



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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October 2, 1989

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GOVERNOR

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Re: Brammer v. Tidewater Grill
ES-452-87A & REP-453-87A

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,

A handwritten signature in cursive script that reads "Norman Lindell".

Norman Lindell
Acting Executive Director

NL/mst

Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a non-resident of this state, the non-resident may be required to file a bond with the clerk of the supreme court.

In some cases the appeal may be filed in the Circuit Court of Kanawha County, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CHERYLANN E. BRAMMER,
Complainant,

v.

DOCKET NUMBERS: ES-452-87A &
REP-453-87A

TIDEWATER GRILL,
Respondent.

ORDER

On the 21st day of September, 1989, the West Virginia Human Rights Commission reviewed the proposed order and decision of the Hearing Examiner, Theodore R. Dues, Jr., in the above-captioned matter. After consideration of the aforementioned and the exceptions thereto, the Commission does hereby adopt said proposed order and decision, encompassing proposed findings of facts and conclusions of law, as its own, with the modifications and amendments set forth below.

In the subsection "Conclusions of Law" paragraph five, the language is changed to read: "5. The complainant is entitled to backpay in the amount of \$14,800, which includes interest." Further, paragraph six of the same subsection is changed to: "6. The complainant is awarded \$2,500.00 for mental pain and anguish."

It is hereby **ORDERED** that the Hearing Examiner's proposed order and decision, encompassing findings of fact and conclusions of law, be attached hereto and made a part of this final order except as amended by this final order.

By this final order, a copy of which shall be sent by certified mail to the parties, the parties are hereby notified that they have ten days to request a reconsideration of this final order and that they may seek judicial review.

Entered this 2nd day of October, 1989.

RESPECTFULLY SUBMITTED,

BY George Rutherford / n
CHAIR / VICE CHAIR
WV HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RECEIVED

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W.V. HUMAN RIGHTS COMM.

CHERYLANN E. BRAMMER,

Complainant,

v.

DOCKET NO: REP-453-87

TIDEWATER GRILL,

Respondent.

**EXAMINERS RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter matured for public hearing on the 11th day of December, 1987. The hearing was held in the John V. Ray Room at the Kanawha County Public Library, Charleston, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner. The presence of a Hearing Commissioner was waived by the parties.

The Complainant was represented by Dan Hardway, Esquire. The representative for the Respondent was Michael Givens and counsel for Respondent was Micheal J. DelGuidice.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these finding and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent

to the findings and conclusions, the same are rejected.

ISSUES

1. Was the Complainant terminated due to her efforts of attempting to resolve a problem with sexual harrassment of a female co-worker by one of Respondent's local managers assigned to the Charleston store.

2. Did the Complainant's conduct constitute conduct which is protected by the West Virginia Human Rights Act to the effect that if she had been fired for performing said conduct, was it in retaliation for said conduct.

3. If so, to what relief is the Complainant entitled.

FINDINGS OF FACT

1. The Complainant is a female.

2. The Complainant was employed with the Respondent from April 16, 1985 to January 7, 1987, at which time she was terminated.

3. During her tenure with the Respondent, the Complainant received a commendation for work initiative, a merit report for making a suggestion which improved the comfort to the guests of the store, and two promotions from waitress to shift supervisor, to ultimately dining room manager.

4. As dining room manager, the Complainant received \$250.00 per week salary.

5. At the time of her termination, the Complainant was paid \$280.00 per week. This increase in her salary was due to

merit raises.

6. The Complainant was not informed of any problems with her performance or the continuance of her job, prior to being discharged.

7. In November 1986, the Complainant had two incidents involving customers. One incident, was resolved by the Complainant's supervisor advising her that she conducted herself properly but she should approach the table of the customer to resolve the problem earlier, on the next occasion, that such an incident arises. The second incident, as did the first incident, involved customers and the food being served to them. The second incident involved chewing gum in a glass of iced tea. The Complainant followed Respondent's policy which was to take the food in question off of the customer's check. However, on this occasion, the guest felt more should have been done. Upon their leaving the store, the Complainant went after the guests to attempt to discuss the reasoning for her actions further.

8. During her tenure with the Respondent, the Complainant witnessed, and was a victim of, improper sexual advances by management of the local store.

9. In reference to a particular female co-employee, the Complainant sought assistance from upper management in charge of the Charleston store. As a result of an investigation by upper management, two of the managers of the Charleston store were fired. The first was fired on the 4th day of January, 1987. And the second manager was fired on the 6th day of the same month. As earlier mentioned, the Complainant's employment was terminated

by the Respondent on the 7th day of January, 1987.

10. The evaluations made by the Complainant's supervisors, during her tenure, were positive with exception of notations thereon for recommended areas of improvement regarding certain details of her job position.

11. The evaluations performed by the Respondent regarding the Complainant did not support the termination of her employment on January 7, 1987, inasmuch as, the Complainant was never reprimanded, warned, or otherwise put on notice that her work performance was anything other than satisfactory.

12. The only intervening factor which could reasonably have been involved in the Complainant's discharge, was the contention that the Complainant was spreading rumors. This pertained to the female co-employee and her problem with the local manager concerning sexual harrassment. It is the contention of management that the Complainant discussed these matters such that they became common knowledge amongst the employees.

13. The record does not reflect that the Complainant engaged in the discussion of the problems with sexual harrassment, which were being realized by her female co-worker, with anyone other than the management person earlier discussed herein.

14. During the Complainant's tenure, two of the managers of the local store were continually making sexual advances upon certain female employees.

15. Upper management, ultimately took action and

discharged those managers responsible for the improper sexual advances.

16. After her termination, the Complainant became employed by two other local restaurants in the Charleston area. Her first employment, after discharge, was on July 16, 1987.

17. The Complainant reasonably mitigated her damages.

18. The Complainant's interim earnings, to the date of hearing, were in the amount of \$3,286.33.

19. As per the \$15.00 increase provided to Respondent's employees every 4 months and the benefits lost as a result of her discharge, the Complainant lost benefits worth \$5,205.00. At the time the parties filed the proposed findings of fact and conclusions of law herein, the Complainant incurred backpay in the amount of \$31,231.94; to be increased by \$360.00 per week and a \$15.00 increase per week on every quarter of the year accruing and calculated from the date of January 25, 1988.

20. The Complainant suffered humiliation and mental anguish as a result of the Respondents's conduct towards her.

21. The Complainant incurred attorneys fees and costs in the prosecution of this action.

DISCUSSION

The Complainant introduced evidence to establish that: she is a female; that she was employed by the Respondent in various capacities, progressively from waitress, to dining room manager, during her tenure with the Respondent; that the Complainant was a victim of sexual harrassment by local

management; that she performed her work satisfactorily; that during her tenure she engaged in assisting a female co-employee with exposing to upper management that the employee was being sexually harrassed by a certain manager assigned to the Charleston store; and that she was discharged for reasons she believed to be related to the fact that she exposed this improper conduct.

By the introduction of this evidence, the Complainant established a prima facie case of sexual harrassment and that her employment relationship with the Respondent was adversely affected by her efforts to abate the same through assistance by upper management. It is the opinion of the Examiner, that the Complainant's conduct in attempting to secure relief from upper management, from what is clearly unlawful sexual advances being made by management towards female employees, (including the Complainant) was protected conduct within the meaning of the West Virginia Human Rights Act and as applied in the case of Frank's Shoe Store v. West Virginia Human Rights Commission and Kathy Varney, (West Virginia Supreme Court of Appeals, Case Number 16913, decided July 10, 1987).

The Respondent introduced evidence to indicate that the Complainant was discharged, not for having exposed what was otherwise conceded as a problem which permeates the restaurant industry, but rather was discharged as a result of her poor job performance and the spreading of rumors within the store; which apparently was perceived as counterproductive to moral and productivity within the store. However, the credible and

overwhelming evidence in this case does not justify applying much weight to that explanation. Accordingly, it is the Examiner's determination that the Respondent failed to articulate a credible legitimate nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981); Shepherdstown Volunteer Fire Department v. State of West Virginia Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983).

Accordingly, it is the specific finding by the Examiner that the Respondent unlawfully discharged the Complainant, as a result of her efforts to abate the continuing improper sexual advances being made by certain managers of the Charleston store. Additionally, the Examiner specifically finds Respondent's articulated reasons to support the Complainant's discharge to be pretext for unlawful retaliatory action against the Complainant for engaging in activity which is protected by the West Virginia Human Rights Act. Frank's Shoe Store, supra.

The Complainant obtained alternative employment on or about July 16, 1987, with a restaurant in Charleston West Virginia. Additionally, the Complainant obtained employment with another restaurant in Charleston which gives rise to the conclusion by this Examiner that she had reasonably mitigated her damages in this case.

As a result of the Respondent's conduct, the Complainant suffered emotional distress and humiliation and accordingly will be provided reasonable damages for the same. In addition to incidental damages, the Complainant realized an economic loss to

the effect that her interim earnings from subsequent employment did not exceed the total salary and benefits she would have received had she not been unlawfully discharged by the Respondent. Accordingly, compensatory damages will also be provided to the Complainant.

The Complainant felt it necessary to prosecute this litigation with the assistance of an attorney hired at here expense. The Examiner finds that the evidence and the theory upon which the case was litigated, required the assistance of counsel learned in civil rights litigation, and accordingly will provide for reasonable attorneys fees on behalf of the Complainant to her counsel. This consideration will include reimbursement for any reasonably incurred expenses in addition to the fees for her counsel.

Lastly, the evidence of record indicates that the parties agree that sexual harrassment is a problem innate in the restaurant industry. However, acknowledgement of this situation is no resolution. Due to the absence in the record of the Respondent's implemenation or referral of any of its management employees for specific training in the prevention and avoidance of situations giving rise to legitimate sexual harrassment claims by its employees, the Examiner will provide and request the Commission to direct that the Respondent, within a prescribed time, have each of its West Virginia managers employed on the date of the Commissions's final Order to participate in a sexual harrassment seminar accredited by either the Equal Employment Opportunity Commission or the West Virginia Human Rights Commission.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties herein.

2. The Complainant established a prima facie case of sexual harrassment and retaliatory action taken against her by the Respondent.

3. That the Respondent failed to articulate a credible legitimate nondiscriminatory reason for its discharge of the Complainant.

4. Accordingly, the Respondent is guilty of taking retaliatory actions against the Complainant, in its decision to discharge her, primarily for her efforts to abate the chronic problem with sexual harrassment of a female co-employee at the Charleston store. Additionally, the Complainant, herself, was a victim of sexual harrassment during her tenure, and the exposure of this, as well, was considered to be a factor in her discharge.

5. The Complainant is entitled to backpay in an amount equal to \$31,231.94, as of January 25, 1988. This amount is to be increased by \$360.00 per week for the first quarter and an increase of 15.00 per week for each subsequent fiscal quarter which accrues to the date of her reinstatement. In addition 15% shall be added to the weekly salary amount for consideration for fringe benefits that the Complainant would otherwise be receiving. Additionally, the Complainant shall receive 10% per annum interest on the amounts provided in this paragraph until full compliance with this Order has been received.

6. The Complainant is awarded the amount of \$15,000.00

as incidental damages for mental pain and anguish.

7. The Complainant is awarded attorneys fees on a total amount of hours expended of 48.40 at the rate of \$125.00 per hour, or \$6,050.00. Additionally, the Complainant is awarded reimbursement for expenses of \$185.03; being more particularly, \$107.00 for service of process; \$42.76 for investigative work and \$35.27 for the transcript of a deposition taken in relation to and during, the pendency of this action.

PROPOSED ORDER

Accordingly, the Examiner does hereby recommend to the Commission that judgement be awarded for the Complainant and that relief be provided as follows:

1. That a cease and desist Order be issued against the Respondent.

2. That the Respondent engage or implement, within a time prescribed by the Commission, an accredited seminar or program on preventing sexual harrassment and compromising sexual situations within employees for its West Virginia managers employed on the date that the Commission issues its final Order in this matter.

3. That further, the Commission, or its designated agent, monitor the compliance with the same, until it is reasonably satisfied, that the conduct of the Respondent is satisfactory in this regard.

4. That the Complainant be awarded backpay and additions to the same, as is heretofore specifically provided

under the Conclusions of Law herein.

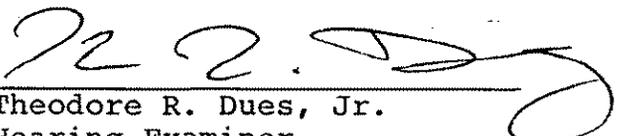
5. That the Complainant be awarded attorneys fees payable to her counsel in an amount as specifically provided under the Conclusions of Law herein.

6. That the Complainant be reimbursed her costs incurred in relation to, and during the pendency of this action, as specifically provided under the Conclusions of Law herein.

7. That the Complainant receive incidental damages for mental pain and anguish as is specifically provided under the Conclusions of Law herein.

DATED: September 15, 1988

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner