



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Cecil H. Underwood
Governor

Herman H. Jones
Executive Director

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

August 26, 1997

Hallie Barker
Rt. 1, Box 128A
Given, WV 25245

Bell Atlantic of WV, Inc.
1500 MacCorkle Ave. S.E.
Charleston, WV 25314

Paul R. Sheridan
Senior Asst. Attorney General
Civil Rights Division
PO Box 1789
Charleston, WV 25326-1789

Erin Elizabeth Magee, Esq.
Jackson & Kelly
PO Box 553
Charleston, WV 25322

Re: Barker v. Bell Atlantic-West Virginia, Inc.
ES-152-93

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, 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 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 a 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 a 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 judge on remand.

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

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

10.8.2. Within the commission's statutory jurisdiction or authority;

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

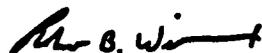
10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. 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 a 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 the executive director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Herman H. Jones, Executive Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

HALLIE BARKER,

Complainant,

v.

DOCKET NUMBER(S): ES-152-93

BELL ATLANTIC-WEST VIRGINIA, INC.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on January 16, 1997, in Kanawha County, at the Office of the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Hallie Barker, appeared in person and by counsel for the West Virginia Human Rights Commission, Paul R. Sheridan, Senior Assistant Attorney General, for the West Virginia Office of the Attorney General, Civil Rights Division. The respondent, Bell Atlantic of West Virginia, Inc. appeared by its representative, James "Buzz" Jenkins, Jr., and by counsel Erin E. Magee, with the firm of Jackson & Kelly.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. Complainant, Hallie Barker, is a member of a protected class under the West Virginia Human Rights Act, in that she is a woman. Tr. I p. 7.

2. Respondent, Bell Atlantic-West Virginia, is a person and an employer as those terms are defined under West Virginia Code §5-11-3(a) and 5-11-3(d), respectively. Tr. I p. 7.

3. The complainant timely filed a complaint with the West Virginia Human Rights Commission; alleging that she had been

discriminated against due to her sex, in the failure to hire her for a position as cable splicer with respondent on or about June 10, 1992; and, that management and other employees had harassed her due to her filing a union grievance, and, that supervisory personnel stated there would be trouble if she pursued discrimination charges. Complaint.

4. Complainant graduated from high school in 1978. She attended the University of Charleston, and received an associates degree in science and technology from Thomas Edison State College, where she received training in aviation, with preliminary work in physics, math and science. Tr. I p. 16.

5. Complainant earned her pilot's license in 1986 and currently holds a commercial rating, a multi-engine rating, and instrument rating and an instructor's rating. She is certified to fly jet aircraft and has worked as a commercial pilot. Tr. I p. 18.

6. Complainant first went to work for respondent in 1979 as an operator, a position she held for eleven years. The complainant took a downgrade to a position as assistant technician in August 1990. This was done to move into the technical side of the phone business, with the hope and expectation that this would permit her to later upgrade to a better job, such as cable splicer. The operator duties were totally unrelated to duties in the technical areas. Tr. I pp. 19-20, and 54-55.

7. As an assistant technician, complainant worked as part of a team of technicians under the supervision of James "Buzz" Jenkins. The team wired buildings, not only for telephone but for audio, video, computer networks and other systems. The cable installed by this crew included in addition to phone wire, coaxial cable and fiber optic

lines. The team would run the wires to each work station, terminate them with the appropriate jack in order to activate them, and then tie them into the system at connection points, known as "frames". Tr. I pp. 20-22, 63-64 and 102.

8. The team consisted of approximately six permanent members. This included Greg Barker, complainant, Joe Mosier, Rick Mosier, Ron Hahn, and perhaps others. Complainant was the only female permanent member of the crew. In addition, there were temporary members of the crew, who were occasionally drawn from operator services on a short term, as needed basis. Temporary crew members assigned from operator services, included Tim Fisher, Carol Borrows, Terrell Evans, and Dave Paul. Tr. I pp. 22-23, 51-52, 63-64, 89, 100-102, 121, 124-125 and 136.

9. Complainant was hired as an assistant technician in August 1990, by the respondent; while Joe Mosier was hired as an assistant technician later in September 1990, by the respondent. Tr. I p. 54; Respondent's Exhibit No. 1.

