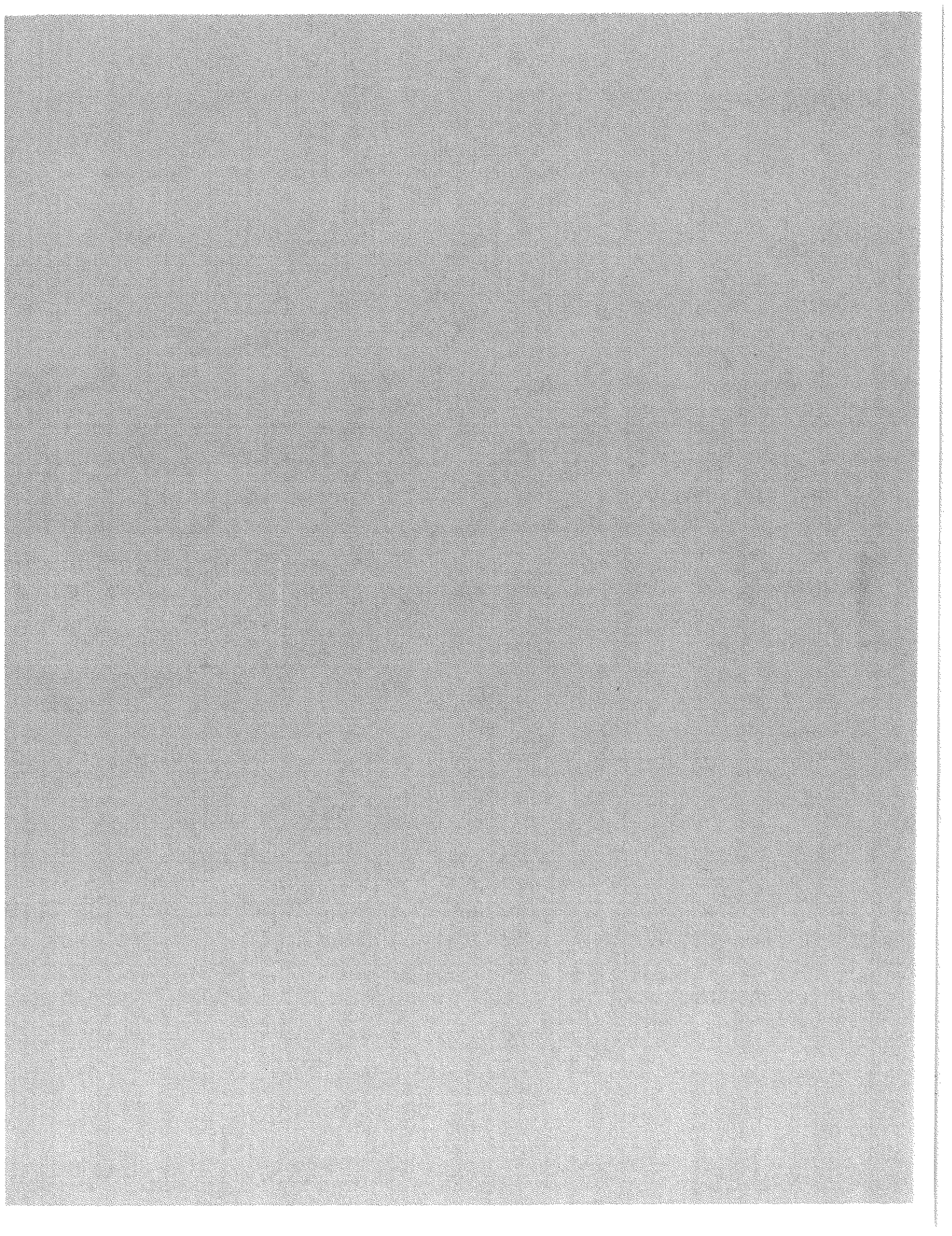
STATE OF WEST VIRGINIA  
COUNTY OF MONONGALIA, to wit:

Taken, sworn to and subscribed before the undersigned authority this 14<sup>th</sup> day of May 2014.

My commission expires April 2, 2018.

  
JANET L. MEALE  
NOTARY PUBLIC





**AFFIDAVIT OF DAVID M. HAMMER, ESQ.**

After being first duly sworn, the affiant testifies as follows:

1. I am a 1988 graduate of the Marshall Wythe School of Law at the College of William & Mary. I am licensed to practice law in West Virginia where I have practiced continuously since 1988. In 1992 I was a founding partner of Hammer, Ferretti & Schiavoni. I am listed in the Chambers Guide, Best Lawyers in America, Martindale Hubbell AV rating, and in SuperLawyers as a leading plaintiff's employment lawyer in West Virginia;
2. I am a past president of the West Virginia Employment Lawyers Association and have also served as chairperson of the Amicus Curiae committee of that group. I am a member of the National Employment Lawyers Association, the American Association for Justice, as and also serve as an executive board member of the West Virginia Association for Justice;
3. My practice primarily involves the representation of plaintiffs; however I also represent governmental entities and private associations. I am admitted to practice before the West Virginia Supreme Court, the Fourth Circuit Court of Appeals, and the United States Supreme Court;
4. I have been a presenter at continuing legal education seminars approved for credit by the West Virginia State Bar on various topics including most recently at the 2014 Mid-Winter Convention and Seminar of the West Virginia Association of Justice. I was appointed by Justice Elliott Maynard of the West Virginia Supreme Court to serve as a plaintiff's representative for the employment law jury instruction project;
5. During the time period from January 1, 2006 to January 1, 2008 my regular hourly rate was \$300.00 per hour which amount has been awarded without reduction in each instance for which I have petitioned for an award of attorneys' fees or simply paid without further argument after petitioning. Examples include:
  - a. *Smith v. General Motors*, Case No. 05-C-925, Circuit Court of Berkeley County, by order entered October 10, 2006 the Court awarded the full amount of legal fees requested at the hourly rate of \$300.00.
  - b. In *Jones v. United States Coast Guard*, FCMS Case # 06-52703, the undersigned petitioned on February 16, 2007 for attorney's fees and costs at the hourly rate of \$300.00 for work performed in Berkeley County, West Virginia as a consequence of prevailing in a federal arbitration that resulted in reinstatement of the plaintiff and full payment of back pay, interest, and restoration of benefits. The United States Coast Guard did not object to that rate and simply paid the amount sought without further briefing.



- c. In *Johnson v. Crouse*, Civil Action No. 05-C-487, Circuit Court of Berkeley County, West Virginia pursuant to a judgment entered on September 6, 2006 the defendant paid our attorney's fees at the rate of \$300.00 per hour without objection.
  - d. In *Seman v. Keefer*, Civil Action No. 05-C-582, Circuit Court of Berkeley County, West Virginia the undersigned was awarded attorney's fees at the hourly rate of \$300.00 for all work performed after January 1, 2006 by order entered on August 9, 2007.
  - e. In *Bess v. J.B. Hunt Transport, Inc.*, 2007 STA 34 the defendant agreed that \$300.00 was a reasonable hourly rate but disputed the total number of hours, however, the defendant later paid all attorney's fees and costs sought without further order of the court.
  - f. In *Gregory v. Forest River, Inc.*, Civil Action No. 3:08CV73, United States District Court for the Northern District of West Virginia, this firm was awarded fees at the rate \$300.00 per hour as a discovery sanction by Magistrate Judge Seibert for work performed in 2008. [Doc. 73].
6. In *Bivens v. UnumProvident*, 3:05CV38, United States District Court for the Northern District of West Virginia, the defendant paid my attorney's fees at the requested rate of \$300.00 per hour as a part of a full and complete restoration of the plaintiff's long term disability payments without requiring a petition;
  7. In addition, the hourly rate of \$300.00 has been paid to me by the Jefferson County Commission for hourly fees incurred in defending a Jefferson County Planning Commissioner from a statutory removal proceeding. I was paid \$300/hr. non-contingent for defending the Jefferson County Board of Health in a discrimination/retaliation action. I was retained by Tina Mawing and the Charles Town Horsemen's Benevolent and Protective Association in a matter now pending before the AAA.
  8. In other cases that were not handled by this law firm hourly rates of \$300.00 or more for work performed in West Virginia have been often awarded.
    - a. For example, in *Bouzahar v. CNA Group Life Assurance Company*, Civil Action No. 3:04CV53, by order entered June 26, 2006 the United States District Court for the Northern District of West Virginia awarded the plaintiff's attorney \$300.00 an hour.
    - b. In *Milam et al. v. Fleetwood Homes of NC, Inc.*, Civil Action No. 02-C-11, Circuit Court of Roane County, West Virginia, by order entered January 2, 2008 the Circuit Court discussed evidence of reasonable hourly rates established by affidavits of attorneys in various West Virginia



jurisdictions as supporting an hourly rate as awarded in that case of \$350.00 per hour.

- c. In *Nationwide Mutual Assurance Company*, Civil Action No. 03-C-443, Circuit Court of Ohio County, West Virginia in 2004 the court approved an award of \$400.00 per hour as a reasonable hourly rate.
9. Effective January 1, 2009 my regular hourly rate for work in class/collective actions increased to \$400/hr. This rate has been awarded to me. For example, in *Hill et al. v. Amtec LLC et al.*, 1:09-CV-01268-JFM by order entered on May 18, 2010 the United States District Court for the District of Maryland approved, without objection from the defendant, an award of attorney's fees at the hourly rate of \$400 for work performed during 2009 and 2010.
10. However, in *Nolan et al. v. Reliant Equity Investors, LLC, et al.*, Case 3:08-CV-00062 [Doc. 191], United States District Court for the Northern District of West Virginia, I was awarded a rate of \$350/hr. for class action litigation that began in March, 2008 but continued into 2011. In addition, work by paralegals was compensated at a blended rate of \$70/hr. for work prior to January 1, 2009 and \$80/hr. thereafter.
11. Effective January 1, 2009 HF&S increased its regular hourly rate for non-class action legal work to \$350 and our paralegal rate to \$90/hr.
12. HF&S has been awarded \$350/hr. for non-class action legal services and \$90/hr. for paralegal services. For example:
  - a. *McLaughlin et al. v. Renal Temporary Services, LLC, et al.*, Circuit Court of Berkeley County, West Virginia, Civil Action No. 08-C-28 by order entered May 26, 2009.
  - b. *Baldau v. Jonkers, et al.*, Circuit Court of Jefferson County, West Virginia, Civil Action No. 07-C-354, *Order Awarding Plaintiff's Fees and Costs*, entered February 24, 2010.
  - c. *Harding v. Tenant, WV Sec. of State*, Circuit Court of Kanawha County, West Virginia, Civil Action No. 10-C-1788, *Agreed Order Granting Plaintiff's Motion for Attorney Fees*, entered April 22, 2013.
13. Defendants represented by legal counsel have paid HF&S an hourly fee of \$350 in discrimination cases post-verdict. For example, in April 2014 in a case styled *McDonough v. Jefferson County Council on Aging, et al.* Civil Action No. 12-C-411 the defendants, represented by Steptoe & Johnson, PLLC, paid Mr. Hammer's legal fees at the rate of \$350/hr. for work performed in 2012 – 2013 in an amount in excess of \$60,000 after having withdrawn all objections to Mr.

Hammer's itemized statement of charges. This payment was pursuant to a judgment and not part of a settlement.

14. Based upon the foregoing it is my opinion that a contingent hourly rate of \$350 for work performed from January, 2009 to the present time is within the range of the prevailing market rates in the Eastern Panhandle of West Virginia.
15. It my opinion that an hourly rate of \$90 for worked performed by legal assistants is reasonable in the Eastern Panhandle of West Virginia. This hourly rate has been paid to HF&S without objection. *See McDonough v. Jefferson County Council on Aging, et al.* Civil Action No. 12-C-411.
16. I have been familiar with the legal work and reputation of Garry Geffert for a longer period of time than I can state with precision – at least two decades. He is a diligent and tenacious lawyer who zealously represents his clients. I have referred potential clients to Mr. Geffert many times (without seeking any referral fee) with the confidence that the potential client will be well-served.

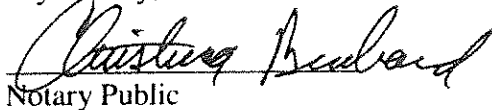
17. And further the affiant sayeth naught.



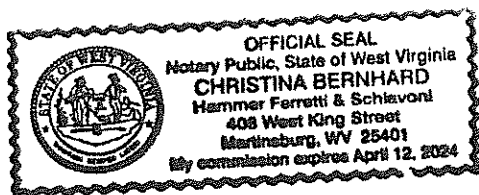
David M. Hammer, Esq,  
WV Bar ID # 5047

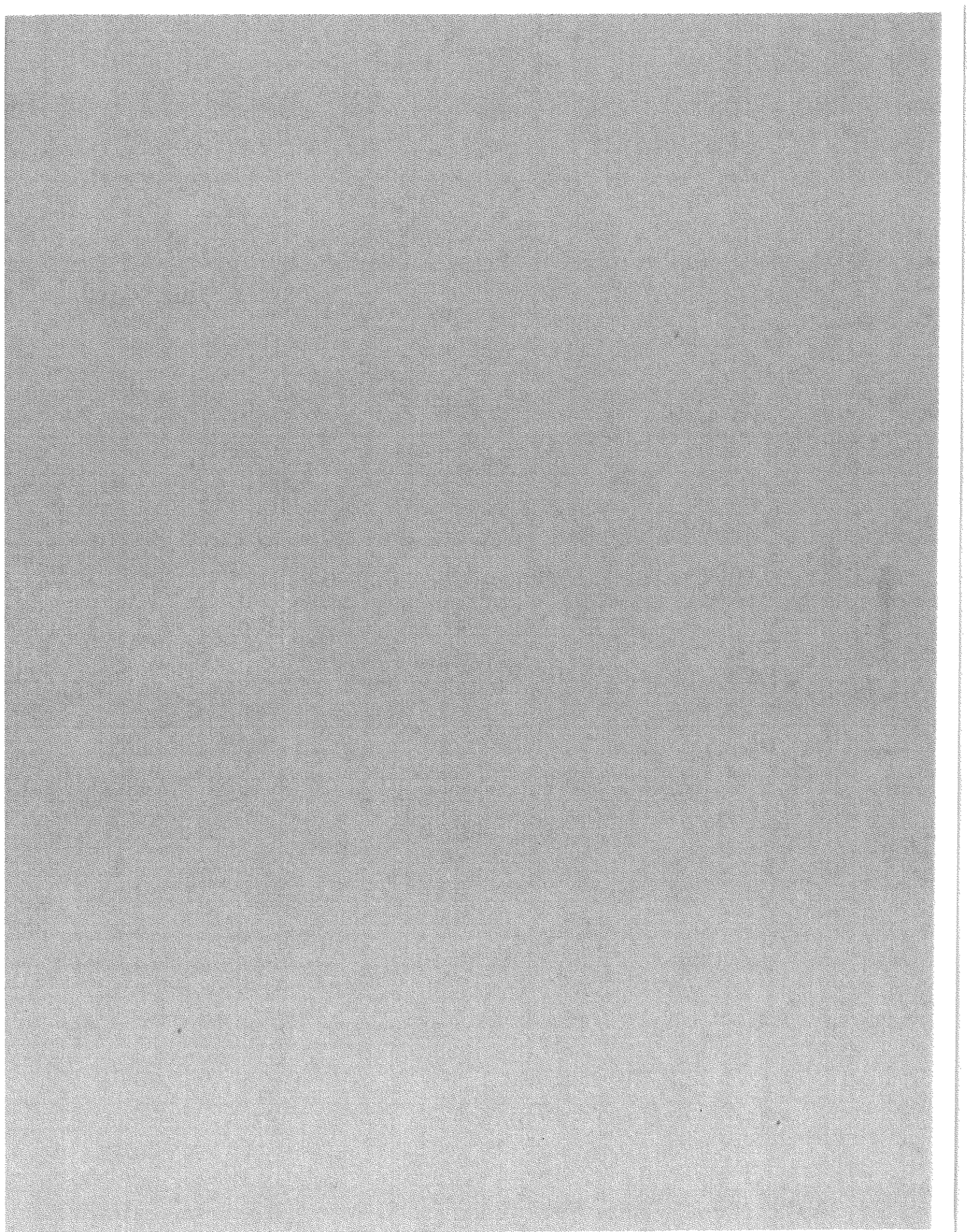
Berkeley County, West Virginia

The foregoing affidavit was signed before me, a Notary Public, on this the 9<sup>th</sup> day of May, 2014.

  
Notary Public

My Commission expires: April 12, 2024







**WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**RENEE L. RICHARDSON-POWERS**  
**Complainant**

**Vs.**

**Docket No. EDS-94-12**  
**EEOC No. 17J-2011-00352**

**WV DIVISION OF MOTOR VEHICLES**  
**Respondent**

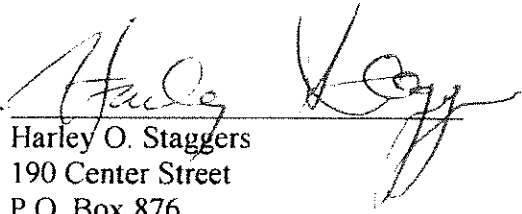
**AFFIDAVIT OF HARLEY O. STAGGERS, JR.**

I, HARLEY O. STAGGERS, being first duly sworn upon my oath, hereby come forth and state as follows:

1. I have been practicing law since 1977 and started trying employment cases in 1993.
2. I obtained a Bachelor's Degree from Harvard University in 1974 and graduated from West Virginia University Law School in 1977.
3. I am admitted to both the state and federal courts.
4. I am a member of the West Virginia Employment Lawyers Association
5. I have been practicing for over 36 years and has extensive experience litigating employment cases. I have litigated at least four (4) reported W.Va. Supreme Court cases including: (1) *Barlow v. Hester Ind., Inc.* 198 W.Va. 118, 479 S.E. 2d 628 (1996); (2) *Conrad v. ARA Szabo* 198 W.Va. 362, 480 S.E. 2d 801 (1996); (3) *Minshall v. Health Care and Retirement Corp. of America* 208 W.Va. 4, 537 S.E. 2d 320 (2000); (4) *Seymour v. Pendleton Community Care*, 209 W.Va. 468, 549 S.E. 2d 662 (2001).
6. It is my opinion that a contingent hourly rate of \$350.00 for work performed from January 2007 to the present time is within the range of the prevailing market rates in the eastern part of West Virginia.



7. It is my opinion that an hourly rate of \$90.00 for work performed by legal assistants is reasonable in the Martinsburg area of West Virginia.
8. I am familiar with the legal work and reputations of Garry Geffert from 1982 until the present. Mr. Geffert is a diligent, tenacious, hard-working attorney who provides invaluable and vigorous services to his clients. I have referred potential clients to him who he has successfully represented, and I will refer potential clients to him in the future.



Harley O. Staggers  
190 Center Street  
P.O. Box 876  
Keyser, WV 26726  
Tele (304) 788-5749  
Fax (304) 788-2976  
WV Bar ID # 3552

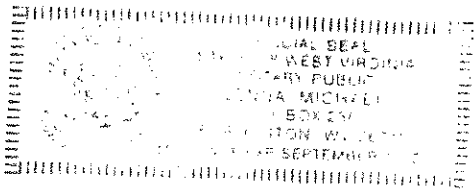
STATE OF WEST VIRGINIA,

COUNTY OF MINERAL, to wit:

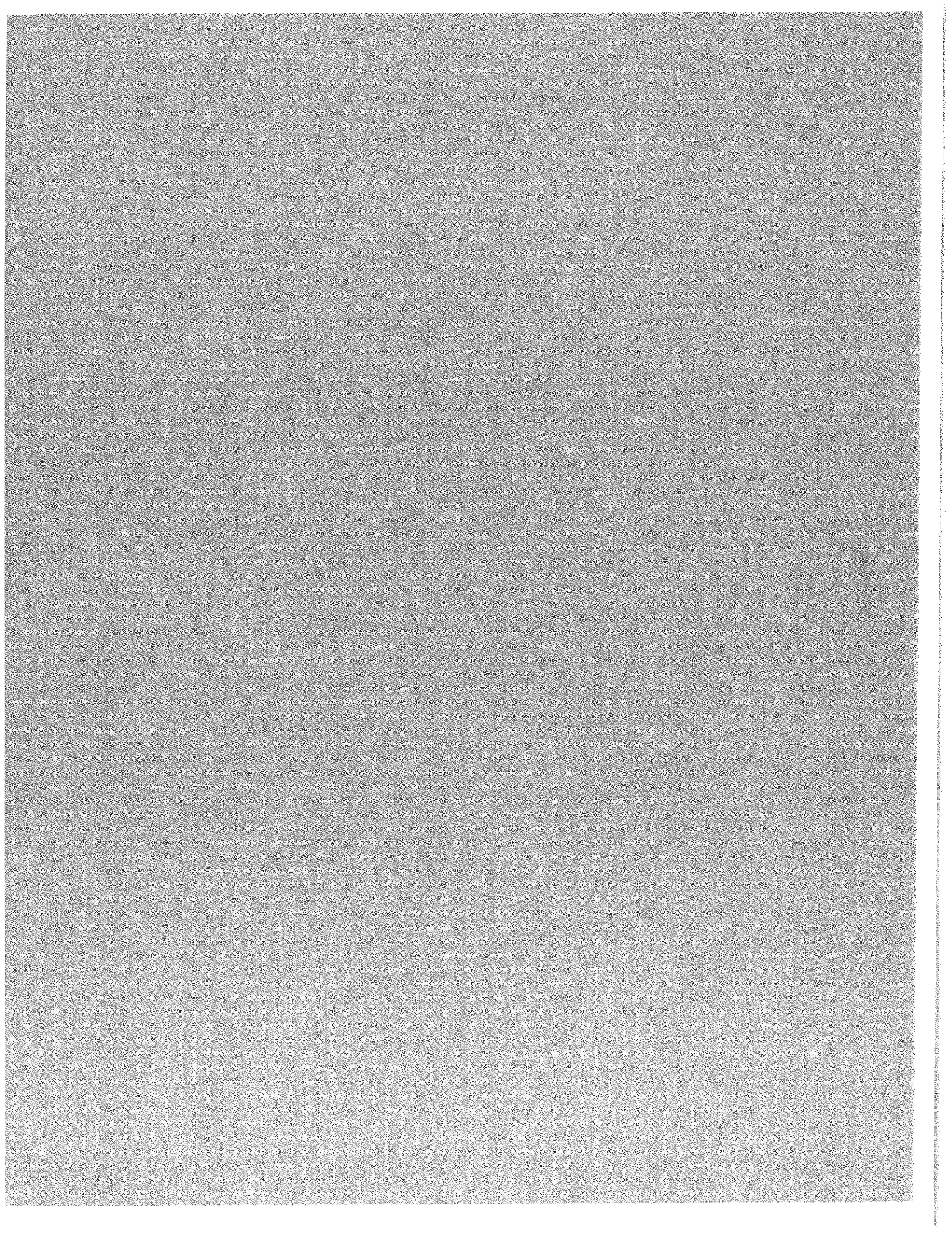
I Jenna Michael Notary Public in and for the State and County aforesaid, do hereby certify that Harley O. Staggers, Jr., whose name is signed to the writing above and hereto annexed, bearing date on the 13th day of May, 2014, has this day acknowledged the same before me in my said County and State.

Given under my hand this 13th day of May, 2014

My Commission Expires: 4-12-22



Jenna Michael  
NOTARY PUBLIC



**AFFIDAVIT OF HARRY P. WADDELL**

STATE OF WEST VIRGINIA  
COUNTY OF BERKELEY, TO-WIT:

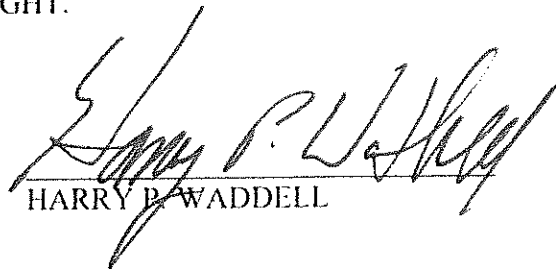
After being first duly sworn, the affiant testifies as follows:

1. I am a 1981 graduate of the Marshall Wythe School of Law at the College of William & Mary. I am an attorney licensed to practice law in West Virginia where I have practiced continuously since 1981. In 1995, I began my solo practice devoting approximately 50% of my time to employment related consulting and litigation. I am listed in SuperLawyers as a leading plaintiff's employment lawyer in West Virginia. I have been selected by the American Trial Lawyers Association as one of the top 100 trial lawyers in West Virginia.
2. I am a past president of the West Virginia Employment Lawyers Association. I am also a member of the National Employment Lawyers Association, the American Association for Justice, and the West Virginia Association for Justice.
3. My practice is primarily limited to representation of plaintiffs in matters involving employment law, civil rights and personal injury. I am admitted to practice before the West Virginia Supreme Court, the Fourth Circuit Court of Appeals, and the United States Supreme Court.
4. I have presented continuing legal education seminars approved for credit by the West Virginia State Bar to the West Virginia Employment Lawyers Association and the West Virginia Association for Justice on various topics including specifically, wrongful discharge employment cases and trial advocacy.
5. As part of my law practice, I have handled numerous cases filed pursuant to fee shifting statutes.
6. Over fifty (50%) percent of my law practice is concentrated in the area of employee law and, in particular, claims involving discrimination and retaliation arising under the West Virginia Human Rights Act.
7. Based upon my education, training and experience, I am familiar with the type of costs incurred and the amount of attorney's fees associated with this type of fee-shifting civil litigation. I have represented both plaintiffs and defendants in civil litigation involving the West Virginia Human Rights Act. Prior to establishing my current practice, I was a partner in the firm of Steptoe & Johnson and defended employers in sued for discrimination and retaliation under the WVHRA.



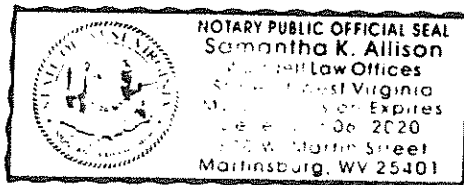
8. Based upon my education, training and experience, I believe that cases filed pursuant to fee-shifting statutes – such as employment and civil rights cases - are typically difficult cases to prosecute. The cases are very risky and attorneys who represent clients in these types of cases must be experienced in every area of trial preparation and advocacy. Attorneys must have extensive knowledge of the very specialized laws dealing with employment and civil rights cases.
9. As a result, and again based upon my experience, a very small group attorneys in West Virginia are both qualified and willing to represent plaintiffs in fee-shifting employment and civil rights cases. Consequently, it is often difficult for clients to find and secure adequate representation.
10. Garry G. Geffert is one of the small group of attorneys in West Virginia who are both qualified and willing to handle these types of cases. His quality of representation and his reputation in the field of employment law is well known and excellent.
11. Based upon my experience and knowledge, I believe that the reasonable market value for Mr. Geffert's services in contingency fee based employment actions in West Virginia is at least \$350.00 per hour.

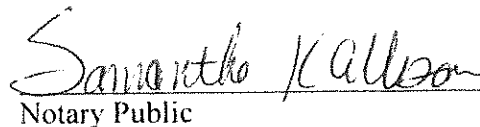
AND FURTHER AFFIANT SAITH NAUGHT.

  
HARRY B. WADDELL

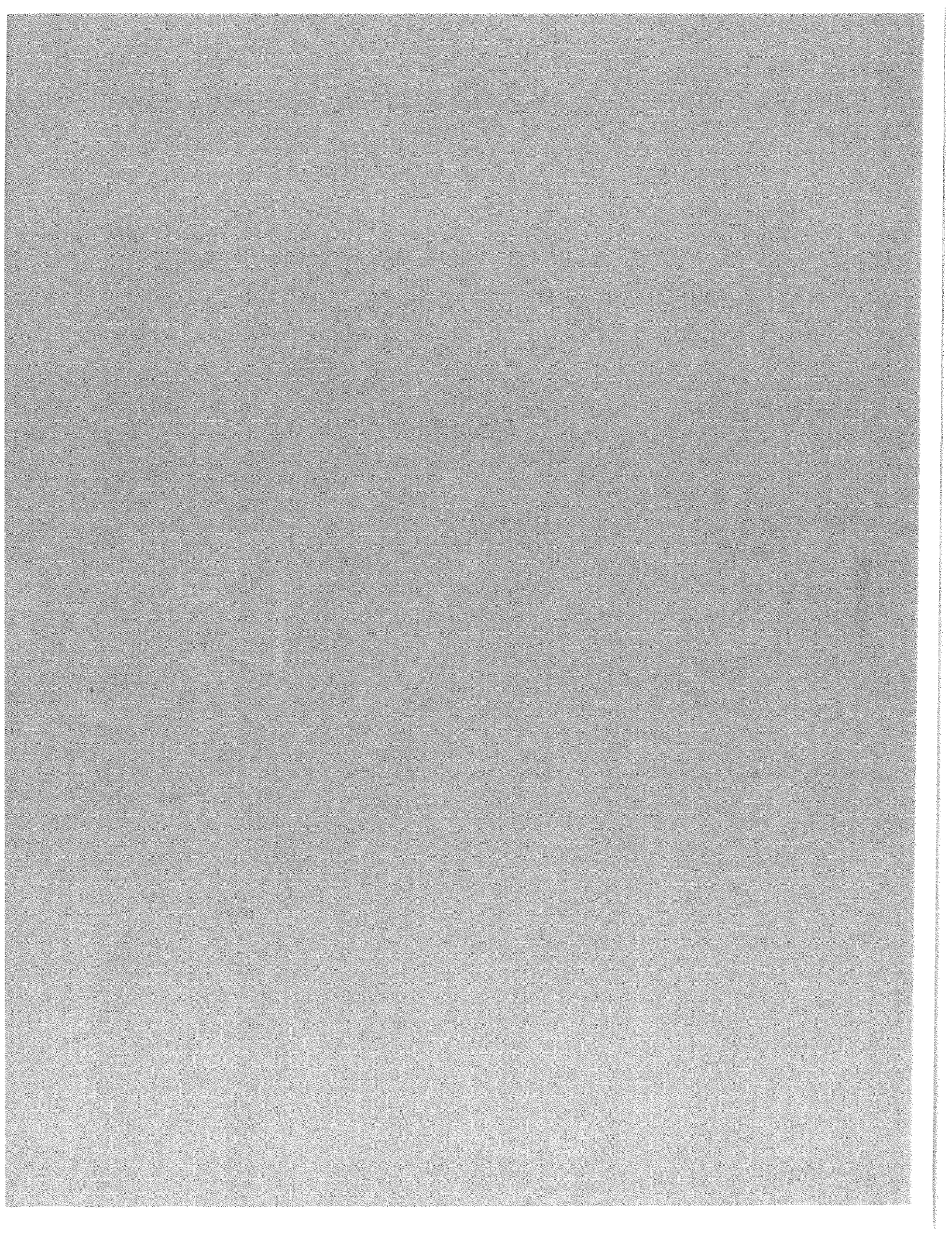
Taken, subscribed and sworn to before me this 12th day of May, 2014.

My Commission Expires: 12/10/20



  
Samantha K. Allison  
Notary Public



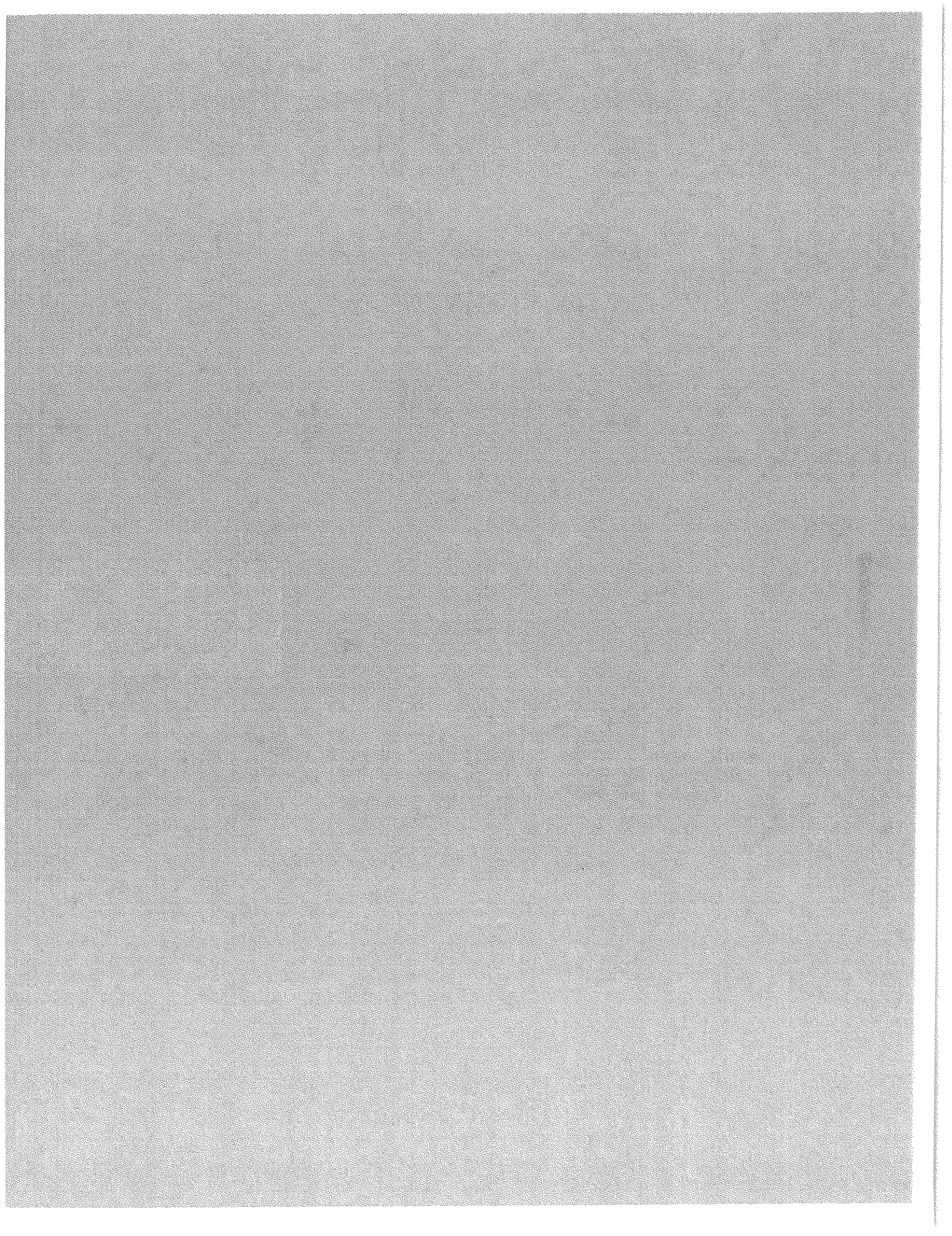


**PREJUDGMENT INTEREST ON BACK WAGES  
FOR RENEE RICHARDSON-POWERS**

Year	Quarter	Back Wages	Back Fringe Benefits	Total Lost Earnings	Total Lost Earnings For Year	Begin Date for Interest	End Date for Interest	Interest for Quarter at 7.00%	Total Interest For Year
2010	4th	\$11,270.00	\$12,906.00	\$24,176.00	\$24,176.00	12/31/10	06/30/14	\$1,480.78	\$1,480.78
2011	1st	\$2,632.75	\$3,298.50	\$5,931.25	\$23,725.00	03/31/11	06/30/14	\$337.34	\$1,193.66
2011	2nd	\$2,632.75	\$3,298.50	\$5,931.25		06/30/11	06/30/14	\$311.39	
2011	3rd	\$2,632.75	\$3,298.50	\$5,931.25		09/30/11	06/30/14	\$285.44	
2011	4th	\$2,632.75	\$3,298.50	\$5,931.25		12/31/11	06/30/14	\$259.49	
2012	1st	\$2,055.00	\$3,334.25	\$5,389.25	\$21,557.00	03/31/12	06/30/14	\$212.20	\$660.18
2012	2nd	\$2,055.00	\$3,334.25	\$5,389.25		06/30/12	06/30/14	\$188.62	
2012	3rd	\$2,055.00	\$3,334.25	\$5,389.25		09/30/12	06/30/14	\$117.89	
2012	4th	\$2,055.00	\$3,334.25	\$5,389.25		12/31/12	06/30/14	\$141.47	
2013	1st	\$2,780.00	\$3,475.50	\$6,255.50	\$25,022.00	03/31/13	06/30/14	\$136.84	\$383.15
2013	2nd	\$2,780.00	\$3,475.50	\$6,255.50		06/30/13	06/30/14	\$109.47	
2013	3rd	\$2,780.00	\$3,475.50	\$6,255.50		09/30/13	06/30/14	\$82.10	
2013	4th	\$2,780.00	\$3,475.50	\$6,255.50		12/31/13	06/30/14	\$54.74	
2014	1st	\$2,851.00	\$3,620.75	\$6,471.75	\$6,471.75	03/31/14	06/30/14	\$28.31	\$28.31
<b>TOTAL PREJUDGMENT INTEREST</b>									<b>\$3,746.09</b>

Source: Pl.Ex. 40  
Pages 3 and 4







BY EMAIL AND REGULAR MAIL

June 20, 2014

Hon. Robert Wilson  
WV Human Rights Commission  
4321 Plaza East, Room 108-A  
Charleston, WV 25301-1400


Re: Rene L. Richardson-Powers, Charging Party  
WV Division of Motor Vehicles,  
Respondent  
Docket No. EDS-94-12

Dear Judge Wilson:

Enclosed please find a Supplemental Affidavit of Garry G. Geffert (Corrected) for filing in the above referenced matter. The original affidavit erroneously identified me as counsel for respondent, when I have represented the complainant throughout this proceeding.

Thank you for your attention to this matter.

Sincerely,

  
Garry G. Geffert  
Attorney at Law

Enc. (2 pages)

cc: Rene L. Richardson-Powers  
Gretchen A. Murphy and Mary M. Downey (by email and regular mail)  
Jill C. Dunn (by email and regular mail)



**GARRY G. GEFFERT**  
**STATEMENT OF TIME AND SERVICES**  
**POWERS V. DIVISION OF MOTOR VEHICLES**

<u>Date</u>	<u>Powers</u> <u>Description of Service</u>	<u>Time</u>
05/28/14	Begin work on reply to resp. proposed findings and conclusions	0.5
05/29/14	Drafting, editing reply to resp. proposed findings and conclusions	3.6
06/06/14	Drafting, editing reply to resp. proposed findings and conclusions	2.0
06/07/14	Drafting, editing reply to resp. proposed findings and conclusions	4.0
06/09/14	Drafting, editing reply to resp. proposed findings and conclusions	5.0
06/10/14	Drafting, editing reply to resp. proposed findings and conclusions	4.5
06/11/14	Drafting, editing reply to resp. proposed findings and conclusions	4.3
06/12/14	Drafting, editing reply to resp. proposed findings and conclusions	2.5
06/13/14	Drafting, editing reply to resp. proposed findings and conclusions	2.5
06/14/14	Drafting, editing reply to resp. proposed findings and conclusions	3.0
06/15/14	Drafting, editing reply to resp. proposed findings and conclusions	2.2
06/16/14	Drafting, editing reply to resp. proposed findings and conclusions	4.3
06/17/14	Drafting, editing reply to resp. proposed findings and conclusions	7.0
	<b>TOTAL ATTORNEY HOURS</b>	<b>45.4</b>

# EXHIBIT 2

Invoices from Nancy McNealy, Certified Court Reporter

Telephone Conference May 13, 2013

Pre-Hearing Conference November 26, 2013

Public Hearing: December 9, 2013  
December 10, 2013  
December 11, 2013  
December 12, 2013  
December 13, 2013

Public Hearing: February 10, 11, and 12, 2014

Charleston, WV 25360  
 FEIN 55-0621463  
 304-988-2873  
 McNealyCCR@aol.com

41837

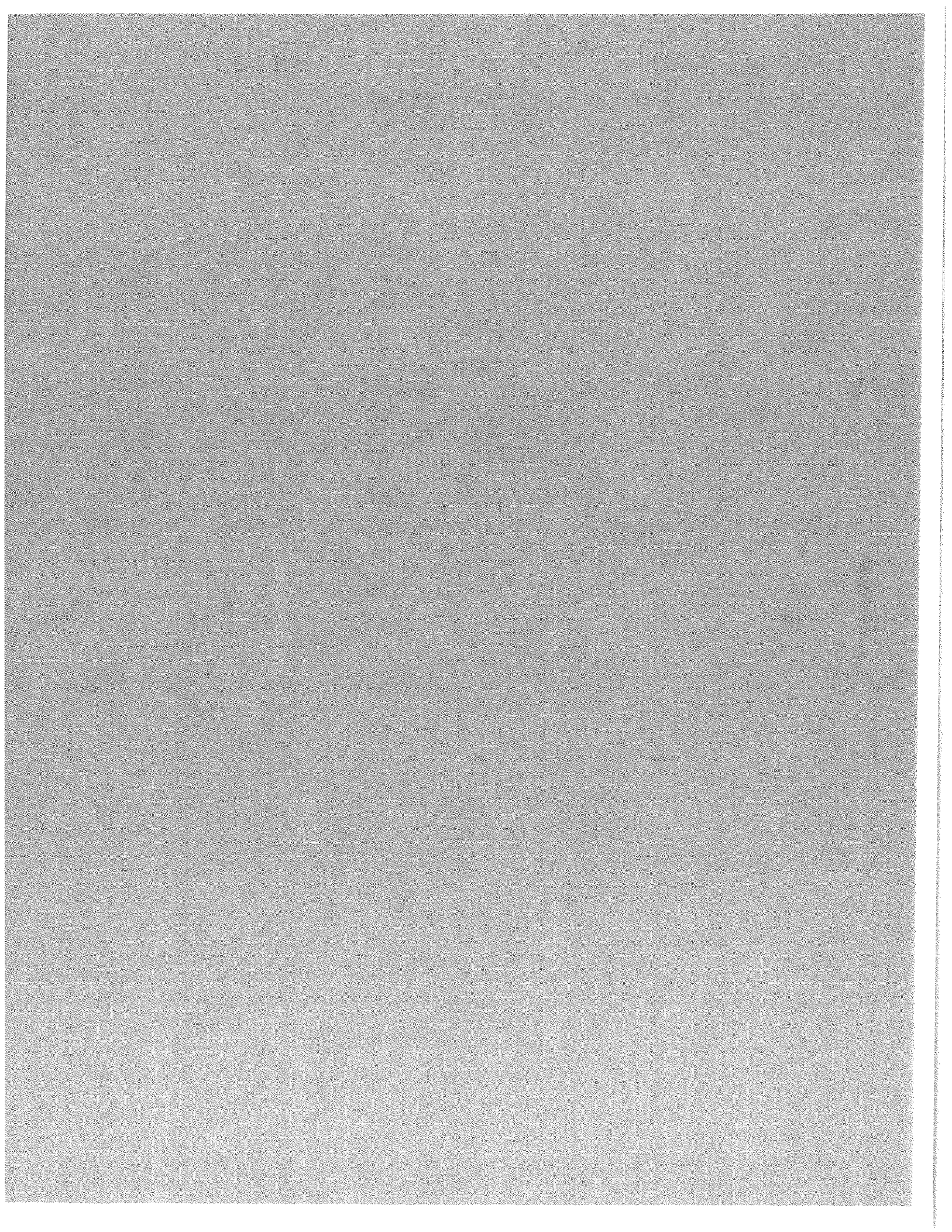
Date	Invoice #
6/27/13	2013-2360

Items - Receipt

West Virginia Human Rights Commission  
 1321 Plaza East, Room 108-A  
 Charleston, West Virginia 25301

Item	Description	Qty	Rate	Amount
Appearance	Renee L. Richardson-Powers v WV Division of Motor Vehicles Docket No. EDS-94-12 Telephone Conference	Full		150.00
O+2 Copies	Transcript of proceedings of May 15, 2013	38	3.95	150.10
<p>"I hereby certify that the items listed hereon have been received and approved for payment."  <u>7-3-13</u>            Date  <u>Ed. Teter</u>            Name</p>				
Reporter - Bonnie Wolfe, sub reporter-Nancy McNealy- Thank you for your business			<b>Total</b>	\$ 300.10

**Balance Due** \$ 300.10



# Nancy McNealy, CVR

Post Office Box 13415  
 Charleston, WV 25360  
 FEIN 55-0621463  
 304-988-2873  
 McNealyCCR@aol.com

# Invoice

Date	Invoice #
12/8/13	2013-3007

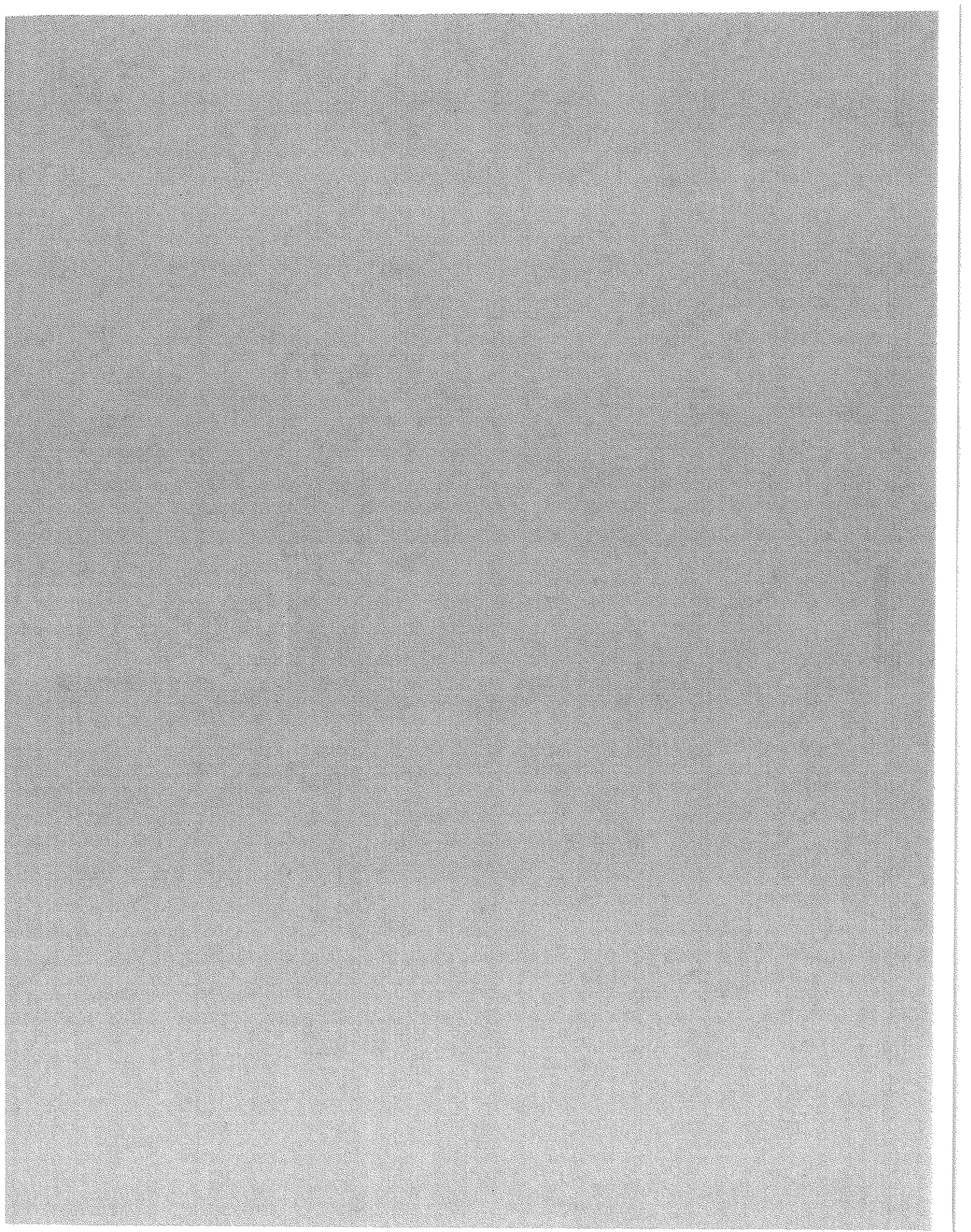
Terms - Receipt

West Virginia Human Rights Commission 1321 Plaza East, Room 108-A Charleston West Virginia 25301	
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Item	Description	Qty	Rate	Amount
Appearance	Renee L. Richardson-Powers v WV Division of Motor Vehicles EDS-94-12	Half		75.00
O+2	Transcript of deposition of pre-trial conference on November 26, 2013	38	3.95	150.10
Reporter – Nancy McNealy- Thank you for your business		<b>Total</b>		<b>\$ 225.10</b>

**BALANCE DUE      \$ 225.10**







# Nancy McNealy, CVR

Post Office Box 13415  
Charleston, WV 25360  
FEIN 55-0621463  
304-988-2873  
McNealyCCR@aol.com

## Invoice

Date	Invoice #
2/4/14	2014-3591

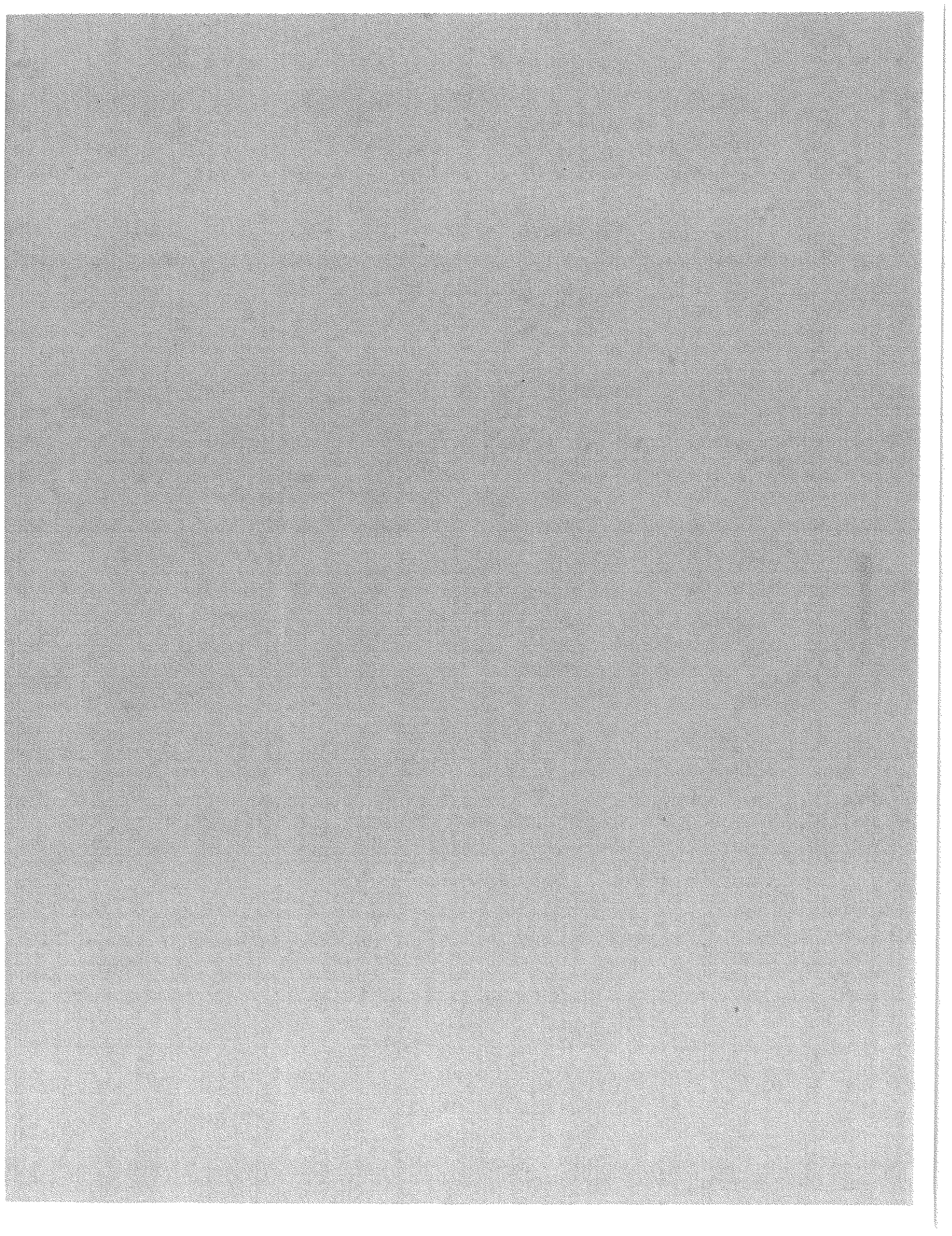
Terms - Receipt

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West Virginia Human Rights Commission 1321 Plaza East, Room 108-A Charleston West Virginia 25301	
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Item	Description	Qty	Rate	Amount
Appearance	Renee Richardson-Powers v WV Division of Motor Vehicles EDS-94-12 EEOC No. 17J-2011-00352 in Martinsburg, WV	Full		300.00
O+2	Transcript of deposition of hearing on December 9, 2013	255	3.95	1,007.25
Reporter – Nancy McNealy- Thank you for your business		<b>Total</b>		<b>\$ 1,307.25</b>

**BALANCE DUE      \$ 1,307.25**



# Nancy McNealy, CVR

Post Office Box 13415  
Charleston, WV 25360  
FEIN 55-0621463  
304-988-2873  
McNealyCCR@aol.com

## Invoice

Date	Invoice #
2/4/14	2014-3592

Terms - Receipt

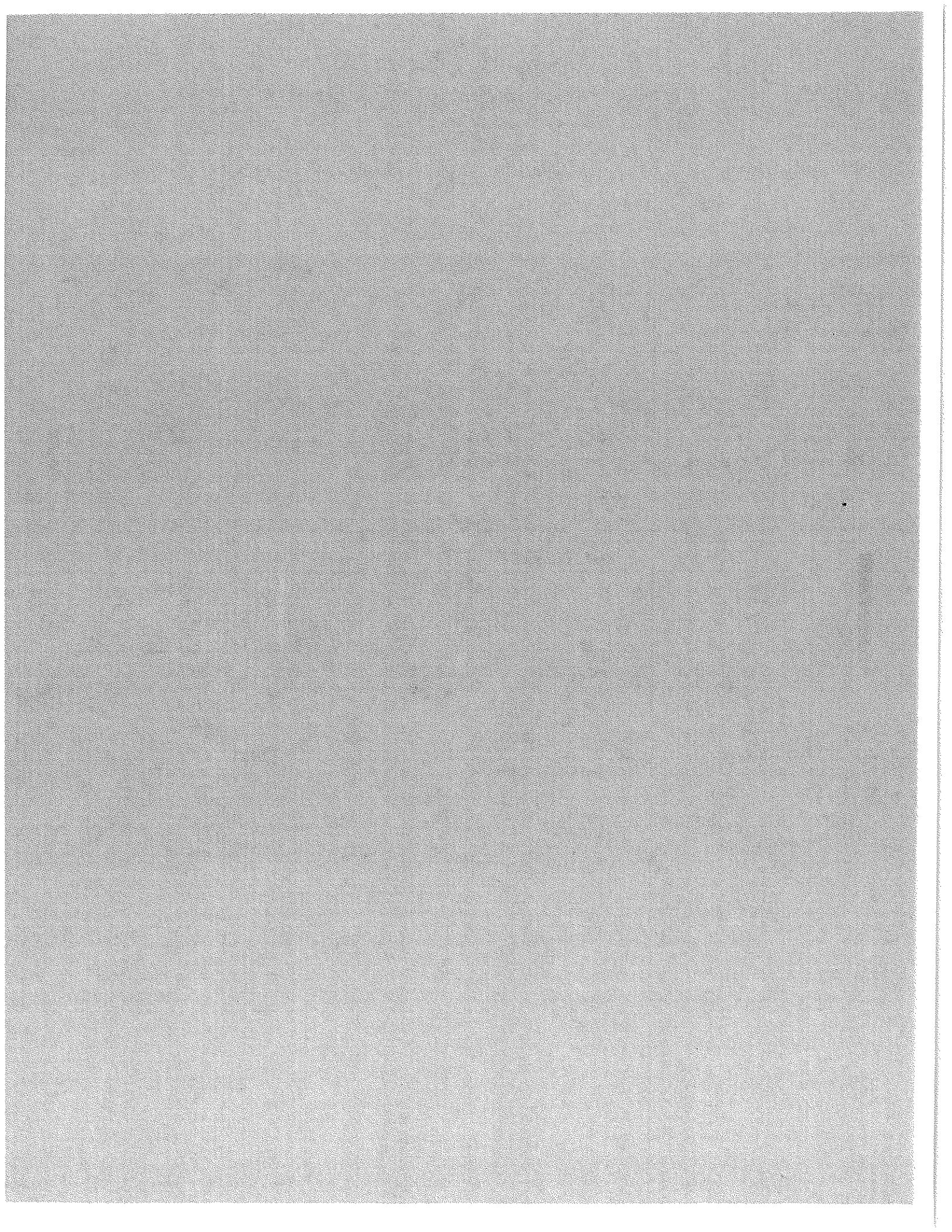
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West Virginia Human Rights Commission  
1321 Plaza East, Room 108-A  
Charleston West Virginia 25301

Item	Description	Qty	Rate	Amount
Appearance	Renee Richardson-Powers v WV Division of Motor Vehicles EDS-94-12 EEOC No. 17J-2011-00352 in Martinsburg, WV	Full		300.00
O+2	Transcript of deposition of hearing on December 10, 2013	252	3.95	995.40
Reporter - Nancy McNealy- Thank you for your business		<b>Total</b>		<b>\$ 1,295.40</b>

**BALANCE DUE      \$ 1,295.40**





# Nancy McNealy, CVR

Post Office Box 13415  
 Charleston, WV 25360  
 FEIN 55-0621463  
 304-988-2873  
 McNealyCCR@aol.com

# Invoice

Date	Invoice #
2/4/14	2014-3593

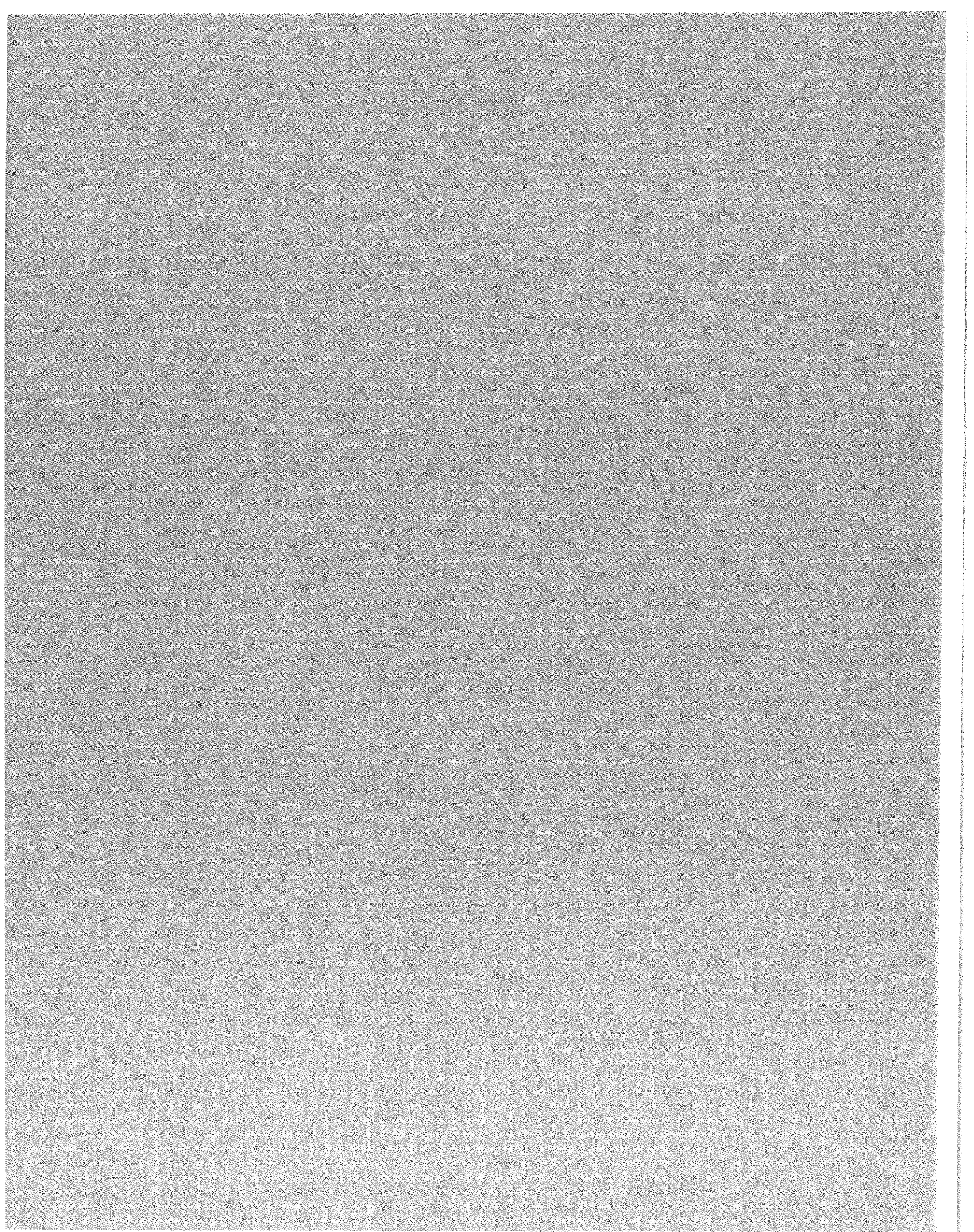
Terms - Receipt

West Virginia Human Rights Commission 1321 Plaza East, Room 108-A Charleston West Virginia 25301	
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Item	Description	Qty	Rate	Amount
Appearance	Renee Richardson-Powers v WV Division of Motor Vehicles EDS-94-12 EEOC No. 17J-2011-00352 in Martinsburg, WV	Full		300.00
O+2	Transcript of deposition of hearing on December 11, 2013	148	3.95	584.60
Reporter – Nancy McNealy- Thank you for your business		<b>Total</b>		\$ 884.60

**BALANCE DUE      \$ 884.60**





# Nancy McNealy, CVR

Post Office Box 13415  
Charleston, WV 25360  
FEIN 55-0621463  
304-988-2873  
McNealyCCR@aol.com

# Invoice

Date	Invoice #
2/4/14	2014-3594

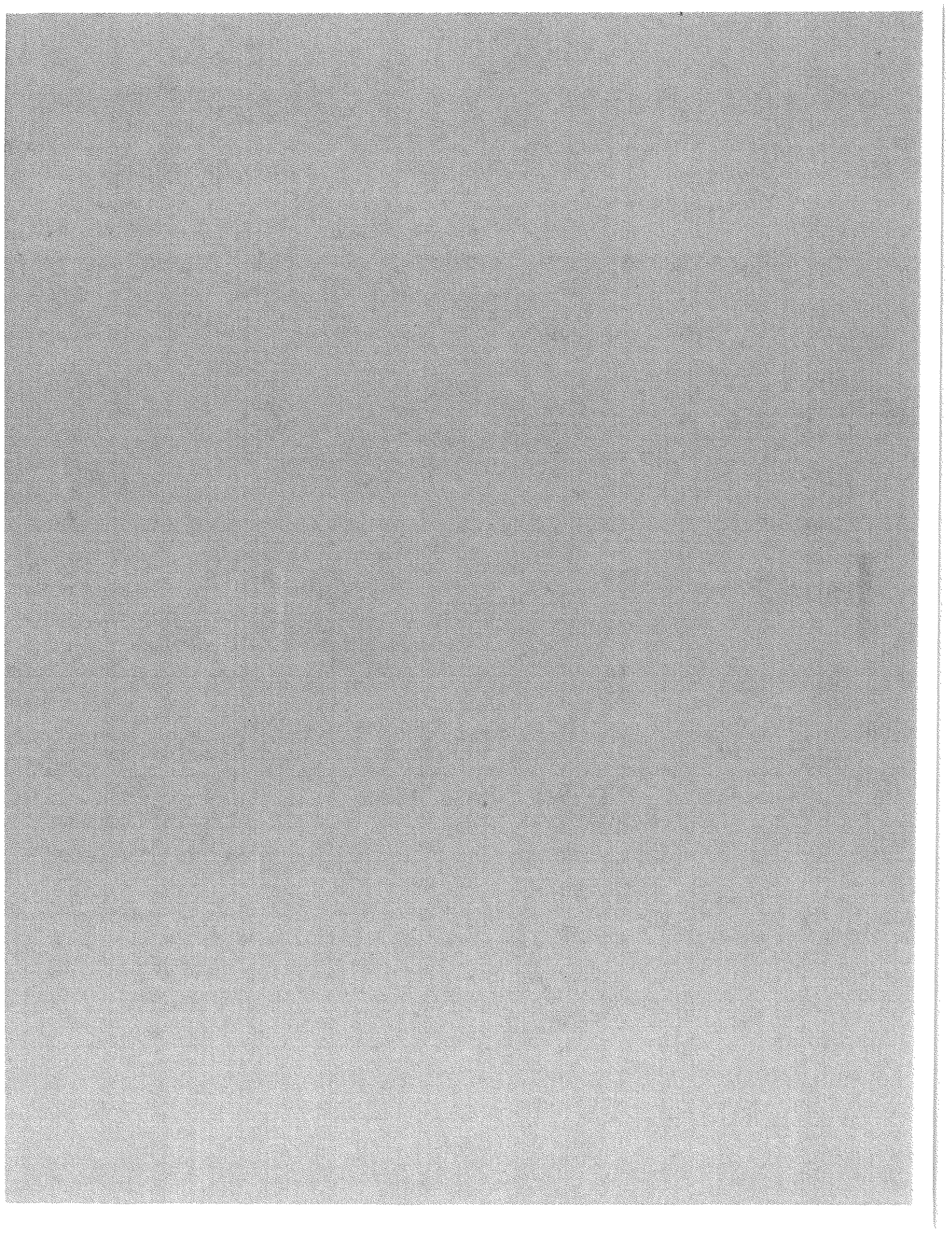
Terms - Receipt

West Virginia Human Rights Commission 1321 Plaza East, Room 108-A Charleston West Virginia 25301	
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Item	Description	Qty	Rate	Amount
Appearance	Renee Richardson-Powers v WV Division of Motor Vehicles EDS-94-12 EEOC No. 17J-2011-00352 in Martinsburg, WV	Full		300.00
O+2	Transcript of deposition of hearing on December 12, 2013	366	3.95	1,445.70
Reporter – Nancy McNealy- Thank you for your business		<b>Total</b>		<b>\$ 1,745.70</b>

**BALANCE DUE      \$ 1,745.70**







# Nancy McNealy, CVR

Post Office Box 13415  
Charleston, WV 25360  
FEIN 55-0621463  
304-988-2873  
McNealyCCR@aol.com

# Invoice

Date	Invoice #
2/4/14	2014-3595

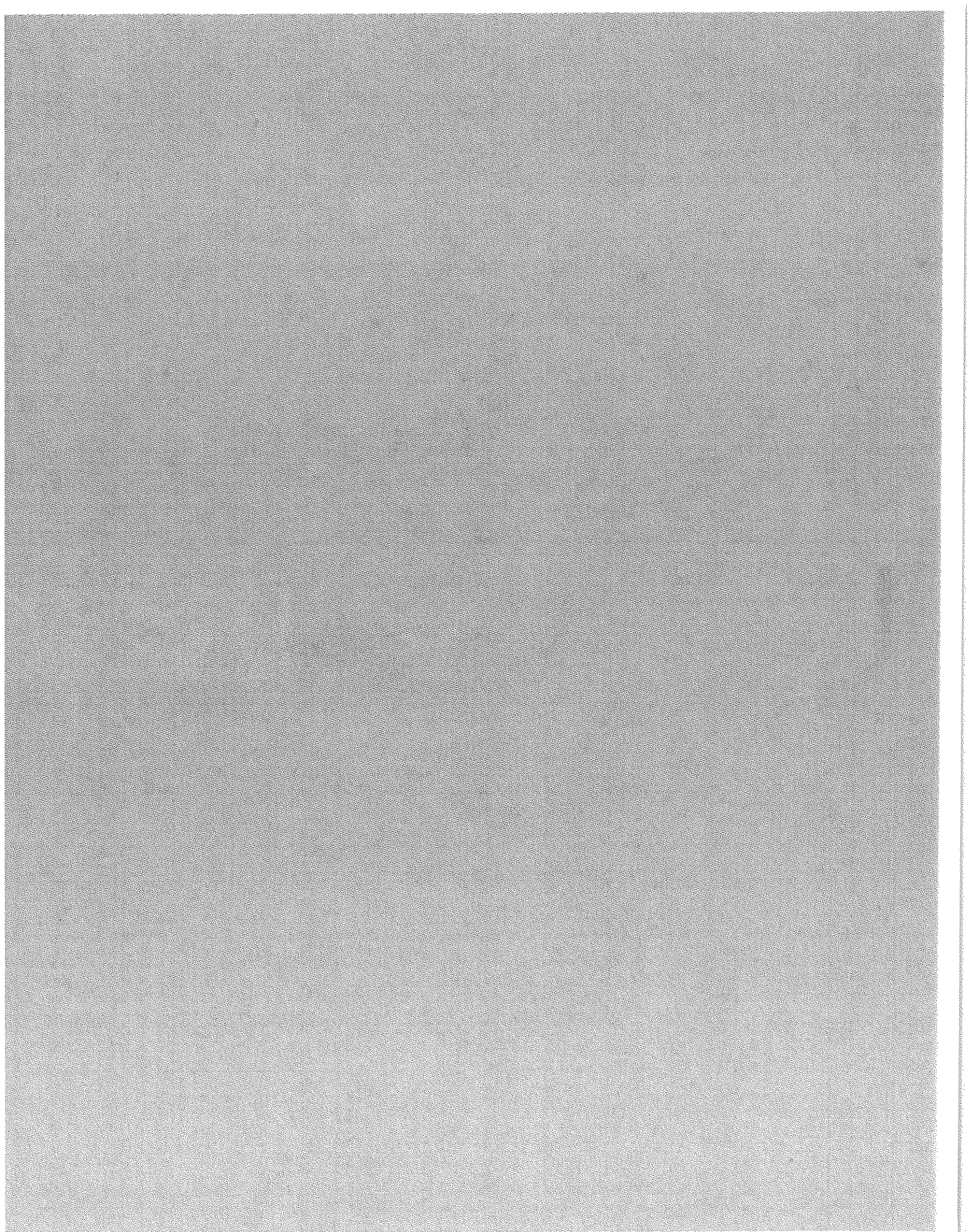
Terms - Receipt

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West Virginia Human Rights Commission 1321 Plaza East, Room 108-A Charleston West Virginia 25301	
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Item	Description	Qty	Rate	Amount
Appearance	Renee Richardson-Powers v WV Division of Motor Vehicles EDS-94-12 EEOC No. 17J-2011-00352 in Martinsburg, WV	Full		300.00
O+2	Transcript of deposition of hearing on December 13, 2013	160	3.95	632.00
<i>Reporter – Nancy McNealy- Thank you for your business</i>		<b>Total</b>		<b>\$ 932.00</b>

**BALANCE DUE      \$ 932.00**



# Nancy McNealy, CVR

Post Office Box 13415  
 Charleston, WV 25360  
 FEIN 55-0621463  
 304-988-2873  
 McNealyCCR@aol.com

# Invoice

Date	Invoice #
3/11/14	2014-3596

Terms - Receipt

West Virginia Human Rights Commission 1321 Plaza East, Room 108-A Charleston West Virginia 25301	
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Item	Description	Qty	Rate	Amount
	Renee Richardson-Powers v WVDMV in Martinsburg, WV Docket No. EDS-94-2 EEOC No. 17J-2011-00352			
Appearance O+2	Appearance Fee on February 10, 2014	Full		300.00
	Transcript of hearing on February 10, 2014	335	3.95	1,323.25
Appearance O+2	Appearance Fee on February 11, 2014	Full		300.00
	Transcript of hearing on February 11, 2014	204	3.95	805.80
Appearance O+2	Appearance Fee on February 12, 2014	Full		300.00
	Transcript of hearing on February 12, 2014	67	3.95	264.65
Reporter – Nancy McNealy- Thank you for your business		<b>Total</b>		<b>\$ 3,293.70</b>

**BALANCE DUE      \$ 3,293.70**

# **EXHIBIT 3**

**Travel Expenses for Mileage and Lodging  
December 7, 8, 9, 10, 11, 12, and 13, 2013**

**Travel Expenses for Mileage and Lodging  
February 8, 9, 10, 11, and 12, 2014**



# STATE OF WEST VIRGINIA TRAVEL EXPENSE ACCOUNT SETTLEMENT

Name: Robert B. Wilson		Title: Deputy Chief Law Judge		FIMS Vendor No: 90970	
Address: 1120 Swan Road			City: Charleston		
State: WV ZIP: 25314		Headquarters: Charleston		Normal Work Hours: 8:30-5:00	
Department: DHHR			Division: Human Rights		Section:
Travel Purpose: Public Hearing in Martinsburg (Powers vs. DMV)					

State Car:		Personal Car:								
Yes	No	Yes	X	No						
DATE	TIME	CITY/STATE	MILES	AMOUNT	AIR	CAR RENTAL	M&I	LODGING	OTHER	TOTAL
12/7/2013		From Charleston		0.00						0.00
		To Shepherdstown	310	145.70			34.50			180.20
12/8/2013		Shepherdstown		0.00			46.00			46.00
12/9/2013		To Martinsburg & back	20	9.40			46.00			55.40
12/10/2013		To Martinsburg & back	20	9.40			46.00			55.40
12/11/2013		To Martinsburg & back	20	9.40			46.00			55.40
12/12/2013		To Martinsburg & back	20	9.40			46.00			55.40
12/13/2013		To Martinsburg & back	20	9.40						9.40
12/13/2013		From Shepherdstown		0.00			34.50			34.50
		To Charleston	310	145.70						145.70
				0.00						0.00
				0.00						0.00
				0.00						0.00
<b>TOTALS</b>			<b>720</b>	<b>338.40</b>	<b>0.00</b>	<b>0.00</b>	<b>299.00</b>	<b>0.00</b>	<b>0.00</b>	<b>637.40</b>

Less Cash Advance (WVFIMS ID#: \_\_\_\_\_) \_\_\_\_\_  
 Amount Due To: \_\_\_\_\_ Employee  State  **637.40**

AGENCY ACCOUNTING INFORMATION					
FUND	ORG	ACT	OBJ	SUB OBJ	AMOUNT

8725  
EEOC

**Traveler must attach copies of direct billed receipts or invoices, i.e., airline, registration, lodging, etc.**

OTHER EXPENSES		
DATE	ITEMS	AMOUNT

EXPENSES DIRECT BILLED TO THE STATE		
DATE	ITEM AND VENDOR	AMOUNT
12/13/2013	Bavarian Inn	698.88

I certify that these costs incurred were in connection with my assigned duties, are true, accurate and actual, and do not reflect any costs or expenses reimbursed or to be reimbursed from any other source.

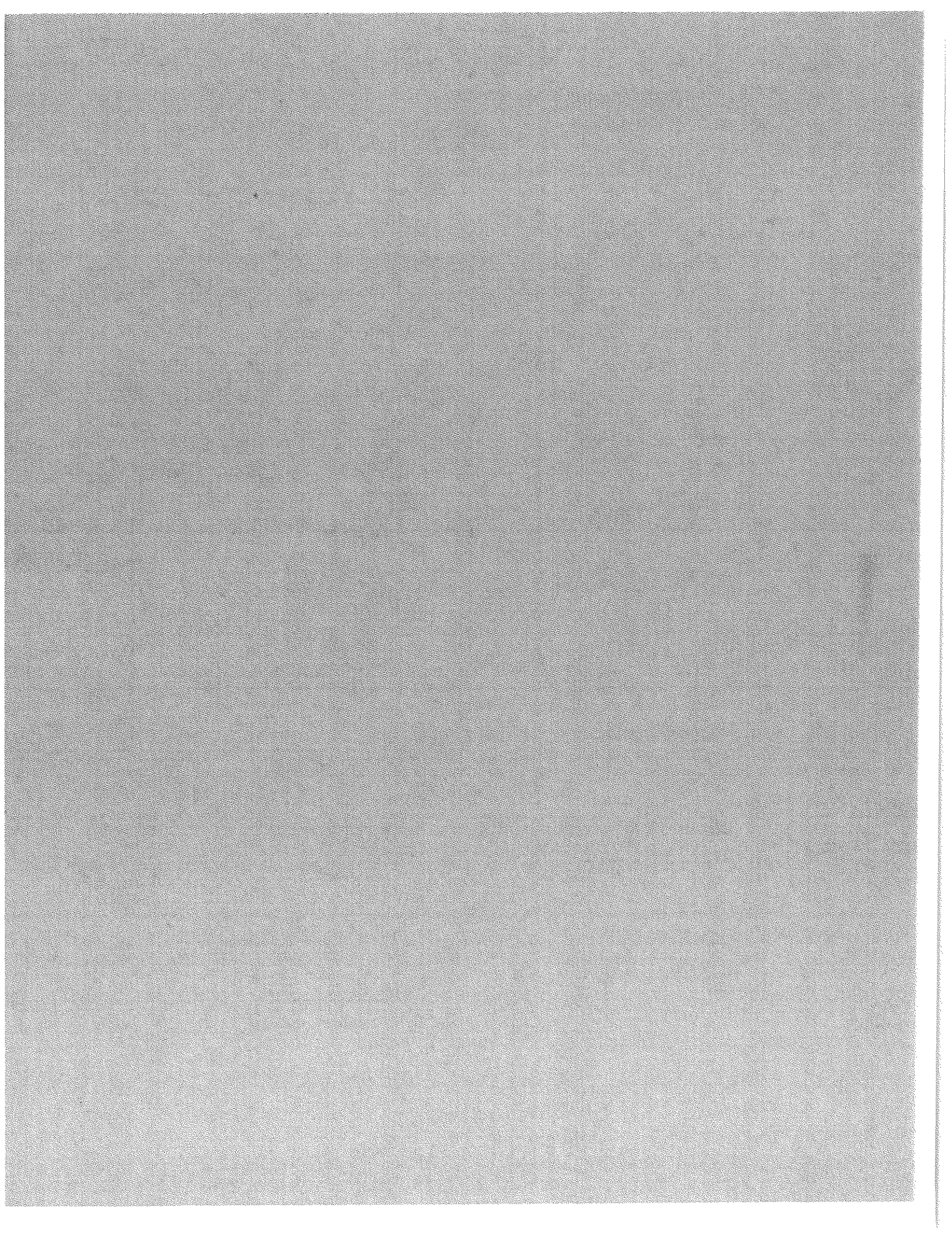
I certify that I have personally examined and approved the Travel Expense Account Settlement. The terms of expenses are reasonable and correspond to the assigned duties of the traveler. The terms of expense further meet all State of West Virginia Travel Regulations and are within the budget of this spending unit.

Robert B. Wilson 12-16-2013  
 Traveler's Signature Date

Edward Teter 12-16-13  
 Approval Agency Head/Designee Date

Approval Supervisor/Agency Head Date







# STATE OF WEST VIRGINIA TRAVEL EXPENSE ACCOUNT SETTLEMENT

Name: Robert B. Wilson	Title: Deputy Chief Law Judge	FIMS Vendor No: 90970
Address: 1120 Swan Road	City: Charleston	
State: WV ZIP: 25314	Headquarters: Charleston	Normal Work Hours: 8:30-5:00
Department: DHHR	Division: Human Rights	Section:

Travel Purpose: Public Hearing in Martinsburg (Powers vs. DMV)										
State Car: Yes <input type="checkbox"/> No <input type="checkbox"/> X <input checked="" type="checkbox"/>		Personal Car: Yes <input type="checkbox"/> X <input checked="" type="checkbox"/> No <input type="checkbox"/>								
DATE	TIME	TO/STATE	MILES	AMOUNT	AIR	CAR RENTAL	M&I	LODGING	OTHER	TOTAL
2/7/2014		From Charleston		0.00						0.00
		To Mill Point	0	0.00	Personal Travel-No Mileage claim					0.00
2/8/2014		From Mill Point		0.00						0.00
		To Shephardstown	220	103.40			34.50			137.90
2/9/2014		Shephardstown		0.00			27.60			27.60
2/10/2014		Martinsburg & return	20	9.40			46.00			55.40
2/11/2014		Martinsburg & return	20	9.40			46.00			55.40
2/12/2014		To Martinsburg	10	4.70						4.70
2/12/2014		From Martinsburg		0.00			34.50			34.50
		To Charleston	310	145.70						145.70
				0.00						0.00
				0.00						0.00
				0.00						0.00
<b>TOTALS</b>			<b>580</b>	<b>272.60</b>	<b>0.00</b>	<b>0.00</b>	<b>188.60</b>	<b>0.00</b>	<b>0.00</b>	<b>461.20</b>

Less Cash Advance (WVFIMS ID#: \_\_\_\_\_ )

Amount Due To:  Employee  State  461.20

ACCOUNTING INFORMATION					
FUND	ORG	ACT	OBJ	SUB OBJ	AMOUNT

**Traveler must attach copies of direct billed receipts or invoices, i.e., airline, registration, lodging, etc.**

OTHER EXPENSES			EXPENSES DIRECT BILLED TO THE STATE		
DATE	ITEMS	AMOUNT	DATE	AND VENDOR	AMOUNT

DATE	AND VENDOR	AMOUNT
2/12/2014	Bavarian Inn	400.00

I certify that these costs incurred were in connection with my assigned duties, are true, accurate and actual, and do not reflect any costs or expenses reimbursed or to be reimbursed from any other source.

I certify that I have personally examined and approved the Travel Expense Account Settlement. The terms of expenses are reasonable and correspond to the assigned duties of the traveler. The terms of expense further meet all State of West Virginia Travel Regulations and are within the budget of this spending unit.

Robert B. Wilson      2/18/2014  
 Traveler's Signature      Date

Edward Teter      2-18-14  
 Approval Agency Head/Designee      Date

\_\_\_\_\_  
 Approval Supervisor/Agency Head      Date

8725