



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301**

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.  
Governor

January 9, 1986

Eugene D. Pecora, Esquire  
Box 212  
Beckley, WV 25801

Marcy K. Schwartz, Esquire  
J. C. Penney, Inc.  
1633 Broadway, 47th Floor  
New York, NY 10019

Rexford C. Simpson, Esquire  
J. C. Penney Company, Inc.  
2000 Oxford Drive  
Bethel Park, PA 15102

Robert M. Steptoe, Jr.  
Steptoe & Johnson  
P.O. Box 2190  
Clarksburg, WV 25302-2190

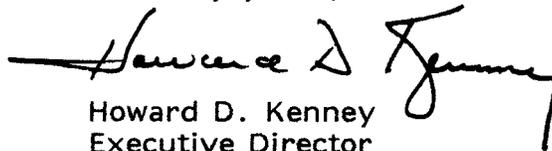
RE: Hairston v J. C. Penney Company, ER-88-77

Dear Mr. Pecora, Mr. Simpson, Mr. Steptoe, and Ms. Schwartz:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Elva R. Hairston v J. C. Penney Company, ER-88-77.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

  
Howard D. Kenney  
Executive Director

HDK/kpv  
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.



COPY

**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.  
Governor

July 2, 1985

Eugene D. Pecora, Esquire  
Box 212  
Beckley, WV 25801

Rexford C. Simpson, Esquire  
J. C. Penney Company, Inc.  
2000 Oxford Drive  
Bethel Park, PA 15102

Robert M. Steptoe, Jr.  
Steptoe & Johnson  
P. O. Box 2190  
Clarksburg, WV 26302-2190

Marcy K. Schwartz, Esquire  
J. C. Penney, Inc.  
1633 Broadway, 47th Floor  
New York, New York 10019

Re: Hairston V. J. C. Penney  
Docket No. ER-88-77

Dear Sirs:

Enclosed is a copy of an Order representing the Commission's action in the above-referenced case. You will be contacted by the Hearing Examiner, Theodore R. Dues, Jr.

Sincerely,

A handwritten signature in cursive script that reads "Roxanne Rogers".

Roxanne Rogers  
Attorney for the  
West Virginia Human Rights  
Commission

RR/kpv

Enclosure

CC: Theodore R. Dues, Jr.  
P. O. Box 5105  
Charleston, WV 25361

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ELVA R. HAIRSTON,

COMPLAINANT,

v.

DOCKET NO. ER-88-77

J.C. PENNEY CO.,

RESPONDENT.

ORDER

At its regular meeting held June 12, 1985, the West Virginia Human Rights Commission moved to reopen the instant case.

It is hereby ORDERED that this case be reopened solely for the purpose of obtaining evidence with regard to the issue of damages.

DATE:

*June 27 1985*

*Russell Van Cleve*

Russell Van Cleve  
Chairman  
WV Human Rights Commission

CERTIFICATE OF SERVICE

I, Roxanne Rogers, Attorney for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing Order by depositing in the United States Mail to the following persons:

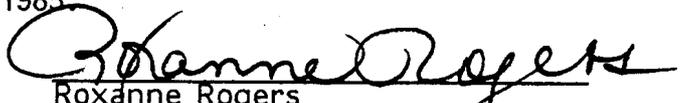
Eugene D. Pecora, Esquire  
Box 212  
Beckley, WV 25801

Rexford C. Simpson, Esquire  
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Clarksburg, WV 26302-2190

Marcy K. Schwartz, Esquire  
J. C. Penney, Inc.  
1633 Broadway, 47th Floor  
New York, New York 10019

This 2nd day of July, 1985.

  
Roxanne Rogers  
Attorney for the West Virginia  
Human Rights Commission

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ELVA R. HAIRSTON,  
COMPLAINANT.

V

DOCKET NO. : ER-88-77

J. C. PENNEY CO., INC.  
RESPONDENT.

FINAL ORDER

On January 27, 1985, the Commission issued an order granting Respondent's Motion For Reconsideration and stating its opinion that good cause existed to further investigate and to elaborate upon certain points identified by said Motion. As a result of the presentations made to the Commission, the Commission issued an order June 27, 1985 allowing the reopening of the Hearing for the purpose of obtaining evidence with regard to damages. That hearing was held on October 23, 1985 at Beckley and there was an agreement that \$32,500.57 were the Complainant's lost wages adjusted by fringe benefits and inflation.

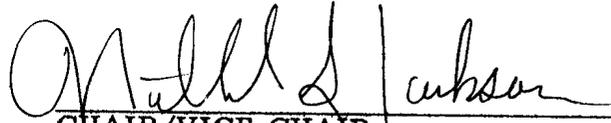
At its regular meeting, November 14, 1985 the Commission hereby adopts and incorporates its Order of November 20, 1984, except insofar as is listed below:

1. Findings of Fact No. 12 at page 7 is deleted and in its place shall be: The Complainant is entitled to recover back wages and benefits in the amount of \$32,500.57.

2. Paragraph No. 2 of the Commission's Order at page 14 is deleted and in its place shall be "It is ORDERED that the Respondent

shall pay to the complainant back wages in the amount of \$32,500.57 plus interest as required by state law."

Entered this 11<sup>th</sup> day of December, 1985.

  
CHAIR/VICE CHAIR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ELVA R. HAIRSTON

Complainant,

v.

Docket No: ER-88-77

J. C. PENNEY CO., INC.

Respondent.

FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

I  
PROCEEDINGS

This case came on for hearing before Hearing Examiner Theodore R. Dues in Beckley, West Virginia on October 12, 1982 and was completed the same day. The Complainant appeared in person and was represented by Eugene Pecora. The Human Rights Commission was represented by Assistant Attorney General Mary Lou Newberger. The Respondent appeared by the counsel Rexford Simpson. The parties waived the presence of the Hearing Commissioner.

The Complainant, Elva R. Hairston, is a black female who was employed by the Respondent, J. C. Penney Company, Inc., from December 2, 1963 until August 27, 1976. This case arises from a timely filed complaint with the State of West Virginia Human Rights Commission on September 20, 1976 in which she charged that Respondent dis-

charged her on the basis of her race in violation of the West Virginia Human Rights Act, as amended, West Virginia Code, Chapter 5, Article 11, Section 9. J. C. Penney Co., Inc., in its verified answer, averred that the Complainant was discharged because of her inability to work accurately and timely.

There are 12 Joint Exhibits to be considered. Additionally, there is one exhibit from the Complainant, and four exhibits from the Respondent. Also to be considered is the testimony of the Complainant and two other witnesses contained in the transcript.

The Recommended decision of the Hearing Examiner was received by the Commission on January 30, 1984, well beyond the 180 day requirement as provided in Administrative Rules and Regulations. Therefore, the Commission did not review or consider the recommended decision in making its decision.

The West Virginia Human Rights Commission, after full consideration of the witness testimony, all exhibits presented, all motions, all arguments of counsel, makes the Findings of Fact and Conclusions of Law and Order as set forth herein.

## II ISSUES

1. Was the Complainant, because of race, treated differently than white employees and if this is so, did such disparate treatment result in her discharge?
2. The above inquiry is answered affirmatively, to what remedy is the Complainant entitled?

III  
SUMMARY OF TESTIMONY

Both the Complainant and the Respondent had full opportunity to call all witnesses and present all evidence, insofar as it was relevant to this complaint. Herein is a summary of the evidence.

FOR COMPLAINANT:

Elva R. Hairston

The Complainant testified that she was employed by the Respondent J. C. Penney Co., Inc., for 13 years. During her tenure she worked as an elevator operator, stockroom helper, sales clerk and stock counter. She worked in the capacity of stock counter from 1973 until her discharge on August 27, 1976. In addition to counting merchandise in all the departments, the Complainant had the added responsibility of relieving sales associates for break and lunch between 11:00 a.m. and 2:00 p.m. The previous stock counter, Debbie Wickline, did not have to relieve sales associates. Wickline is a white female.

In a two and one half year period Hairston received four Corrective Interview Reports: January 19, 1974, December 1, 1975, March 16, 1976, and August 16, 1976. These reports centered on Ms. Hairston's lateness with her books. The March 16, 1976 report, however, dealt primarily with her poor health. The Corrective Interview Reports did not give instructions or guidance for improving her job performance.

Ms. Hairston stated that she was the only black working for the Respondent, that she did not miss much work because of her allergy, and that she was given two week's notice prior to her discharge.

Subsequent to the Complainant's dismissal, she sought employment at Purity Bakery, Arthur Treacher's, Famous Shoe Store, K-Mart, A & P, Leeds, Polka Dot Shop, E.M. Payne Co., Krogers, and others.

On cross examination Ms. Hairston stated that she made numerous attempts to secure employment after her termination from the Respondent.

FOR RESPONDENT:

Edwin Bowman

Edwin Bowman testified that he is still employed by Respondent as a store manager in Punxsatowney, PA. He was in Beckley, West Virginia as the general merchandise manager, also known as assistant manager, from October, 1973 until September, 1976. He supervised the Complainant while she performed as stock counter. Bowman testified that the stock counter's job is to count the merchandise so the store can order new merchandise according to its needs. It is a very important function as far as accuracy and timeliness for reaching the projected sales estimates.

Bowman testified that he observed the Complainant for three months and noticed that the job was not getting done. The first Corrective Interview Report of January 19, 1974 reflected this. The Complainant was told how many books were to be counted, how many books were actually counted and how many books had to be distributed to others to count. Bowman testified that the Complainant's performance improved greatly after the Corrective Interview Report. It was not until December 1, 1975 that the Complainant received a second Corrective Interview Report regarding the same problem. Again, Ms. Hairston responded positively and her performance improved. Bowman further

testified that the Complainant's performance declined, resulting in the third Corrective Interview Report on March 16, 1976. Bowman testified that Ms. Hairston had shown previously that she could do the job, so she was given a chance to show that she could.

On March 30, 1976, an appraisal of the Complainant's work was completed by Bowman. She received a "3", which signified a satisfactory rating. Bowman testified that a few months later the Complainant began having problems again and that she was subsequently terminated because the job needed to be done on a permanent basis.

Frances Lilly, a white female, received three Correctives from Danny Pritchard on November 7, 1975, February 20, 1976, and May 21, 1976, and was not terminated. (JOINT EXHIBITS 10, 11, 12) Bowman stated that he was Pritchard's supervisor. Respondent had first-hand knowledge of Lilly's work performance. Bowman indicated that the Respondent does not have a requirement that a certain number of Corrective Interview Reports would result in termination.

Bowman further testified that a white male, Donnie Jones, was terminated after receiving one Corrective Interview Report. Jones worked one month for the Respondent.

On cross examination Bowman stated the Dismissal Policy, Section 112204, was followed when Hairston was terminated. Under further questioning, he also stated that the Complainant was given a detailed description of goals to accomplish for a period of time, but not consistently throughout her tenure at J. C. Penney.

#### Roger Taylor

Roger Taylor was the store manager in Beckley from October 1, 1975-September 30, 1977. He testified that he was involved, directly or

indirectly in all Corrective Interview Reports. Taylor stated that Ms. Hairston received a satisfactory rating on her evaluation two weeks after the March 16th Corrective Interview Report because she was making a sincere effort to improve and that the eventual decision to terminate Complainant was based on the "roller coaster" effect of her work performance. He further testified that race was not a factor in the decision to terminate Ms. Hairston. On cross examination, Taylor admits that Hairston was not given a 90 day follow-up, as Lilly was. (Tr. 99-100)

#### IV FINDINGS OF FACT

1. The Complainant, Elva Hairston, is a black female who was 57 years old at the time she was discharged by the Respondent in August 27, 1976.
2. Respondent, J. C. Penney Co., Inc., is a multi-state corporation engaged in retail business in the State of West Virginia with a store located in Beckley, West Virginia.
3. Ms. Hairston filed a timely charge of race discrimination in employment against the Respondent with the West Virginia Human Rights Commission on September 20, 1976.
4. Ms. Hairston was hired as an elevator operator by the Respondent on December 2, 1963. At the date of her discharge she was a stock counter, responsible for counting merchandise in all the departments.
5. Ms. Hairston was discharged effective August 27, 1976 for her alleged inability to get her work done timely and accurately.
6. There are four Corrective Interview Reports in Ms. Hairston's file: November 9, 1974, December 1, 1975, March 16, 1976, and August

16, 1976. The reports were primarily concerned with Ms. Hairston's lateness with her books. The March 16, 1976 report mentions "bad counts" but primarily deals with Ms. Hairston's poor health.

7. The reason for dismissal states that Ms. Hairston did not improve in the area of accuracy and timeliness after receiving Corrective Interview Reports on December 1, 1975 and March 16, 1976.
8. The reason for dismissal contradicts the rating Ms. Hairston received on performance evaluations. On February 13, 1974 she was rated "Good-Exceeds Requirements" with a comment by her supervisor that she had shown great improvement since their discussion on February 5, 1974. The last evaluation of March 30, 1976 was "Satisfactory - Meets Requirements." Again, the supervisor stated that improvement was shown in her counting since the last meeting.
9. Frances Lilly, a merchandising assistant who is a white female, received three Corrective Interview Reports in a six month period: November 7, 1975, February 20, 1976, and May 21, 1976. She was not terminated because of her poor performance.
10. Frances Lilly was given a 90 day follow-up after the Corrective Interview Report of February 20, 1976. She was provided with a 9 page description of the desired performance goals and the steps to be used to reach those goals.
11. At the time of her discharge, Ms. Hairston was the only black working in a sales-oriented capacity.
12. The Complainant is entitled to recover back wages and benefits for the period August 26, 1976 to the date of the hearing. Had she

continued in the employ of Respondent she would have earned \$7,521.27, calculated as follows:

<u>YEAR</u>	<u>SALARY</u>	<u>BENEFITS</u>
1976 (Sept. - Dec)	\$1708.20	\$ 427.05
1977 (Jan. - "	4934.80	1233.70
1978 (" "	4934.80	1233.70
1979 (" "	4934.80	1233.70
1980 (" "	4934.80	1233.70
1981 (" "	4934.80	1233.70
1982 (" - Oct)	<u>3890.90</u>	<u>925.72</u>
TOTALS	\$30273.10	\$7521.27

V  
LEGAL DISCUSSION

Federal law under Title VII is by no means controlling in all cases under the West Virginia Human Rights Act. See, e.g., West Virginia Human Rights Commission v. United Transportation Union, Local 6551, 280 S.E.2d 653 (W. Va. 1981). Nevertheless, the West Virginia Supreme Court of Appeals has adopted the framework of McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973) and its progeny for the procedure for the evaluation of evidence presented in employment discrimination cases wherein there is alleged disparate treatment of member of a protected class. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, et al, 309 S.E.2d (1983). Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Under the Shepherdstown analysis, the burden is upon the Complainant to prove by a preponderance of the evidence a prima facie case of discrimination which burden may be carried by showing (1) that the Complainant belongs to a protected group under the statute; (2) that she applied and was qualified for a position or positions for which there was an opening; (3) that she was rejected despite her qualifications; and (4) that after the rejection, the Respondent continued to accept the applications of similarly qualified persons and in fact hired persons similarly qualified. If the Complainant is successful in creating this rebuttable presumption of discrimination, the burden then shifts to the Respondent to offer some legitimate and non-discriminatory reason for the rejection. Should the Respondent succeed in rebutting the presumption of discrimination, then the Complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the Respondent were merely a pretext for the unlawful discrimination.

It should be noted that the burden of persuasion never shifts from the Complainant to the Respondent in these actions. "The defendant need not persuade the court that it was actually motivated by the proffered reasons." Burdine, 450 U.S. at 254. "It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. 450 at 25455. If the Respondent meets this rebuttal burden, it is incumbent upon the Commission to make the ultimate determination whether there was intentional discrimination on the part of the Respondent.

As noted McDonnell-Douglas, the Supreme Court has held specifically that its prima facie formulation will not neatly apply to every case of alleged employment discrimination but must be adopted to the

facts at issue, supra, n. 13. The case at hand requires careful analysis in order to arrive at an appropriate tailoring of the McDonnell-Douglas formulation as discussed in Shepherdstown.

The principal modification of McDonnell-Douglas, in the discharge context, pertains to the prima facie case. In order to establish a prima facie case, the Complainant must meet the initial burden of proving that she is a member of a protected class, that she was discharged, and produce evidence of disparate treatment from which the court may infer a causal connection between the basis and the discharge. Burdine, supra, Green v. Armstrong Rubber Co., 612 F.2d 967 (5th Cir. 1980).

With respect to discharge for poor work performance, the Complainant must demonstrate by a preponderance of the evidence that her performance was not poor or that if it was, white employees who had equally egregious work records were not similarly discharged. Osborne v. Cleland, 620 F.2d 195 (8th Cir. 1980). The Complainant, Elva R. Hairston, has established a prima facie case of unlawful discharge. To wit, that she was qualified to retain her job as evidenced by evaluation ratings; and moreover, that a white employee was treated dissimilarly than she with respect to terms and conditions of employment.

Respondent has attempted to rebut this prima facie case established by Complainant. Shepherdstown reiterates that when a prima facie case has been established the burden shifts to the Respondent to articulate a legitimate non-discriminatory reason for its action. Respondent asserts that Complainant's work performance was poor and points out as proof thereof four Corrective Interview Reports it felt compelled to give to Complainant over a two year period. Respondent further contends that at least two white employees were

recipients of Corrective Interview Reports and that one of the two, a white male was terminated after one month's employment. The Commission does not find for purposes of analogy Respondent treatment of this male employee to be probative given his short tenure. As justification for its retention of the other white employee, Respondent argues that she was a good employee and recipient of a company award and that the Corrective Interview Reports are not used as instruments to terminate employees.

The Commission finds that Complainant has established the articulated reasons to be pretextual. Ms. Hairston was given four Corrective Interview Reports over a two year period, the former two which by company policy, should have been discarded after one year. Further, the two Corrective Interview Reports which Respondent could consider, March 16, 1976 and August 16, 1976, reflect assessments totally inconsistent with evaluation ratings received for Ms. Hairston for the years in question. The white employee received three Corrective Interview Reports, in a six month period, and was not terminated but in fact given a detailed plan as to how to improve her work performance. The Complainant, Ms. Hairston was not. Noteworthy also, is the fact that Respondent has no objective measures or company rule for determining what the effects of Corrective Interview Reports should have on an employee's employment rights. Substantive criteria was disparately applied. In fact, Respondent testimony on this issue was confusing and not credible. Neither Ms. Hairston's supervisor, nor the store manager made any effort to help her as reflected by evidence that she did not receive an aforementioned 90 day objective plan. Pouncy v. Prudential Insurance Co., 499 F. Supp. 427 (S.D. Tex. 1980).

VI  
CONCLUSIONS OF LAW

In accordance with the foregoing findings of fact, issues presented, and taking into consideration the arguments of counsel, the following Conclusions of Law are reached:

1. At all pertinent times, the Complainant was a citizen and resident of West Virginia within the meaning of West Virginia Code, Chapter 5, Article 11, Section 2.
2. At all pertinent times, the Respondent was an employer within the meaning of West Virginia Code, Chapter 5, Article 11, Section 3(d).
3. On September 20, 1976 the Complainant filed a verified complaint alleging that the Respondent had engaged in discriminatory practices within the meaning of Chapter 5, Article 11, of the West Virginia Code.
4. Said complaint was time filed within 90 days of the alleged act of discrimination. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to 8, 9, and 10, Article 11, Chapter 5, of the Code of West Virginia.
5. Complainant made an initial prima facie showing that the Respondent discriminated against on the basis of race.
6. The Respondent's articulation of a non-discriminatory reason for the rejection of Complainant is found to be pretextual.
7. On the basis of the disparate treatment by the Respondent of Ms. Hairston when compared with at least one other employee, Frances Lilly, the Respondent did practice illegal racial discrimination.



of Law by the West Virginia Human Rights Commission, it is hereby ordered as follows:

1. The Respondent, J. C. Penney, Inc., (hereinafter called Respondent), its officers, agents, employees, successors, assignees and all persons and organizations in active concert or participation with it, are hereby permanently ordered to CEASE and DESIST at its Beckley, WV facility or places of business or operation located in West Virginia from engaging in any employment practices which discriminate against persons on account of their sex, race, color, national origin, religion, age, blindness or handicap which perpetuates the effects of past discrimination against such.
2. It is ORDERED that Respondent shall pay to the Complainant back wages representing compensation for loss of wages suffered by Complainant as a result of Respondent's unlawful discriminatory practices. This amount shall be \$40,897.55, which includes compounded interest of eight percent (8%) per annum, and is determined as if the Complainant had not been terminated on August 26, 1976 through the date of the hearing. This amount was calculated as follows:

<u>YEAR</u>	<u>BACKPAY</u>	COMPOUNDED <u>INTEREST</u>	<u>TOTAL</u>
1976	1,708.20	136.65	1,844.85
1977	4,934.80	542.37	7,322.02
1978	4,934.80	980.54	13,237.36

1979	4,934.80	1,453.77	19625.93
1980	4,934.80	1,964.85	26525.58
1981	4,934.80	2,516.83	33977.21
1982	3,890.90	3,029.44	40897.55

3. It is further ORDERED that the Complainant is entitled to an award of attorney fees. The Respondent shall pay the Complainant's attorney, Eugene Pecora \$2,700.00.
4. The Respondent shall comply with the Commission's Order within 35 days from receipt thereof.

Mar 20 1984  
DATE

Enter:

Russell Van Cleve  
Russell Van Cleve  
Chairperson  
WV HUMAN RIGHTS COMMISSION

RVC/kv

EUGENE D. PECORA  
ATTORNEY AT LAW  
109 E. MAIN STREET  
ROOM 214  
BOX 212  
BECKLEY, WEST VIRGINIA 25801  
TELEPHONE 304-253-5523

COPY

RECEIVED

AUG - 2 1984

August 1, 1984

W.V. HUMAN RIGHTS COMM.  
Approved

Mr. Howard D. Kenney  
Executive Director  
State of WV Human Rights Commission  
215 Professional Building  
1036 Quarrier Street  
Charleston, WV 25301

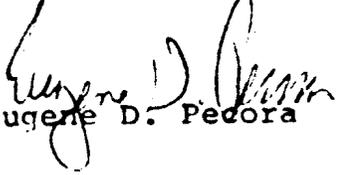
RE: ER-88-77  
Hairston v. J. C. Penney, Inc.

Dear Mr. Kenney:

Per your letter of July 24, 1984, I am enclosing  
an affidavit of my itemized time spent on the above  
case.

If you require further information, please advise.

Sincerely yours,

  
Eugene D. Pecora

VSC

Enclosure

cc: Rexford Simson, Esq. (with enclosure) -  
J. C. Penney Co., Inc.  
P.O. Box 816  
Pittsburgh, PA 15230  
Elva Hairston (with enclosure)  
418 S. Fayette St.  
Beckley, WV 25801

APPENDIX A

RECEIVED

AUG - 2 1982

W.V. HUMAN RIGHTS COMM.

STATE OF WEST VIRGINIA  
COUNTY OF RALEIGH, TO-WIT:

Before the undersigned authority this day personally appeared EUGENE D. PECORA, Attorney at Law, who, after being duly sworn, deposes and says:

That he agreed to represent ELVA R. HAIRSTON on a contingent fee basis of Thirty (30%) percent of any recovery in her complaint before the West Virginia Human Rights Commission against J. C. PENNEY COMPANY, DOCKET NO. ER-88-77, and that the following itemized statement of his time is a true and accurate record:

<u>Date</u>	<u>Item</u>	<u>Time Spent</u> <u>(To nearest Ctr. Hr)</u>
9/3/76	Initial Interview	1.50
9/15/76	Review letter from Human Rights Commission to client	0.25
9/20/76	Preparation of two complaints ER-88-77 & ER-87-77	0.25
9/21/76	Review letter from Human Rights Commission to client	0.25
5/9/77	Review Determination letter from Commission	0.25
5/18/77	Letter to Commission re: appeal	0.25
5/24/77	Review Order from Commission	0.25
6/9/77	" Commission's Determination letter	0.25
6/22/77	Letter to Commission re: appeal	0.25
6/22/77	Review Commission's letter & Notice of Conciliation Process	0.25
6/27/77	Letter returning Conciliation Discussion form to Commission	0.25
8/4/77	Letter to Commission	0.25
5/17/79	Review letter from Commission	0.25
5/24/79	Letter to Commission re: Conciliation discussions	0.25
5/29/79	Review letter from Commission re: Public Hearings	0.25
7/9/79	Letter to Commission re: Public Hearings	0.25
11/16/79	Letter to Commission re: Public Hearings	0.25
12/11/79	Review letter from Commission re: Public Hearings	0.25
1/5/82	Letter to Commission re: Public Hearings	0.25
1/22/82	Review letter from Commission re: Public Hearings	0.25
3/3/82	" " " " " " " "	0.25
3/15/82	Letter to Commission re: Public Hearings	0.25
8/10/82	" " " " " " " "	0.25
9/14/82	Review Notice from Commission of hearing 10/19-20/82	0.25
9/16/82	Review Order of Hearing Examiner	0.25
9/19/82	Review client's report re: employment	0.25
9/20/82	Review Respondent's Answer	0.25
9/22/82	Review Complainant's Answer	0.50
9/22/82	Conference with client	2.00
9/23/82	Review Commission's Request to Produce	0.25
9/24/82	Review letter from J. C. Penney to Commission	0.25
9/25/82	Conference with client	1.50
9/27/82	Conference with Mary Reed-Catalog & Credit Dept. J. C. Penney	0.50

<u>Date</u>	<u>Item</u>	<u>Time Spent</u> <u>(To nearest Qtr. Hour)</u>
9/30/82	Review letter and exhibits from J. C. Penney to Commission	0.50
9/30/82	Review Respondent's Request to Produce	0.50
9/ /82	Pre-hearing Conference Memorandum	0.50
10/ 4/82	Review letter from Hearing Examiner	0.25
10/5/82	Conference with client	0.25
10/5/82	Review letter from Assistant Attorney General to Commission	0.25
10/6/82	Preparing information for Assistant Attorney General	0.25
10/7/82	Review Order from Hearing Examiner & Pre-hearing Conference Memorandum	1.00
10/11/82	Letter to J. C. Penney re: Proposed settlement	0.25
10/20/82	Letter to Assistant Attorney General enclosing Motion to Produce	0.25
10/22/82	Preparation Answer to Respondent's Request to Produce	0.50
10/22/82	Review Commission's Motion to Compel	0.25
10/26/82	Review letter from J. C. Penney re: Proposed settlement	0.25
10/29/82	Review Respondent's Answer to Commission's Request to Produce	0.50
11/1/82	Letter to J. C. Penney correcting proposed settlement figures	0.25
11/1/82	Letter to Assistant Attorney General re: " "	0.25
11/4/82	Review letter from J. C. Penney to Assistant Attorney General	0.25
11/8/82	Review letter from J.C.Penney to Theodore R. Dues, Jr.	0.25
11/11/82	Research and review	3.00
11/12/82	Review of reply to J. C. Penney	0.25
11/12/82	Hearing	5.50
12/2/82	Letter to Theodore R. Dues, Jr. Enclosing Unemployment Compensation information	0.25
1/8/83	Letter to Assistant Attorney General enclosing transcript and handwritten findings of fact	0.25
1/19/83	Review letter from J.C. Penney to Theodore R. Dues, Jr.	0.25
1/26/83	" " " " " " " "	0.25
1/27/83	Letter to Assistant Attorney General re: Correcting Findings of Fact	0.25
2/2/83	Review Proposed Findings of Fact and Conclusions of Law by Attorney General	1.00
2/2/83	Preparation Addendum to Findings of Fact etc.	0.50
3/10/83	Review letter from J.C.Penney	0.50
3/18/83	Review Respondent's Proposed Findings of Fact, Conclusions of law and Supporting Brief	0.50
3/18/83	Review letter from J.C. Penney	0.25
3/21/83	Review Commission's Response to Respondent's Request to reopen hearing	0.25
3/24/83	Review Order of Hearing Examiner	0.25
3/31/83	Review Commission's Notice of Right to Sue	0.25
11/10/83	Letter to Hearing Examiner	0.25

<u>Date</u>	<u>Item</u>	<u>(To near- Time Spent est Quarter Hour)</u>
1/27/84	Review letter from Hearing Examiner to Commission enclosing his findings	1.00
1/30/84	Review letter from J. C. Penney to Commission	0.25
4/2/84	" " " Commission to J. C. Penney	0.25
5/15/84	Letter to Glenda Gooden	0.25
7/24/84	Review letter from Commission	0.25
7/25/84	Research re: fees in response to 7/24/84 letter	0.75
Total hours		<u>36.00</u>

Your deponent further states that had he not taken this case on the 30% contingent fee basis, his hourly charge would have been \$75.00 per hour for a total of \$2700.00.

*Eugene D. Pecora*  
 \_\_\_\_\_  
 EUGENE D. PECORA

Taken, subscribed and sworn to before the undersigned authority  
 this the 1st day of Aug., 1984.

My commission expires:  
April 26, 1981

*Virginia Cassity*  
 \_\_\_\_\_  
 NOTARY PUBLIC, RALEIGH COUNTY, W. VA.

# JCPenney

August 9, 1984

RECEIVED

W.V. HUMAN RIGHTS COMM.

Mr. Howard D. Kenney  
Executive Director  
West Virginia Human Rights Commission  
215 Professional Building  
1036 Quarrier Street  
Charleston, WV 25301

RE: Hairston vs. JCPenney Company, Inc.  
Charge No. ER-88-77

Dear Mr. Kenney:

I am in receipt of Attorney Pecora's fee affidavit submitted pursuant to your request of July 24, 1984. My response is rather brief but I am not sure, after reviewing the Commission's Administrative Regulations, exactly what format this response should follow. If this letter form is inappropriate, please inform me and I will attempt to restructure my comments.

First of all, I must reiterate the point raised in my letter of July 31 regarding the appropriateness of considering this issue at this point. There is no Finding of the Commission and it would appear to be very premature to be considering fees prior to any Finding. Particularly in this case where there is no Hearing Examiner's Report, a number of steps may have to occur prior to any Final Order. A new hearing or at least a partial reopening of the hearing, among other options, certainly is a possibility.

Secondly, ignoring the timing issue for the moment, I have some reservations about the substantive portions of Mr. Pecora's affidavit. Regarding Mr. Pecora's comments about a contingent fee, pursuant to Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), the fact that Mr. Pecora and Mrs. Hairston may have agreed to a contingent fee arrangement is of little consequence. As the Court stated ". . . The criterion for the court is not what the parties agreed, but what is reasonable." In looking at what is reasonable, Respondent must

APPENDIX B

Mr. Howard D. Kenney  
Page 2  
August 9, 1984

take specific issue with Mr. Pecora's proffered hourly billing rate of \$75. First of all, I would question whether that would be his prevailing hourly rate charged a private citizen in Beckley for a matter of such relative simplicity. In this regard, it must be emphasized that Mr. Pecora did not have primary responsibility for the preparation and/or presentation of this case. The fact that he claims only 36 hours of work in over eight years on the case is clear evidence of his minimal involvement. It is very difficult to compare this involvement and minimal responsibility to the efforts expended by counsel in the two class action lawsuits noted in your letter. If he must be compensated at all for these hours, it certainly should be at his minimum prevailing rate and certainly not at any premium rate. I would respectfully request the Commission to demand further evidence from Complainant's counsel as to actual billing rates charged individuals in his every day practice. Secondly, even assuming that Ms. Pecora can justify a current rate of \$75 per hour, Respondent must question whether this rate should apply to all of the hours listed. These hours cover the last eight years and it is hard to imagine that the same rate would have been in effect in 1976 and in each and every year thereafter. Respondent believes the hours should be billed at the rate prevailing at the time the work was performed and not all at an August 1984 billing rate.

Very truly yours,

J. C. PENNEY COMPANY, INC.



Rexford C. Simpson  
Regional Personnel Relations  
Attorney

RCS:cv

cc: Eugene Pecora, Esq.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ELVA R. HAIRSTON

v.

ER-88-77

J. C. PENNEY CO., INC.

O R D E R

On January 17, 1985, came respondent and J. C. Penney Company, Inc., by Counsel and sought by Motion, reconsideration of the final order of the West Virginia Human Rights Commission entered November 20, 1984, in the matter styled Elva R. Hairston v. J. C. Penney Co., Inc., Docket No. ER-88-77, and the Commission being of the opinion that good cause exists to further investigate and deliberate upon certain points identified by respondent, notwithstanding consideration of objection to said motion by Counsel for Complainant, Elva R. Hairston, does hereby grant respondent's motion for reconsideration.

It is so Ordered.

Entered this 29 day of January, 1985.

  
\_\_\_\_\_  
Russell Van Cleve  
Chairperson  
West Virginia Human Rights Commission

RVC/kpv