10. Joe Mosier is currently employed by respondent as a cable splicer. He was promoted to the position of cable splicer on June 7, 1992, receiving the promotion which complainant was denied. It is this denial of the cable splicer promotion on June 7, 1992, which is the basis of complainant's failure to promote sex based discrimination complaint with the West Virginia Human Rights Commission. Tr. I p. 6; Tr. II p. 31.

11. The MAP system is the system by which classified employees can seek and gain promotion. The MAP process as it existed in 1991 and 1992 was to be initiated by the associate or bargaining unit

employee, who, working with his or her supervisor, could determine an appropriate career path for himself or herself. The associate would fill out the application, indicating up to four positions sought, and then approach the supervisor so that the supervisor could fill out the supervisor's notes which must accompany the application. Those supervisor's notes would contain additional factors to be considered. The supervisor also documents the candidate's performance rating for the current year. The application with the supervisor's notes is then forwarded to the MAP office, which Sandra Miller administers. Tr. I pp. 36-37, and Tr. II pp. 11-13.

12. Joe Mosier's MAP application was submitted September 3, 1991. Mr. Mosier's copy of the MAP application offered into evidence does not contain the supervisor's notes. Mr. Mosier's application reflected only his prior work as a systems technician for Bell Atlantic-Com. Mr. Mosier's application indicated that one of the position's sought was that of cable technician. Respondent's Exhibit No. 6.

13. Complainant's MAP application was submitted on September 9, 1991. Her application reflected an associate's degree in science and technology, and work in the team she worked for since 1989. Complainant's MAP application contained the supervisor's notes as offered into evidence. Complainant's application also indicated that she sought the position of cable splicer. Respondent's Exhibit No. 7.

14. The failure of respondent to produce the supervisor's notes for Mr. Mosier was the result of Ms. Miller's allegedly sending all these documents to the respondent's Compliance Office in Washington, D.C., which allegedly lost them in the process. The candidate list

for the job vacancy also was allegedly sent to the Compliance Office of respondent, and was never provided in respondent's discovery responses as prepared by the respondent's initial legal counsel in this matter. Tr. II pp. 81-82, and 139.

15. Upon receipt of a MAP application, Ms. Miller rates the candidates for each of the positions sought, either as "basically qualified", "qualified with additional factors", or "qualified pending testing", and this code is entered into the data base. Ms. Miller considers a number of factors from the application and supervisor's notes. The relevant factors include: (a) current or previous job title, (b) related training, education and experience, (c) performance reviews, (d) "additional factors", (e) the cable splicer's test, and, (f) seniority. Tr. II pp. 14-15.

16. Ms. Miller rated the candidates with Q codes. The higher rated Q code (the lower the number), would invariably be selected over a lower rated. The statements that Ms. Miller made to the effect that directly related experience could be considered in assigning the Q code is not credible. Ms. Miller specifically testified that the difference between Mr. Mosier's Q code 06 and the complainant's Q code 07 was the outstanding supervisor evaluation of Mr. Mosier versus the entirely satisfactory evaluation of complainant, by their supervisor. Tr. II pp. 19-20, 22, 125-127 and 144-145.

17. Ms. Miller states that Mr. Mosier was better qualified than complainant because of his relevant outside experience as a service technician with Bell Atlantic-Com, his in-house training courses and his outstanding rating. Tr. II p. 47.

18. Ms. Miller states that she did not consider complainant's associate's degree in science and technology because it was not relevant; and she didn't consider complainant's in-house electricity course because no courses were listed on her application. Ms. Miller states that she thinks that she credited Mr. Mosier for his in-house training courses, but that she can't be sure since the supervisor's notes are gone. Mr. Mosier never listed his in-house courses on his application however. Tr. II pp. 49, 84, 86 and 89-90.

19. The undersigned concludes as a matter of fact, that Ms. Miller's testimony is not credible regarding what was considered, as the fact of the matter was that Mr. Mosier had the better Q code and there was no reason for her to have looked at any of these other factors. Ms. Miller's testimony regarding what was considered is far too specific in details compared to her complete failure to remember the specifics and general evasiveness regarding her conversations with the complainant relative to complainant's discussions concerning her allegations of sex based disparate treatment by her supervisor Buzz Jenkins. The absence of the supervisor's notes or other documents with his application file mitigates against any purported explanation for her consideration of factors related to Mr. Mosier's outside experience or in-house training, while discounting any adders for complainant's in-house training, pilot experience and science and technology associate's degree.

20. The undersigned finds as a matter of fact, that respondent's decision to promote Mr. Mosier was based in part upon the sex of the complainant, in that her evaluation and that of Mr. Mosier, by Mr. Jenkins, were tainted by a gender bias of Mr. Jenkins' in making what

are essentially subjective ratings of the two candidates. The undersigned finds as a matter of fact that the Commission has proven by direct and circumstantial evidence that Mr. Jenkins was biased against women working for him and that that bias was also responsible for his subverting her opportunity to take the cable splicer's test until the position had been given to Mr. Mosier.

21. Complainant testified credibly, that Mr. Jenkins treated her differently from the male permanent members of his crew. This disparate treatment consisted of assigning complainant to perform less complicated and more menial mundane job duties associated with wiring individual stations for jacks; while never allocating her responsibility for wiring the frames. Furthermore, she was denied tools that were supplied to all the male members of the crew. Mr. Jenkins also refused to appoint her as the TA (a temporary in charge of the project in his absence, who would receive bonus pay), when he had allowed all the male permanent member of the crew to serve in that capacity. Furthermore, Mr. Jenkins, prevented complainant from taking her cable splicer's tests on a number of occasions, until after Mr. Mosier had been promoted to the cable splicer position. Tr. I pp. 26-36, and 14-42.

22. Specifically, the complainant was omitted from being given power screw drivers and tool boxes which were handed out to other permanent members of the crew. She eventually went to Mr. Jenkins' supervisor, Bill Davis over her not being provided a fiber glass ladder and the Makita rechargeable screwdriver. Mr. Davis purchased these items for her. She was ultimately given the ladder, but Mr. Jenkins deliberately gave the rechargeable screwdriver to someone

else, because he stated that he was upset with her having gone over his head. Mr. Jenkins testimony that he did not ever deny complainant the tools necessary to do her job was not credible in the least. Mr. Jenkins at first denied that he had ever withheld the tool box, or rechargeable screwdriver; than went on to qualify his responses by saying that tools went with trucks not people (a contention belied by the fact the items were dispensed to individual crew members), that complainant asked for tools that were not necessary (a contention belied by the fact that the male permanent crew members were given the tools complainant was not), and ultimately admitted that complainant had requested a tool box, but that complainant eventually got one, although he could not say when she was finally given the tool box. Tr. I pp. 26-31, 118-119, and 133-135.

23. Mr. Jenkins explained that TA's are put in charge of specific projects in the absence of the regular supervisor from the site, for which the TA received additional pay and gained experience dealing with customers and being in charge of getting the job done in the supervisor's absence. Although complainant specifically requested this opportunity, she was never given that opportunity. Mr. Jenkins testified that he randomly distributed this assignment at first, but later gave it exclusively to Mr. Mosier when he became more comfortable with him. Mr. Jenkins admits that he does not think he ever made complainant TA. The credible evidence is that all the male permanent members of the crew had served as TA at some point. To the extent Mr. Mosier testified that complainant had been TA his testimony is not credible in the least, as it is directly contradicted by that of Mr. Jenkins on this point and is flat out contradictory regarding

his contention that complainant had never been denied tools. Tr. I pp. 34-36, 120-123, 145-147, and 199.

24. On one occasion when temporary assigned members of the crew were subject to being sent back to their regular assignment for lack of work, it was the woman, Carol Burrows who was sent back; while the other male temporary assignments remained on the job. Tr. I pp. 148-149.

25. The most extreme evidence of Mr. Jenkins gender bias in terms of the promotion process itself, is his refusal to allow the complainant to take the cable splicer's test until after Mr. Mosier was offered the position of cable splicer. Mr. Jenkins admits that he cancelled complainant's testing at times, then claims it was only twice. Although the objective evidence definitely identifies two such occasions, it is far more likely that this happened three or four times as the complainant testified. His explanation that he needed her to do work at Morgantown and could not allow her to go is deemed incredible. Mr. Mosier's testimony was that he was working in Morgantown and Mr. Jenkins allowed him to take off Thursday and take the test on Friday. Should Mr. Mosier have been so much better a worker, etc. it is not plausible that he was not needed at the site but on other occasions, complainant was indispensable. Tr. I pp. 41-42, 115-116, 143, and 207.

26. The evaluations of complainant and Mr. Mosier were performed in February 1991 and covered the period of 3 months from September through December 1990 for Mr. Mosier and the period of 4 months from August through December 1990 for the complainant. Mr. Jenkins rated Mr. Mosier's performance as outstanding overall and rated

complainant's performance entirely satisfactory. Respondent's Exhibit No. 1 and Complainant's Exhibit No. 3.

27. The subjectivity of these evaluations is self evident, as there are no objective measurements involved in the performance rating. This fact is best demonstrated by the fact that Mr. Jenkins would score both complainant and Mr. Mosier as outstanding in several categories under one heading; yet then rank the overall under that heading as entirely satisfactory. In giving these ratings to the respective candidates, it is noted that certain discrepancies appear in these ratings that call their validity into serious question. For instance, Mr. Jenkins stated repeatedly that the main thing that made Mr. Mosier so much superior to complainant was his attitude, yet he was rated only as entirely satisfactory in that category in the written evaluation. Mr. Mosier was reported to have missed no time from work for the period and was scored outstanding on his evaluation, complainant had missed 6 hours due to illness and did not receive an outstanding in this category. Although Mr. Jenkins specifically noted that his evaluations were based on his objective observations of what Mr. Mosier did when he was gone and that he observed him hard at work upon his return, such testimony is not deemed credible. It is not deemed credible based upon the other evidence of his gender bias as detailed above; and because the evaluations themselves are hopelessly tainted by this demonstrated bias. Tr. I pp. 141-142, 154, and 180.

28. The testimony of Ms. Miller that even absent the consideration of Mr. Jenkins evaluations (which were admitted by her to have been the difference in the Q code in favor of Mr. Mosier), that Mr. Mosier would be the superior candidate based upon his

relevant outside work experience and in-house training courses, is not credible or probative. This finding is based upon the fact that Ms. Miller was never given the course specifics regarding complainant's associate's degree in science and technology and therefore, could not speak to the relevancy of that course work, which she admits she didn't consider. Further, Ms. Miller did not consider complainant's in-house training at all. Since the only difference between her alleged source of information regarding Mr. Mosier's in-house training was the missing supervisor's notes, the fact that complainant's in-house training was not credited by Ms. Miller was the direct result of Mr. Jenkins' sex based discrimination in not providing these details for Ms. Miller's consideration with respect to the complainant. Thus it is pure speculation on the part of Ms. Miller that Mr. Mosier would compare more favorably than complainant in terms of additional factors, when she does not even know what those factors might have been in regards to the complainant.

29. The Commission has proven that gender bias played a role in the decision to promote Mr. Mosier to cable splicer over complainant, in that the better Q code rating was the result of a subjective evaluation by a biased supervisor, and in that she was prevented from becoming qualified by taking the required cable splicer's test until after Mr. Mosier was promoted to that position.

30. Respondent has failed to submit sufficient evidence to conclude that Mr. Mosier would have been selected in the absence of the gender discrimination that occurred in the promotion of Mr. Mosier.

31. The complainant has been denied promotion as a result of discrimination based upon her gender, and is entitled to back pay in the amount of \$57,139.72 plus interest thereon. Complainant's Exhibit No. 1.

32. The complainant testified credibly, that after she filed her grievance over not getting the promotion, Mr. Jenkins threatened that she would regret it. The next day her tires were slashed in the parking lot. She was picked at after this, citing specifically that Mr. Jenkins suddenly decided to enforce a no sticker on hard hat rule selectively against her, changed the policy to prohibit free calls home to home number only, which impacted her exclusively as she did not have anyone at home to talk to and instead used that privilege to take care of business at home. Complainant further testified credibly, that Mr. Jenkins generally assigned the worst tasks to her and generally harassed her to the point that she lost 20 pounds in a two week period. Tr. I pp. 48-50.

33. The undersigned finds that the respondent, through its agent, complainant's supervisor, Mr. Jenkins, did engage in retaliatory conduct against the complainant as a result of her pursuing her grievance over the failure to promote.

34. Discriminatory conduct of Mr. Jenkins, caused complainant to become upset and nervous to the point of nausea, and generally depressed her. Thus the undersigned finds that complainant suffered humiliation, embarrassment, emotional distress and loss of personal dignity, both when she was subjected to the unlawful discriminatory failure to promote and when she was subjected to the unlawful

discriminatory retaliatory conduct after filing a grievance over the failure to promote. Tr. I pp. 75-76.

B.

DISCUSSION

To make a prima facie case of employment discrimination under the West Virginia Human Rights Act, a complainant must offer proof that:

1. The complainant is a member of a protected class;
2. the employer made an adverse decision concerning the complainant; and,
3. but for the complainant's protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

The "but for" test of discriminatory motive making up the third prong of the Conaway test is merely a threshold inquiry, requiring only that a complainant show an inference of discrimination. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995).

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 Corporation 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 Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 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 then 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 employment decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real motive; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 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, supra. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Barefoot, supra. Where pretext is shown discrimination may be inferred, Barefoot, supra, though discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. ___, 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, supra. "Mixed motive" applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the "mixed motive" analysis, the complainant need only show that complainant's gender played some role in the decision, and the employer can avoid liability only by proving that it

would have made the same decision even if it had not considered the complainant's gender. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

The complainant is a member of a protected class in that she is female. Respondent made an adverse employment decision when it promoted Mr. Mosier to cable splicer effective June 7, 1992, and did not select complainant for that position opening. Since both the successful male applicant and the complainant were equally qualified for that position and the member of the non-protected class was selected over complainant; and because the Commission has established evidence that indicates that the evaluations of supervisor, Mr. Jenkins were tainted by his demonstrated bias against women in his work crew; the Commission and complainant have established a prima facie case of sex discrimination under the West Virginia Human Rights Act.

The respondent has articulated a legitimate non discriminatory basis for its decision to promote the male applicant over the complainant, that being the superior qualifications and performance of Mr. Mosier. The undersigned concludes that the preponderance of the evidence indicates that unlawful gender based discrimination played a major role in the selection of Mr. Mosier over the complainant. The evaluations performed by Mr. Jenkins were the difference between Mr. Mosier's Q code of 06 and complainant's Q code of 07. There is little doubt that Ms. Miller made her selection of the successful candidate at that point in time without reference to additional factors such as the relevant outside work experience and in-house training courses, which factors did not go into the Q code given the respective

candidates. As Mr. Jenkins' treatment of complainant in particular and women crew members in general, gives rise to a clear pattern of sex based discrimination; the undersigned concludes that complainant's gender played a substantial role in the adverse employment decision. The undersigned further concludes that the reasons testified to regarding the relevant outside work experience and course work making Mr. Mosier the better candidate, were pretextual in that the reasons advanced for not considering complainant's outside work experience, education and in-house training courses, were not valid, since the failure to consider these other factors beyond the Q code were the result of Mr. Jenkins' failure to include these items on complainant's supervisor's notes, while evidently supplying them for Mr. Mosier's application.

Although it is entirely possible that Mr. Mosier's three years additional relevant outside work as a system technician, would have made him a superior candidate; it is not possible to conclude that the respondent has demonstrated that this decision would have been made regardless of Mr. Jenkins' participation in the promotion process. The testimony by Ms. Miller to that effect, is based upon her failure to identify those additional factors which would be relevant within complainant's past work experience, associates degree in science and technology and her in-house training course work. The reasons given for this failure to identify relevant factors, if believed, is the direct result of Mr. Jenkins' respective completeness or incompleteness of the documentation of these other factors, in the promotion process. It is just as likely that the missing supervisor's notes did not convey any additional factors, and that Ms. Miller

simply based the decision upon the Q codes that resulted from Mr. Jenkins' subjective evaluations of the respective candidates. Under such circumstances, when Ms. Miller has no idea what the course work was for complainant in the associates degree program, it is pure speculation and ex post facto rationalization on the part of Ms. Miller to assert that Mr. Mosier would have been selected as best qualified regardless of the tainted supervisor's evaluations. Thus any hypothetical opinion regarding whether Mr. Mosier would still have been the top qualified candidate is based upon incomplete information, which information remained incomplete as a result of Mr. Jenkins' bias against complainant in not supplying such details for complainant, while providing additional detail with Mr. Mosier's application. As a result of the unlawful discriminatory failure to promote the complainant to the cable splicer position, the complainant is entitled to back pay in the amount of \$57,139.72, and interest thereon.

The undersigned concludes that the complainant and Commission have proven by a preponderance of the evidence, that the respondent, through its supervisor, Mr. Jenkins, retaliated against the complainant as a direct result of her having filed a grievance over the failure to promote her to the cable splicer position in June 1992. Such behavior as additional harassment of the the complainant generally for going over his head, and filing the grievance over the events leading to the selection of Mr. Mosier as cable splicer; were specifically stated to have been in retaliation by Mr. Jenkins, based upon the credible testimony of the complainant.

The complainant was upset and nervous to the point of nausea as a result of the discriminatory conduct of Mr. Jenkins, and such conduct

resulted in her becoming depressed as well. Thus the complainant has suffered humiliation, embarrassment, emotional distress and personal dignity both as a result of the unlawful discriminatory behavior of respondent in the process of applying for the promotion to the cable splicer position in June 1992; and as a result of Mr. Jenkins' subsequent retaliatory harassment of complainant after she filed her grievance for failure to promote.

The complainant is entitled to incidental damages in the amount of \$3,277.45, for each of the two separate claims of unlawful sex discrimination; both, for the failure to hire for the position of cable splicer, and, for the subsequent retaliation and harassment as a result of the grievance filed over that failure to promote. Pearlman Realty Agency v. West Virginia Human Rights Commission, 239 S.E.2d 145 (W.Va. 1977); Bishop Coal Company v. Salyers, 380 S.E.2d 238 (W.Va. 1989). Bishop Coal, supra, provided for a cap on incidental damages awarded by the Commission at \$2,500.00 to be adjusted from time to time to conform to the consumer price index.

C.

CONCLUSIONS OF LAW

1. The complainant, Hallie Barker, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, W.Va. Code §5-11-10.

2. The respondent, Bell-Atlantic-West Virginia, Inc., is an employer as defined by W.Va. Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

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

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

5. Complainant has established a prima facie case of discrimination.

6. The complainant and Commission have established by a preponderance of the evidence that unlawful sex discrimination played a substantial role in the decision to promote a male instead of complainant to the position as cable splicer; while the respondent has not demonstrated by the preponderance of the evidence that the selection of the male as the superior qualified candidate would have been the outcome absent such unlawful sex discrimination in the promotion process.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of \$57,139.72, plus prejudgment interest of \$26,966.59 calculated through the end of September 1997, plus statutory interest thereafter.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$6,554.90 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity, suffered as a result of the failure to promote and subsequent retaliatory harassment of complainant for grieving that failure to promote.

9. As a result of the unlawful discriminatory action of the respondent, the Commission is entitled to an award of reasonable costs in the aggregate amount of \$558.00.

D.

RELIEF AND ORDER

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

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant \$84,106.29.

3. Within 31 days of receipt of this decision, the respondent shall pay to the Commission costs in the aggregate amount of \$558.00.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$6,554.90 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

5. The respondent shall pay ten percent per annum interest on all monetary relief.

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

It is so ORDERED.

Entered this 26th day of August, 1997.

WV HUMAN RIGHTS COMMISSION

BY: Robert B. Wilson
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

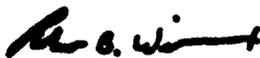
I, **Robert B. Wilson**, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 26th day of August, 1997, to the following:

Hallie Barker
Rt. 1, Box 128A
Given, WV 25245

Bell Atlantic of West Virginia, Inc.
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Charleston, WV 25314

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Charleston, WV 25322



ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE