

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SHEILA E. HALL,

Complainant,

v.

**Docket Number: EARS-446-02
EEOC Number: 17JA200279**

WAL-MART STORES, INC.,

Respondent.

CHIEF ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

A public hearing in the above captioned-matter was convened on November 6 - 7, 2003, in the Second Floor Large Conference Room, at the office of the West Virginia Department of Health and Human Resources Beckley, at 407 Neville Street, Beckley, West Virginia and again on March 17, 2004 in Classroom C-118, Mine Safety Academy, Beaver, West Virginia.

The complainant, Sheila E. Hall, appeared in person and her case was presented by Paul Sheridan, Deputy Attorney General, Civil Rights Division, West Virginia Attorney General's Office. The Respondent, WAL-MART STORES, Inc. appeared in person by its Attorney, Sandra Law and its corporate representative, Thomas Christopher Bare.

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 the applicable law. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and legal analysis of the chief 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 arguments are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary for 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. At the public hearing, the following exhibits were placed under seal: Commission's Exhibits Nos. 28, 29, 32 and 33 and Respondent's Exhibits Nos. 3, 4 and 5.

I.

STATEMENT OF THE CASE

Sheila E. Hall, an African American female over forty years of age and a long time employee of the Beckley WAL-MART store, was demoted from the position of department manager of the Health and Beauty Aids Department to a non-managerial job. She did not experience a decrease in pay.

Skaggs, Beckley Store Manager, treated Hall harshly on occasions, disciplining her at times and under circumstances that did not provide her an opportunity to meet the job requirements he had established for her.

The record evidence supports a finding that Hall's demotion was done in contravention to well established WAL-MART WalMart Corporate Personnel and Disciplinary Policies. There were other department managers, white males, who also were unable to meet all of Bare's expectations but were not treated in the same manner as Hall. Bare did not demote them from their positions as department managers.

II.

PARTIES CONTENTIONS

Hall contends that she was demoted from the position of a department manager because of race, sex and age discrimination. She alleges a continuing violation. She also contends Respondent did not comply with its Corporate Personnel and Disciplinary Policies.

WAL-MART contends Hall was demoted because of performance problems. WAL-MART contends Hall could not perform the duties of the Health and Beauty Aids

Department manager. WAL-MART contends its management offered Hall a position as a department manager in another department and she refused to accept the offer. Finally, WALMART contends that it complied with its Corporate Personnel and Disciplinary Policies.

III.

SUMMARY OF THE DECISION

The evidentiary record overwhelming supports a finding that Sheila E. Hall was subjected to discriminatory discipline because of her race and gender and that WAL-MART did not follow its own Corporate Personnel and Disciplinary Policies.

IV.

FINDINGS OF FACT

1. The Complainant Sheila E. Hall (here after referred to as Hall) is an African American woman, over forty years of age who was hired by WAL-MART STORES, Inc. in 1989. She worked the day shift. (Hr. Tr. Vol. I, at 24).
2. Hall was initially hired on August 14, 1989 as a temporary associate. She was promoted to department manager, an hourly supervisory position, for the second time on October 4, 1997. She is currently employed as a sales associate.
3. The Respondent, WAL-MART STORES, Inc. (here after referred to as WAL-MART) has a store located in Beckley, West Virginia. This is the store where Hall is employed.
4. The Beckley store was a Division One store, which means it did not sell groceries and it was not a Supercenter. (Hr. Tr. Vol. II, at 11 - 13).
5. In the mid 1990's the Beckley store became a Supercenter. Its sales volume increased and it had approximately 600 employees. (Hr. Tr. Vol. II, at 12 - 13).
6. Before her employment with WAL-MART, Hall worked for Heck's Department Store for fifteen (15) years until the store filed bankruptcy. (Hr. Tr. Vol. I, at 22).

7. Hall held the following positions: five (5) years as a cashier; one (1) year on the floor in Cosmetics and nine (9) years as department manager of various departments including Candy, Greeting Cards, Cosmetics, Health and Beauty Aids, Toys, Housewares, Jewelry, Electronics and Sporting Goods. (Hr. Tr. Vol. I, at 23).

8. Thomas Christopher Bare (hereinafter referred to as Bare) began working at the Beckley WAL-MART as the store manager on December 8, 1998. (Hr. Tr. Vol. II, at 11). Ed Skaggs (hereafter Skaggs) replaced Bare as store manager in 2002.

9. The Health and Beauty Aids Department at WAL-MART sells personal products, shampoo, hair spray, feminine products, soap, razor blades, razors, hair coloring, hair accessories and other similar items. This is a high volume, high product turnover department. (Hr. Tr. Vol. I, at 25).

10. The Health and Beauty Aids Department has four aisles within the store. (Hr. Tr. Vol. I, at 253).

SHEILA E. HALL'S EVALUATIONS

11. Hall received regular evaluations. (Hr. Tr. Vol. I, at 35-41) In her first few years, she received satisfactory evaluations with a rating of "standard." (Commission's Exhibit Nos. 2, 3, 4, 5, 6, 7, 8).

12. Hall's rating for the review period ending November 16, 1989 was standard. She did receive some below standard performance appraisals in the area of productivity. As a result of this evaluation, Hall received a raise of twenty-five cents per hour. (Commission's Exhibit 2).

13. Hall's rating for the review period ending November 3, 1990 was standard. She did not receive any below standard performance appraisals. She did receive one above standard rating in the area of cooperativeness. (Commission's Exhibit 3).

14. Hall had a six month periodic review ending February 14, 1990. She received a standard rating. Her major strengths were "orders to rate of sale; aware of what's hot, what's not; follows direction well-needs no follow up." The areas needing improvement

were "P. A. usage"; "comp shopping;" and "planning and feature buying." (Commission's Exhibit 4).

15. Hall's rating for the review period ending August 14, 1990 was standard. Her major strengths were "very dependable, cooperative with everyone, easy to get along with, good job knowledge, puts out good effort." The areas needing improving were "taking initiative, becoming more aggressive in merchandising, set an example for salesclerks and motivate them and follow through with 30-60-90 plans." Hall received a raise of twenty-five cents per hour. (Commission's Exhibit 5).

16. Hall's rating for her two year pay increase anniversary ending August 14, 1991 was standard. Her major strengths were "customer service, always willing to take the customer to area rather than point; very easy to work with; always following direction to complete." Her major area of job performance needing improvement was "keeping up with assembly books and conter(sp) returns and (remaining phrase is not legible)". Hall received a raise of twenty-five cents per hour. (Commission's Exhibit 7).

17. Hall's annual evaluation for the review period August 14, 1992 was "meets requirements." This means Hall's performance was consistent, she completed all assigned tasks and her area was running smoothly and in order. Hall was at work when scheduled and had good customer service. She received some "exceeds requirements" in the following areas 'notifies maintenance of any spills which needs assistance'; 'assists customers in selecting/finding merchandise'; 'knows area well to assist customer in finding all merchandise', 'uses the ten foot rule'; 'effectively trains sales floor associates.' She received some "below requirements." Her major area of job performance needing improvement was "in stock, maintenance, signing, labels comp flag(sp) program.". Hall received a raise of forty cents per hour. (Commission's Exhibit 8).

18. Between August 14, 1992 and August 14, 1994, Hall had additional raises. As of August 14, 1994, Hall was making \$6.85 an hour. This is an increase of seventy cents over a two year period.

19. In Hall's annual evaluation for the review period August 14, 1994 - July 7, 1995, July 7, 1995 - August 14, 1996. and the review period August 14, 1997 - August 14,

1998, while the department manager for Health and Beauty Aids, she received a rating of "above standard." Each evaluation lists areas of strength and improvement. (Commission's Exhibit No. 9, 15; Hr. Tr. Vol. I at 161 - 163; Hr. Tr. Vol. II, at 52; Hr. Tr. Vol. III, at 240 - 241).

20. Hall received a raise of twenty cents per hour as a result of annual evaluation for the review period August 14, 1994 - July 7, 1995. (Commission's Exhibit 9).

21. On August 3, 1995, Skaggs, Hall's supervisor, completed an associate's commendation form which resulted in a raise of twenty cents an hour. Hall now earned \$7.25 an hour. (Commission's Exhibit 10).

22. Hall's major areas of strength for the review period August 14, 1994 - July 7, 1995 were that she "worked well with others; knew her merchandise and department well and had good signage." It was noted that she needed to improve in the areas of CBL training; out of stock tags, paperwork and follow through with people and notes. (Commission's Exhibit 9).

23. Hall continued to receive regular pay increases and commendations. (Hr. Tr. Vol. I, at 43, 47; Commission's Exhibit No. 10, 11).

24. In 1996, Skaggs gave Hall an Associate's Commendation for taking on the added responsibility of computer-based learning captain. She received a raise of twenty cents an hour. (Hr. Tr. at 49, 50; Commission's Exhibit No. 11).

25. Hall received an "above standard" rating for the period July 7, 1995 - August 14, 1996. She received a raise of thirty seven cents per hour for an hourly rate of \$7.82. Hall's evaluation identified her major strengths as being courteous, following the dress code, working well with others, and having completed her CBL 100%. Her areas of improvement were "needs to work on attendance, side counters (remaining words are not legible). Hall points out in her evaluation that she had been absent because of illness. Mike Aurednik and Skaggs, supervisors, signed this evaluation. Stan Williams, manager/director said that Hall's overall strengths were that she was a good honest dependable worker who cared about her job, worked whenever needed and worked on her own. Williams said she needed to improve in "out of stock" and the signing program.

(Commission's Exhibit 12, 13).

26. On October 4, 1997, Hall received another commendation and is given a fifty cent raise to be department manager. She now earned \$8.71 an hour. (Commission's Exhibit 14).

27. Hall received a raise of twenty four cents per hour as a result of annual evaluation for the review period of August 14, 1997 - August 14, 1998. (Commission's Exhibit 15). She now earned \$8.95 an hour.

28. Hall's major areas of strength for the review period August 14, 1997 - August 14, 1998 were in the areas of performing her duties as a department manager, ordering, and customer service. Her areas of improvement were correcting her Perpetual Inventory (PI), working on her bins to be at company standards. (Commission's Exhibit 15).

29. In 1998, the last evaluation she received before Bare took over as store manager, Hall was given an "above standard" evaluation. (Commission's Exhibit No. 15, Hr. Tr. Vol. I, at 64).

30. In 1999, Hall's annual evaluation was lowered from "above standard" to "meets expectations." (Commission's Exhibit 16; Hr. Tr. Vol I, at 164-167; Hr. Tr. Vol. II, at 54; Hr. Tr. Vol III, at 242-244).

31. Hall received a "meets expectation" rating for the annual evaluation period August 14, 1998 - August 14, 1999. She received a raise of thirty six cents per hour for an hourly rate of \$9.15. Her major strengths were "works well with others, flexible, price changes done on tie, good communication; follows dress code and follows proper safety procedures." Some of her areas of improvement were controlling inventory and making sure associates follow directions." Hall pointed out in her evaluation that she should be evaluated better and get the maximum raise considering the help we had in the department." Jeff Adams and Skaggs, supervisors, signed this evaluation. (Commission's Exhibit 16)

32. Hall received a "meets expectation" rating for the performance appraisal for the period August 14, 1999 to August 14, 2000. In the appraisal, her strengths are defined as "dependable, has leadership abilities; works well with others; knows what needs to be

done; and 100% on CBLs." Her areas of improvement were that she needed "to take more interest in the stockroom; getting freight out back; pay more attention to "outs"; hold associates in area more accountable". Hall received a thirty-eight (38) cents pay raise per hour. Her hourly pay increased from \$9.15 to \$9.89. Lahoma Mills, Timothy Walsh and Skaggs, supervisors, signed off on this performance appraisal. Hall received several "below expectation ratings" on this performance evaluation.(Commission's Exhibit 17).

33. In July 2001, Hall received a "below expectations" performance appraisal. (Commission's Exhibit 22, Hr. Tr. Vol. I at 138-139). This is the only "below expectations" performance appraisal Hall has ever received while employed at the Beckley WAL-MART store.

34. After Bare left as store manager, Hall received an "exceeds expectations" evaluation in July 2002. (Commission's Exhibit 23, 24, & 25).

Shelia E. Hall's Experience as a Department Manager

35. In 1997, WAL-MART modified its in-store management structure, eliminating the position of department manager. Departments were grouped under the direction of area managers. (Hr. Tr. Vol. I, at 54-56). This structure was abandoned after a few months and WAL-MART returned to the department managers. (Hr. Tr. Vol. I, at 54-58).

36. During this time, Hall essentially remained in the position of department manager for the Health and Beauty Aids Department. (Hr. Tr. Vol. I, at 56-57).

37. When the area manager structure was abandoned, employees who were interested could sign up for the position of department manager. Hall signed up but was not selected. The reason she was given was that another candidate, Becky Vance, had been selected who wanted to advance in the company. (Hr. Tr. Vol. I, at 57).

38. Hall subsequently filed a complaint with the Beckley Human Rights Commission (Hr. Tr. Vol. I, at 59).

39. Hall received a call from Skaggs asking her to return to work to discuss the matter of being of a department manage. Prior to learning that she would no

longer be a department manager, Hall had been a zone manager and had been responsible for two departments, Cosmetics and Health and Beauty Aids (Hr. Tr. Vol. I, at 57).

40. The day after Skaggs called Hall about the department manager's position she went on vacation to Virginia. When she returned a week later and went back to work Skaggs told her that she would be a department manager for Health and Beauty Aids. (Hr. Tr. Vol. I, at 60).

41. Hall felt that "Bare had an instant dislike for me because of the way he scrutinized her work. . . . it seems like nothing I did was ever good enough for him. I couldn't please him." (Hr. Tr. Vol. I, at 65).

42. Stocking is not a job duty in the department manager job description. (Commission's Exhibit No. 1 at 5 - 6).

43. Bare took part of the Health and Beauty Aids Department and gave it to the Pet Department. (Hr. Tr. Vol. 1, at 86-87).

44. At some point Bare withdrew Hall's authority to order merchandise, making it impossible for her to address "outs" when the inventory was not already in the store. (Hr. Tr. Vol. I, at 180; Hr. Tr. Vol. III, at 88 and Commission's Exhibit No. 21).

45. Hall participated in "freight parties or blitzes" for other departments. (Hr. Tr. Vol. II, at 46; Hr. Tr. Vol. II, 80 - 82).

46. Freight parties or Blitzes were a regular part of the store-wide inventory system. (Hr. Tr. Vol. III, 77 - 79).

47. Freight parties were used to assist Hall with her inventory in the Health and Beauty Aids Department. There was a question regarding how often they were used and how effective they were. Store Manager Bare said that freight parties were held "at least once every other week to ten days." (Hr. Tr. Vol. II, at 45-46). But, Bare also said that freight parties were held "on average, once a month." (Hr. Tr. Vol. II at 102-103). Bare's testimony is inconsistent.

48. District Manager Greg May observed only one blitzing party in the Health

and Beauty Aids Department. (Hr. Tr. Vol. II, at 297).

49. Vincent Moses (there after referred to as Moses) had no recollection of any blitz parties in the Health and Beauty Aids Department after January 10, 2001 which is the date of Hall's written coaching or reprimand.

50. Hall developed a hernia from the lifting and pulling pallets at work. As a result, Hall was off from work for five weeks for surgery but returned to work on January 2, 2001 because she received a call from her employer asking that she return to assist in meeting a deadline for modules to be done in the Toy Department. (Tr. Hr. Vol. I, at 100).

51. When Hall returned to work on January 2, 2001, she suffered a relapse and could not return to work on January 6, 2001 but did return on January 7, 2001 to work in the Health and Beauty Aids Department. (Hr. Tr. Vol. I, at 99-104).

52. On January 10, 2001, co-manager Vincent Moses gave Hall a written reprimand about "outs" in the Health and Beauty Aids Department. This was approximately three days after Hall returned to work. (Hr. Tr. Vol. I, at 122, 104, 106).

53. Moses gave Hall the written reprimand at the direction of the district manager, Greg May, and the store manager Bare.

54. Hall refused to sign the form because she felt she was being held to a different standard and that she was expected to accomplish more than she could do without help.

55. Hall asked for a Telzon, a hand held computer used to assess the inventory.

56. Moses said that he was unaware of anyone looking into Hall's concerns. (Hr. Tr. Vol. III, at 71-72).

57. After the meeting, Hall was upset. She clocked out and went home.

58. Bare criticized Hall in front of other employees and witnesses.

59. On May 14, 2001, Hall met with Bare, Glen Gand and Lisa Horton in the "security room" about her "outs."

60. Hall credibly testified that Bare told her at this meeting that she had 30

days to get her department in order. (Hr. Tr. Vol. I, at 117-118). During this meeting she was told that she must develop a "Plan of Action", but was left to do it on her own time which is contrary to WAL-MART policy. (Hr. Tr. Vol. I, at 109-112).

61. Hall developed a "Plan of Action." When she tried to turn it in, Bare told Hall to "just keep it and I will get it from you." Bare stated that he had a conversation with Hall regarding the plan of action, then he said he did not have a conversation with her about the plan but that he directed someone else to get the plan from her. Bare never collected the plan himself. (Hr. Tr. Vol. I, at 112). Bare's testimony is inconsistent. I find that Hall's testimony is credible in this regard.

62. WAL-MART's policy requires the manager to meet with an employee to review the employee's "Plan of Action." Bare admitted that he never reviewed Hall's plan of action with her. (Respondent's Exhibit No. I, Hr. Tr. Vol. II, at 194, 248-250).

63. On May 23, 2001 and prior to the expiration of the thirty days, Assistant Manager, Donna Adkins called Hall to the office. Hall met with Adkins and Glen Gand. Hall explained that Bare told her she had thirty days to implement her "Action Plan." Gand told Hall that Bare said "we want to make a change now." Gand told her that she was being demoted. (Hr. Tr. Vol. I, at 120 - 121).

64. Hall was upset. With permission, she went home. (Hr. Tr. Vol. I, at 123).

65. Bare claims that he offered Hall another department manager's position in Cosmetics on two occasions, once when she was reprimanded and another when she was demoted. But the evidence in the record does not support his contentions. The evidence supports a finding that Bare did not participate in the January 10, 2001 discipline session and that Bare had no recollection of the substance of the May 14, 2001 meeting.

66. Moses had no recollection of any offers made to Hall that would transfer her to another department as a department manager. (Hr. Tr. Vol. III, at 40).

67. In the spring of 2001, the Health and Beauty Aids Department had a good inventory review. This review occurred just before Hall was demoted. Hall stated that this was the best inventory review she had received since she started with WAL-MART.

(Hr. Tr. Vol. II, at 339 and Hr. Tr. Vol. I, at 139).

68. Ninety days after Bare gave Hall a "below standard evaluation", he did not re-evaluate her. This resulted in Hall losing a retro-active pay raise. Teresa Shea, co-manager, discovered Bare's failure and sought to address it. (Commission's Exhibit No. 23; p. 125; Hr. Tr. Vol. I, at 244-249).

69. There was no evidence of verbal coaching in a separate file kept in compliance with WAL-MART Corporate Personnel and Disciplinary Policies.

70. Bare's testimony regarding Hall's reprimand and demotion is not credible because of many inconsistencies.

Michael McDowell's Investigation

71. Michael McDowell was the regional personnel manager for WAL-MART at the time Hall was demoted. He was based in Bentonville, Arkansas.

72. McDowell had responsibility for 87 stores in the region including Beckley, West Virginia. These stores averaged 500-600 employees each. (Hr. Tr. Vol. III, at 121-123).

73. Bare contacted McDowell on two occasions in 2001 regarding Hall before demoting her. The second call took place about one week or so after the first. On the second call, Bare reported to McDowell that Hall had not improved and a decision was made to demote her. (Hr. Tr. Vol. III, at 124 - 128).

74. Bare never told McDowell that Hall's reprimand came upon her return from a five week medical leave. (Hr. Tr. III, at 189-190).

75. McDowell acknowledged that this was something Bare should have told him. (Hr. Tr. III at 190).

76. McDowell was unaware that at the time of Hall's demotion, she was paid less than the white male department managers with less experience. (Hr. Tr. Vol. III, at 163-164).

77. Bare erroneously told McDowell that he had given Hall a "Decision Day."(Hr. Tr. Vol. II, at 136).

78. Bare did not tell McDowell that he had given Hall thirty days to improve and then demoted her two weeks before the thirty days expired. (Hr. Tr. Vol. III, at 177).

79. McDowell stated that had he known that Bare had given Hall 30 days to improve and that Hall's 30 day period was not yet up, McDowell would have told Bare to wait out the 30 days. (Hr. Tr. Vol. III, at 177).

80. Bare did not call McDowell about the performance problems and misconduct of white male managers Charles Bowden, Ken Scott, Greg Hall, and Tommy Osborne. (Hr. Tr. Vol. III, at 162).

81. After Hall was demoted she contacted McDowell, the regional manager, and told him that she had been demoted and felt that it was related to her race. (Hr. Tr. Vol. I, at 123-124, 197-198, Commission's Exhibit No. 27 ¶ 3).

82. Hall faxed McDowell a description of what had happened to her. In the fax, Hall said she was discriminated against because she had been denied a "decision day" and a "thirty days" to improve per WAL-MART WalMart Corporate Personnel and Disciplinary Policies. (Commission's Exhibit 21, Hr. Tr Vol. I, at 126-127).

83. McDowell admitted that Hall did call him after the demotion and told him that she had been treated unfairly. She sent a follow-up letter documenting things she felt were not fair. (Hr. Tr. Vol. III, at 157; 130 158).

84. McDowell investigated Hall's complaint by calling Greg May, District Manager who confirmed that there were some problems with "outs." (Hr. Tr. Vol. III, at 132 - 135).

85. Greg May reviewed Hall's file looking for coaching at the request of McDowell. Greg May did not find any record of a Decision Day. (Hr. Tr. Vol. III, at 136 -137 and Hr. Tr. Vol. III, -271-272).

86. McDowell admitted that Hall called him and told him her demotion was racially motivated. (Hr. Tr. Vol. II, at 199).

87. McDowell's investigation failed to address the racial discrimination charge that she alleged and Hall's allegations that she had been treated differently from other

employees. (Hr. Tr. Vol. III, at 208).

88. There is no written report of McDowell's investigation. (Hr. Tr. Vol. III, at 154, 156, 157-158, Commission's Exhibit No.21).

89. At the time of his investigation, McDowell was unaware of Hall's written January 10, 2001 reprimand. (Hr. Tr. Vol. III, at 189-190).

90. McDowell stated that he regularly conducts investigations regarding allegations of discrimination, but he cannot recall any claim of discrimination he ever investigated that had any merit. (Hr. Tr. Vol. III, at 215).

Thomas Christopher Bare, Hall's Supervisor

91. Bare admitted that if verbal coaching is done in accordance with WAL-MART policy, it is documented by the supervisor as to "time, place, and context of this conversation." (Hr. Tr. Vol. II, at 137, Respondent's Exhibit No. 2 at 88-89).

92. The alleged verbal coachings that Bare claims he gave Hall prior to the written reprimand would have occurred while Hall was out on sick leave. Bare's testimony regarding verbal coachings is not credible. Hall was not verbally reprimanded in accordance with WAL-MART policy. (Hr. Tr. Vol. II, at 141 - 143).

93. Bare did not follow WAL-MART WalMart Corporate Personnel and Disciplinary Policies when he failed to document any alleged verbal coachings. There is no evidence in the record that Hall's supervisor or any other supervisor documented the time, place, and content of the Level One meeting and kept the documentation in a separate file in accordance with WAL-MART polices.

94. There is no documentation that on May 14, 2001, Hall had a level three coaching that constituted a "Decision Making Day" in accordance with Walt-Mart corporate policies.

95. Hall did not receive the next day off (May 15, 2001) with pay to decide whether she would make the improvements required by Walt-Mart Corporate Personnel and Disciplinary Policies.

96. Bare's testimony regarding Hall's "Decision Making Day" is not credible

because of the numerous inconsistencies in his testimony. (Hr. Tr. Vol. II, 171-175, 186).

97. There is no evidence in the record that any supervisor met with Hall to discuss her "Plan of Action" as required by WAL-MART Corporate Personnel and Disciplinary policies.

98. Although Hall was told she had a thirty day improvement period, there is no evidence in the record that Hall actually had a thirty day improvement period as required by WAL-MART Corporate Personnel and Disciplinary policies. Hall was demoted before the thirty day improvement period expired.

99. Bare did not re-evaluate Hall in 2001 as required by WAL-MART Corporate Personnel and Disciplinary Policies and did not give her a retroactive pay increase. Bare left just a few months before Hall was evaluated in July 2002 . As a result of this evaluation, she received a "meets expectation" rating. (Commission's Exhibit Nos. 23, 24, 25; 147-148).

100. Although Bare stated that Hall consistently had 200 -300 "outs" and despite his testimony that the number of "outs" were regularly recorded, Bare could not produce any written evidence that substantiated his testimony that Hall's "outs" were between 200-300. (Hr. Tr. Vol. II, at 120).

101. Moses stated that Hall was given a written coaching on January 10, 2001 because she had 20-25 "outs." Moses also said that many departments had the same number of "outs." (Hr. Tr. Vol. III, at 56, 59-61).

102. Sarah Angle credibly testified that Bare told her to be careful not to hire any more blacks. Angle said that Bare told her "the ratio is high right now." Angle stated that Bare gave her a percentage of the number of blacks and whites she should have. (Hr. Tr. Vol. III, at 277). The record evidence supports a finding that Bare never denied Angle's testimony. (Hr. Tr. Vol. at 11-255).

**WHITE MALE DEPARTMENT MANAGERS WHO HAD PERFORMANCE
PROBLEMS DURING THE TIME SHEILA E. HALL WAS A DEPARTMENT
MANAGER WERE NOT DEMOTED BY STORE MANAGER BARE**

Charles Bowden

103. Charles Bowden , a white male, replaced Hall as the department manager in the Health and Beauty Aids Department. (Hr. Tr. Vol. II, at 88). He was transferred from the Garden Department.

104. Prior to Bowden's transfer to Health and Beauty Aids, Bowden had been found guilty of misconduct, that is, fraternizing with a subordinate. This is a violation of WAL-MART Corporate Personnel and Disciplinary Policies. Bare admitted that he was aware of the violation and that this form of misconduct was a more serious offense than performance problems. Bowden was not demoted as a result of this misconduct. (Hr. Tr. Vol. II at 124-127, 128, 132).

105. A department manager is to be terminated if he is romantically involved with an employee he supervises. (Hr. Tr. Vol. III, at 147-148). Transfer is a possibility, but, if the charge is proven, the consequence is termination. (Hr. Tr. Vol. III, at 148-149).

106. Bowden's violation of WAL-MART's fraternization policy was admitted. (Hr. Tr. Vol. II, at 128).

107. Bowden had problems managing Health and Beauty Aids. (Hr. Tr. Vol. II, at 319-320).

108. Although Hall had more tenure and experience than Bowden; Bowden was paid more than Hall. (Hr. Tr. Vol. II, at 218-219).

109. Bowden also had a problem with "outs." (Hr. Tr. Vol. II, at 217-221).

110. Bowden had a problem with fraternization, attendance, misconduct and personal appearance. (Hr. Tr. Vol. II, at 221; Commission's Exhibit No. 34).

111. Skaggs, Bare's replacement demoted Bowden in October 2002. Bare never demoted Bowden. (Commission's Exhibit No. 34 at 490; Hr. Tr. Vol. III, at 249,

267-268; Respondent's Exhibit No. 8).

Greg Hall

112. WAL-MART hired Greg Hall (not related to Hall) on March 4, 1991. (Commission's Exhibit No. 28 at 321, 323, 356).

113. When hired, Greg Hall had limited retail experience and no prior managerial experience. (Commission's Exhibit No.28 at 372).

114. Greg Hall's evaluations like Hall indicated that he had recurring problems with inventory. (Commission's Exhibit No.28 at 318-320, 329).

115. Greg Hall had difficulty managing the Toy Department. Bare transferred Greg Hall to the Furniture Department, a less difficult department. (Hr. Tr. Vol. at 135; Hr. Tr. Vol. II, at 60; Hr. Tr. Vol. II, at 227-228; Commission's Exhibit No. 28 at 323).

116 . Greg Hall was paid more than Hall. As of February 2001, with less than 6 years of experience, Greg Hall made \$10.80 per hour, almost one dollar more per hour than Hall who by then had been a department manager for 12 years. (Commission's Exhibit No. 17 at 203; Commission's Exhibit No. 29 at 384, 397; Hr. Tr. Vol. II at 229-230).

117. Greg Hall's February 2001 evaluation revealed that he was having inventory and stock problems, the same type of problems for which Bare demoted Hall. However, Greg Hall was not demoted. (Commission's Exhibit No. 28 at 317, 320).

Tommy Osborne

118. Tommy Osborne, a white department manager for the Sporting Goods Department, had problems keeping his department organized. Bare did not demote him, but transferred him to the Hardware Department. (Hr. Tr. Vol. II, at 232, 233; Commission's Exhibit No. 29 at 381; Hr. Tr. Vol. I, at 136).

119. When Skaggs returned to the Beckley WAL-MART store in 2002, he demoted Osborne to an overnight receiver. Bare never demoted Osborne. (Commission's Exhibit No. 29 at 380).

120. After five years of service with WAL-MART, Osborne was receiving a higher salary than Hall who had 12 years of experience as a department manager. (Commission's Exhibit No. 29 at 384). Bare stated that Osborne's salary was based on experience. (Hr. Tr. Vol. II, at 229-230).

Kenneth Scott

121. Kenneth Scott, a white male department manager, received a written reprimand on January 10, 2001, for problems with inventory in stock. This was the same day Hall received a written reprimand for the same problem. (Hr. Tr. Vol. III, at 257, respondent's Exhibit No. 4 at 267).

122. Scott's problems with "outs" had been going on for at least a month before his write up. The record is devoid of any evidence that Scott was out sick during the one month period before his write up. (Hr. Tr. Vol. III, at 33-34).

123. Hall, on the other hand, had been out on sick leave for over a month prior to January 10, 2001. (Hr. Tr. Vol. II, at 196).

124. Scott made an unauthorized \$1,400 in markdown on a store item. Bare admitted that this action constituted misconduct and was an integrity issue and as such was more serious than performance problems.

125. Bare never demoted Scott.

James Elkins

126. James Elkins, a white male, was promoted to the position of department manager February 2001. (Commission's Exhibit No. 33 at 282).

127. Elkins had problems handling his freight. Bare gave him a verbal warning on September 9, 2001 that was specific and documented. Elkins was given a specific time to improve. (Respondent's Exhibit No. 5 at 311).

128. Although Elkins did not improve, Bare never demoted him.

129. When Skaggs returned to the Beckley store as store manager, he disciplined Elkins and removed him as the department manager of the Pet Department.

Skaggs followed WAL-MART Corporate Personnel and Disciplinary Policies. He gave Elkins a "Decision Making Day" and a specified two weeks to improve. When Elkins failed to improve, Skaggs demoted him in accordance with WAL-MART Corporate Personnel and Disciplinary Policies. (Hr. Tr. Vol. III, at 249-252, 269-270; Respondent's Exhibit No. 5 at 311-312).

Vincent Arnold Moses

130. Moses was a co- manager of the Beckley WALMART Store for at least two years and supervised Hall for four to six months during his tenure at the store. (Hr. Tr. Vol. III, at 6, 9).

131. During the time Moses supervised Hall, he observed that her performance problems were "not being ready for customers and out of stock" problems. (Hr. Tr. Vol. III, at 11).

132. Moses personally assisted Hall in stocking shelves. He observed blitz parties in Hall's department at least once or twice weekly. (Hr. Tr. Vol. III, at 12, 13.).

133. Moses gave Kenneth Scott a written coaching on the same day he gave Hall one which was January 10, 2001.

134. Moses admitted that his written coaching was the only one Hall had ever received. At the time Moses did this coaching, there had been no previous verbal or written coaching maintained in writing in any file. (Hr. Tr. Vol. III, at 42).

135. Moses admits that prior to Hall's written coaching, she was called out of her department to work a blitz party in the Toy Department more than once. (Hr. Tr. Vol. III, at 49). She did not return to work until early January 2001 and her written coaching took place on Jan 10, 2001.

136. Moses said that he gave Hall several verbal coachings from the sales floor but there is no written document of this and Hall's written coaching does not indicate that this occurred.

137. Moses admitted that Hall made him aware that there was a problem with overnight stocking in her department. (Hr. Tr. Vol. III, at 64, 67). Moses admitted

that no steps were taken to correct this problem. (Hr. Tr. Vol. III, at 68).

138. Moses does not recall whether he or Bare addressed the remarks Hall wrote in the comment section of the written coaching i.e. concerns regarding employees not doing their jobs; not having the equipment she needs to do her job and not having a telzon. (Hr. Tr. Vol. III, at 71-72).

139. Moses was under the impression that Bare had offered Hall another department manager's position but he did know when the position was offered to her. (Hr. Tr. Vol. III, at 39) He did not recall Hall being present when he had the discussion with Bare regarding another manager position. (Hr. Tr. Vol. III, at 40).

140. Moses admitted that it would have been Bare's responsibility to follow up and offer the position to Hall. (Hr. Tr. Vol. III, at 41).

141. Moses was under the impression that Bare had done so but he does not recall Bare telling him that he did. (Hr. Tr. Vol. III, at 41).

142. Moses could not recall if any other department managers other than Scott received written coachings for their "outs" during the same period that Hall received a written coaching. (Hr. Tr. Vol. III, at 62).

143. Moses stated that he did not know if Hall received a decision making day because he went back to the Groceries Department at the Beckley Wal-Mart store and on December 1, 2001, he was transferred to the store in Covington, Virginia.

144. Although Moses supervised Scott and Osborne, he did not participate in the switching around of those department managers. (Hr. