



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Herman H. Jones
Executive Director

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

June 18, 1997

Mary K. Burdette
2500 Brooklyn Dr.
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SW Resources, Inc.
1007 Mary St.
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Parkersburg, WV 26101

Re: Burdette v. SW Resources, Inc.
EH-258-95

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;

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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 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 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
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MARY K. BURDETTE,

Complainant,

v.

DOCKET NUMBER(S): EH-258-95

SW RESOURCES, INC.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on April 3, 1996, in Wood County, at the Municipal Building in Parkersburg, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Mary K. Burdette, appeared in person and by counsel, Walt Auvil with the firm Pyles & Auvil. The respondent, SW Resources, Inc., appeared by its representative, Craig Greening, Director of Operations for SW Resources, Inc. and by counsel, Robert J. Kent and Beth Harter, with the firm Bowles, Rice, McDavid, Graff & Love.

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. The respondent, SW Resources, Inc. is a private non-profit, community rehabilitation program whose mission is to provide vocational rehabilitation services to persons with disabilities. Tr. p. 795.

2. The respondent is a "person" and an "employer" as those terms are defined by W. Va. Code §§ 5-11-3(a) and 5-11-3(d), respectively. Respondent had about 35 staff and about 150 clients engaged in various work activities around the time when the alleged discriminatory actions took place. Tr. p. 155.

3. The complainant, Mary K. Burdette suffers from Multiple Sclerosis ("MS") and has suffered from that condition at all times pertinent to this complaint. By stipulation, Tr. p. 12.

4. Complainant is an otherwise qualified individual who suffers a disability which substantially limits one or more of her life activities, Multiple Sclerosis. Tr. pp. 640-641.

5. Complainant was a client of the West Virginia Division of Rehabilitation Services for purposes of funding her college education. Tr. pp. 642-643.

6. Cynthia Woody, who heads the Parkersburg Branch Office of the West Virginia Division of Rehabilitation Services, and who is a long time participant on both the respondent's Board of Directors and Rehabilitation Services Committee, had a conversation with complainant during which she advised her not to disclose her condition of suffering from Multiple Sclerosis to the respondent when applying for a position with respondent because traditionally she would be hired as a production employee for Work Adjustment Training "WAT" and would not be hired as a full-time staff employee with benefits. Tr. pp. 642-644; and Evidentiary Deposition of Cynthia Woody, Joint Exhibit No. 1 pp. 39, 42 and 43.

7. Complainant was offered and accepted a full-time position with benefits with the respondent. She became an employee of respondent on August 16, 1993. Tr. pp. 647 and 648; p. 1156; and Complainant's Exhibit No. 27-A.

8. Complainant was hired as a BRC Clerk/Case Management Division. Her job duties were set forth in Complainant's Exhibit No. 9, consisting primarily of Medicaid billing, roster, quality assurance

for records; producing monthly BRC reports, including case management assignment sheet, Medicaid roster, closures/referrals, S & P due/overdue; etc. Tr. p. 1155; Complainant's Exhibit No. 9.

9. Complainant started out in basically a secretarial role, but under Sandy Butcher and Bill Dearien, complainant became involved in extra projects working for Sammy Burdette (no relation to complainant), on the Auction Committee. Complainant also worked for Mr. Dearien on the West Virginia Assistive Technology Systems "WVATS" projects and for Ms. Butcher on the West Virginia University Parkersburg job fair project. These were later written into her job goals. Tr. pp. 648 and 649.

10. Complainant was initially supervised by Mary Beth Ness, the Office Manager for respondent, SW resources, Inc. Ms. Ness had originally interviewed complainant, who had volunteered the information that she had Multiple Sclerosis at a second interview for the BRC Clerk position for which she was hired. Complainant later reported to the BRC manager Sandy Butcher. Tr. pp. 1155, 1156 and 1336.

11. Sandra K. Butcher was the Supervisor of Case Management Services; and it was decided that since complainant performed more work for the BRC Division than what she actually performed for the Office Manager, that it would be better for Ms. Butcher to be her Supervisor. Tr. pp. 1217 and 1336.

12. During complainant's employment with the respondent, she received two job reviews from Ms. Butcher and signed by the respondent's president Mr. Dearien, which were both very good. Those reviews contain comments that complainant does well getting out

reports and billing in a timely fashion; and that she does Medicaid billing in a timely fashion and sees that case management spreadsheets are updated in the two respective reviews. Her work performance was commendable, noting that she is very willing to accept extra duties as they may arise. Complainant received a raise in connection with her February 28, 1994 performance review. The second review was performed on September 15, 1994. She was never informed at any time prior to her November 10, 1994 meeting with Ms. Burdette and Ms. Carroll, that her performance was in any way deficient. Complainant was never disciplined, cautioned or warned about spending too much time on extra duties outside her main job duties. Tr. pp. 650, 652-654 and 657; Complainant's Exhibits Nos. 10 and 11.

13. Ms. Ness indicated that a second BRC Clerk was hired on August 17, 1993, that person being Stacy Hopkins. Stacy Hopkins performed duties on the placement side; including spreadsheets for job coaching and placement programs, including typing letters for the S & P meetings. Tr. pp. 1159 and 1160.

14. Ms. Hopkins later transferred to an accounts receivables position; and it is this vacancy which was filled by Danette Harshbarger as the other BRC Clerk hired on September 28, 1994. Tr. pp. 1127, 1134 and 1338.

15. This position, which was filled as the BRC Clerk/Training and Placement Services, was primarily responsible for maintenance of client case files, and tracking and compiling information needed for reports and billings for training and placement services. Complainant's Exhibit No. 12.

16. Ann Carroll, was the Supervisor of Training and Placement Services for the respondent from June 1993 until March 1995. Tr. p. 1112.

17. From the time that Mr. Dearien, resigned as President/CEO for respondent in August, 1994 until a new President/CEO was named to replace him in January 1995, the respondent's Board of Directors appointed a management team of several mid level managers to oversee the daily operations of the respondent and act in a decision making capacity in the absence of the CEO. This management team consisted of Ann Carroll, Sandy Butcher, Craig Greening (Director of Operations), Sammy Burdette (Director of Resource Development) and Mary Ness. Tr. pp. 1114-1115.

18. Beginning in August and September of 1994, the management team was aware of financial difficulties, that required staff reductions, as a Mr. Venable had already been let go. The management team again met with the Board of Director's Executive Committee and were informed that further staff reductions would be necessary on November 1, 1994; and basically left the decision as to what positions to cut up to the management team. The next day November 2, 1994, the management team met and discussed possibilities and basically agreed that the only place that could be cut was the BRC Clerk positions which it was felt could be handled by one and a half instead of two full time clerks. Since Ms. Carroll supervised Ms. Harshbarger and Ms. Butcher supervised the complainant, the management team left it to the two of them to make a recommendation of what to do following a review of the two positions. Tr. pp. 272, 1116 and 1117.

19. The management team was aware of the financial straits that respondent was in at the time that Danette Harshbarger was hired as a BRC Clerk on September 28, 1994. Ms. Butcher indicated that Ms. Hopkins left her BRC position sometime prior to Ms. Butcher taking maternity leave in August 1994 and Ms. Butcher did not return from maternity leave until November 1, 1994 although she did come into the office intermittently from August 20, 1994 until September 22, 1994. Tr. pp. 284, 285, 1491 and 1493-1495.

20. Ms. Butcher was told that complainant had Multiple Sclerosis when complainant was discussing a doctors appointment with Ms. Butcher. Although complainant mistakenly identifies her hire date as August 16, 1992, when in fact it was 1993; nevertheless her testimony is credible that this conversation took place approximately one year after she was hired; which would mean that Ms. Butcher became aware of her Multiple Sclerosis prior to her going on maternity leave. Tr. pp. 658, 659 and 1345.

21. Following the November 2, 1994 management team meeting, Ms. Carroll and Ms. Butcher met and decided that Ms. Butcher would go on part time basis and that they would only have to cut one of the BRC Clerk positions to part time instead of laying one off. Once it was decided that there would be one full time and one part time BRC Clerk, Ms. Carroll and Ms. Butcher analyzed the job duties with the input of Ms. Ness, who indicated that she felt that all the billing activities be kept with the full time person for the sake of availability of that person should Ms. Ness have any questions that came up. Those duties were then set forth in Complainant's Exhibit No. 13, listing those duties that would pertain to the full time and part time BRC Clerk

positions respectively. It is noted that the majority of those functions listed for the full time BRC Clerk position had previously been within complainant's BRC Clerk/Case Management Division Job Description; while the majority of those duties listed for the part time BRC Clerk position had previously been part of the BRC Clerk/Training and Placement Services Job Description applicable to Danette Harshbarger. Tr. pp. 270 and 1339; and Complainant's Exhibits Nos. 9, 12 and 13.

22. Ms. Butcher and Ms. Carroll next undertook the decision to decide who would be offered the full time position and who would be offered the part time slot. In making that decision, Ms. Butcher noted that complainant was very good at Public Relations type work and had done very good work on the job fair, the auction and WVATS. She felt that complainant was more career oriented to these types of activities while Ms. Harshbarger was from a clerical type work background. It was also felt that Ms. Harshbarger was efficient and accurate in her clerical duties and that the two of them looked at who would be the best at performing the day-to-day, repetitive, clerical activities and stay on task. Looking at these factors it was decided that Ms. Harshbarger would be offered the full time BRC Clerk position. Tr. pp. 1117-1119, 1341 and 1342.

23. Following the approval of their proposal for cutting complainant's position to a part time position and retaining Ms. Harshbarger as a full time employee, the two met with complainant on November 10, 1994. At that time they informed her of their decision to cut her back to a part time position, and informed her of the reasons for that decision. The complainant questioned why she was

selected for the part time position when she had greater seniority than Ms. Harshbarger; and was told that this simply wasn't a factor in the discussions. Complainant brought up the question of whether she was going to be expected to train Ms. Harshbarger to replace her, and was told that they certainly hoped she would. Tr. pp. 1121, 1122, 1125 and 1345.

24. Complainant confronted Ms. Butcher with the fact that nothing had ever been said to her, that she had done every assignment given to her, never turned in a report late, never missed excessive amounts of work; without receiving a legitimate response to why out of the blue she was to be given the part time slot and was being told that she had no interest in her job duties as Clerk. After meeting with Ms. Carroll and Ms. Butcher, complainant was very upset and went back to her desk, than left the office for the rest of the day. That evening, she came in for a WVATS meeting and left her letter of resignation. Complainant felt that she could not take the part time position because she needed her health insurance benefits, which had been a major factor in her decision to take the position in the first place. Tr. pp. 672-674.

25. During the course of the meeting, complainant asked Ms. Butcher to reconsider her decision and give her the full time position. Complainant did not file a grievance under the respondent's internal grievance procedure. There was no evidence offered to suggest that the respondent had an internal grievance procedure, or, if there was such a policy, to what such a policy would pertain. Tr. p. 739.

26. Ms. Carroll admitted that she was aware that complainant needed to take time off for medical testing; and when this staffing discussion was undertaken, Ms. Butcher had mentioned, that she thought that whenever complainant had needed to take time off for medical appointments, that she had told her to go and that there was no problem with that. Tr. pp. 1129 and 1130.

27. Complainant's handicap was a factor which played a part in respondent's decision to select the complainant to be placed on part time status.

28. The respondent's articulated reasons for its decision to select the complainant for reduction of hours, are found to be pretextual, in that complainant performed all duties well prior to the decision; while there was insufficient time to evaluate Ms. Harshbarger's performance prior to the decision being made.

29. The respondent's agent, Ms. Butcher selected complainant for adverse employment action, based upon her handicap.

30. Upon being told that she would be cut to part time, complainant was hurt and very upset. She felt that everything had been taken away from her. Tr. pp. 674 and 736.

31. At the time of complainant's resignation, she was making \$6.55 per week based on a 40 hour week. Complainant was out of work from November 11, 1994 until she bought her business on March 1, 1995. During this period in which she was out of work, complainant estimates her lost wages as \$4,224.75. Tr. pp. 701-704.

32. Following her resignation on November 10, 1994, complainant did undertake a good faith effort to obtain other employment prior to obtaining her bridal shop business on March 1, 1995. Tr. pp. 720-721.

33. Following her resignation, complainant has exercised her right to participate in the respondent's health insurance plan under COBRA. She has made monthly payments of \$232.32 to maintain her health coverage under respondent's plan through June 1, 1996 at which time her 18 months COBRA option expired.

B.

DISCUSSION

To make a prima facia 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 handicap 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 handicap. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

West Virginia Code § 5-11-3(m) provides that the term "handicap" includes a person who has a physical or mental impairment which substantially limits one or more major life activities, including caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working; as well as a person with a record of such an impairment or regarded as having such an impairment. The West Virginia Human Rights Act makes it unlawful for any employer to discriminate against individuals with respect to compensation, hire, tenure, terms, conditions and privileges of employment even if such individual is handicapped. W.Va. Code § 5-11-9(1). The Rules Regarding Discrimination Against Individuals with Disabilities were Legislatively promulgated with an effective date of May 19, 1994. 77 C.S.R. 1, § 2.4 provides that Multiple Sclerosis is a recognized physical impairment under the W. Va. Human Rights Act. 77 C.S.R. 1, §§ 2.8.1, 2.8.2 and 2.8.3 provide that a person having a physical or mental impairment that does not substantially limit a major life activity but is treated by another as having such a limitation, that does substantially limit major life activities only because of attitudes of others toward such impairment, or that results in being treated by another as having an impairment

that substantially limits a major life activity; are encompassed under "Is regarded as having an impairment."

The complainant is a member of the protected class of handicapped individuals since she has a physical disability Multiple Sclerosis. Multiple Sclerosis in this instance has been largely asymptomatic as far as the respondent's agents and complainant's coworkers are concerned. Nevertheless, Multiple Sclerosis is a disorder of the nerve sheaths which can cause symptoms similar to injury to any part of the central nervous system. These symptoms can include vision problems; muscle weakness, spasticity or reflex abnormality; sensory impairments and pain; bladder, bowel and sexual dysfunction; depression, euphoria and other cognitive abnormalities; and fatigue. Complainant's Exhibit No. 34. The course of Multiple Sclerosis is highly variable with a person being perfectly normal one day and totally incapacitated the next; that might clear up totally with no recurrence. A person could also have a first attack with it never clearing up thereafter and go right down hill, even resulting in death. The disease can take any course in between, and it is not possible to predict its course. Those suffering from Multiple Sclerosis after eleven-fifteen years; 31% work, 63% are disabled and 6% die; after 21 years from onset; 28% can work; 50% are disabled and 20% die. Tr. pp. 1368-1371. The West Virginia Supreme Court has held that nonsymptomatic infection with HIV is not only a physical impairment but such impairment "substantially limits one or more of an individual's major life activities." Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814, at 818 (W.Va. 1990). In the instant case, complainant suffers from a similar asymptomatic chronic

disease which can at any time develop into a totally disabling condition or potentially fatal condition without warning. Multiple Sclerosis thus has the inherent propensity to interfere with the complainant's ability to care for herself as a result of depression accompanying the diagnosis itself and the uncertainties associated with that diagnosis independent of the perceptions of others. The evidence also supports a finding that respondent's agents may have regarded her condition to be substantially disabling from work, in that the respondent may have viewed the potential deterioration in complainant's medical condition of Multiple Sclerosis as a factor which disposed them to cut her hours and cease her eligibility for medical coverage under their insurance plan. For these reasons it is found by the undersigned that complainant is a person with a disability as defined under the West Virginia Human Rights Act.

There is no dispute but that the complainant suffered an adverse employment decision when her hours were cut and she lost her health benefits on November 10, 1994. The fact that complainant was subjected to these actions shortly after her immediate supervisor, Ms. Butcher became aware of her having Multiple Sclerosis, provides evidence from which it may be inferred that this action was taken as a result of complainant's handicap. Thus the complainant has established a prima facie case of handicap discrimination.

The respondent has advanced a legitimate nondiscriminatory basis for its decision; namely that they wished to consolidate billing functions with the one full time position that would remain, following the cut back in staffing necessitated by the financial conditions; and that complainant was less interested in clerical duties than public

relations type work they had her involved with, while the other clerk possessed good abilities in this area. The adverse decision was made on behalf of the respondent by Ms. Butcher and Ms. Carroll, who both deny that complainant's handicap played any part in that decision. Their testimony is not credible in this respect. Although Ms. Carroll denied that the complainant's handicap came up in the discussions, she later on cross examination admitted that Ms. Butcher had mentioned that whenever complainant had needed to go to medical appointments she had let her go. This indicates that complainant's handicap had been discussed and had played a part in the decision, despite the witnesses characterization that it was not in a negative way. Thus this case fits under the mixed motive analysis, under Price Waterhouse, supra. Furthermore, in addition to the timing of this decision coming on the heels of Ms. Butcher becoming informed of complainant's handicap, there are other circumstances indicating that respondent's reasons for its actions are pretextual. These include the fact that respondent hired a full time BRC clerk in September of 1994, well after the financial predicament of the respondent was known to those on the management team. The complainant's work reviews indicate that she had done a good job in those areas relating to the billing functions, and it is only in testimony relative to this case that allegations contrary to the contemporaneous performance reviews are now intimated by respondent's witnesses. The explanation that the person selected for full time BRC Clerk had demonstrated her superior skills in this area is extremely suspect given the fact that that individual had worked for respondent for significantly less than a month and a half, during which time Ms. Butcher was not there to evaluate her

performance. Neither does the respondent's witnesses contention, that complainant's much greater seniority vis a viz that of the woman selected for the full time position did not enter into their decision making process, sound credible from members of a management team undertaking such a decision. Thus, this case may also properly be analyzed under the three step inferential proof system articulated in McDonnell Douglas, supra. The reasons advanced by the respondent for its actions are found to be pretextual in light of the evidence discussed previously. The complainant has proven by a preponderance of the evidence that the reasons advanced by the respondent are pretext for unlawful handicap discrimination by the respondent, as the undersigned believes the timing of respondent's decision shortly after its agent Ms. Butcher was informed of complainant's handicap suffices to base a decision that this factor was the decisive one in the respondent's decision to cut the complainant's hours. Any inference that the respondent could not have been discriminated on the basis of her handicap because respondent's agent Ms. Ness hired her knowing of her handicap, is rendered meaningless by the fact that Ms. Butcher and Ms. Carroll, who made the decision to cut her hours, were not aware of her condition until shortly before that decision came about, and were not involved in the initial decision to hire complainant.

The complainant was hurt and upset by the respondent's decision to cut her hours. Complainant felt like everything had been taken from her as a result of that action, and the corresponding loss of her health insurance. Complainant has suffered humiliation, embarrassment and emotional and mental distress and loss of personal dignity as a result of the respondent's unlawful discriminatory conduct. The

complainant is entitled to incidental damages in the amount of \$3,277.45. 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.

Given the predicament she was in with the loss of health insurance and the outrage she was subjected to in being told that she would be switched to part time in favor of a new hire and would be expected to train her replacement as well, it cannot be said that her reaction to respondent's decision by resigning, was unwarranted. The fact of the matter is that she viewed her health insurance benefits to be of paramount importance and therefore she was compelled to resign to maintain her ability to obtain that insurance through COBRA. Thus the undersigned concludes that the complainant was constructively discharged from her position. The complainant subsequently undertook good faith efforts to find comparable employment without success. The complainant is entitled to back pay for the period November 11, 1994 through March 1, 1995 when she bought her bridal shop business. Complainant made \$6.55 per hour for a forty hour work week. She has testified that her lost wages were \$4,224.75, for this period; and such calculation is accepted as her lost wages during this period, as respondent did not present evidence concerning the actual lost wages in dispute.

The complainant also is entitled to award for her COBRA payments to maintain her health insurance under respondent's plan. Those COBRA

payments were \$232.32 per month. Although, complainant has requested that those damages extend into the future for as long as her life span under standard mortality tables, complainant has not requested reinstatement or back wages subsequent to her acquisition of her business on March 1, 1995. Thus it is inconsistent that she should be entitled to the cost of maintaining health insurance beyond the date of her purchase of the bridal shop business. The undersigned concludes that the complainant is entitled to an award of \$929.28 for the cost of COBRA coverage during the period of applicable back wages.

The respondent has alleged that the jurisdiction of the West Virginia Human Rights Commission is preempted in this matter by ERISA, because complainant has asserted that she was denied the right to health insurance coverage as a result of the respondent's cutting her hours in an action based on unlawful handicap discrimination. In support of this argument, respondent cites numerous cases for the proposition that state causes of action are preempted under ERISA. What respondent has failed to note in such cases is that this holding applies to those cases in which the ERISA plan itself is a defendant or in cases in which the ERISA plan would be subject to payment of benefits or subject to some requirement which would directly affect administration of benefits. Pizlo v. Bethlehem Steel Corp., 884 F.2d 116, at 120 (4th Cir. 1989). The West Virginia Supreme Court has held that ERISA does not preempt the West Virginia Human Rights Act where there is no pension trust defendant, the relief is not the obligation of the pension fund, and the pension is merely peripheral to the issues in the case. Donaldson Mine Co. v. Human Rights Com'n, 420 S.E.2d 902 (W.Va. 1992). It is noted that no evidence was presented

which would indicate that the health insurance plan of the respondent was administered by respondent; nor has the complainant sought relief from the health insurance plan directly or relief requiring the plan's administrator to act in any fashion. It is found that the instant case is distinguishable from the facts in Hamilton v. Lifesavers, Inc., an unpublished case from the United States District Court for the Northern District of West Virginia, in that there is no critical issue of the existence of a pension plan, or waiver statement that a termination was voluntary, which is critical to the action under the West Virginia Human Rights Act at issue here. The United States Supreme Court has held that preemption of a State's unlawful discharge law, occurs only when the existence of the pension plan is a critical factor in establishing liability. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990). There is no critical factor of the existence of the benefits plan in the instant case. The respondent's action of cutting complainant's hours on the unlawful basis of her handicap would result in liability under the West Virginia Human Rights Act, even were her health benefits not eliminated. Therefore, after considering the factors set forth in Donaldson, supra, it is the conclusion of the undersigned that the complaint is subject to the jurisdiction of the West Virginia Human Rights Commission; and, that the complaint is not preempted under ERISA.

The West Virginia Supreme Court has set forth a twelve factor test for determining reasonableness of the attorneys fees set forth in Aetna Casualty and Surety 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 service 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. In the present case the complainant's attorney has submitted a fee application setting forth hours the reasonableness of which the respondent does not dispute. However, complainant's attorney has requested a rate of \$150.00 per hour, stating in his attached affidavit that his services are comparable to those surveyed in the Parkersburg area and that such customary fees range from \$125.00 to \$150.00 per hour. Complainant's attorney entered into contingent fee arrangements at a \$125.00 per hour rate; but has since raised its rates to \$150.00 per hour for hourly fees. Respondent objects to the \$150.00 hourly fee and states that the non profit nature of respondent should be taken into consideration. The undersigned finds that after applying the twelve factors, \$125.00 per hour is appropriate for this type case as evidenced by the nature of the contracts of representation submitted.

C.

CONCLUSIONS OF LAW

1. The complainant, Mary K. Burdette, 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, SW Resources, 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 handicap discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful handicap discrimination. Additionally, the complainant has proven by a preponderance of the evidence, that unlawful handicap discrimination played a role in the decision, to select her for reduction of hours.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of \$4,224.75, and reimbursement of her COBRA payments of \$929.28 for the period, (for a total of \$5,154.03), plus statutory interest.

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 \$3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. As a result of the unlawful discriminatory action of the respondent, complainant is entitled to an award of reasonable attorneys fees and cost in the aggregate amount of \$10,452.51.

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 \$5,154.03, plus prejudgment interest.

3. Within 31 days of receipt of this decision, the respondent shall pay to the complainant attorney fees and costs in the amount of \$10,452.51.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$3,277.45 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.

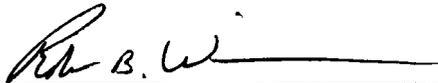
6. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to

immediately so advise the West Virginia Human Rights Commission,
Norman Lindell, Deputy Director, Room 108 A, 1321 Plaza East,
Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 18th day of June, 1997.

WV HUMAN RIGHTS COMMISSION

BY: 

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

18TH DAY OF JUNE 1997

, to the following:

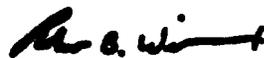
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PARKERSBURG WV 26101

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**ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE**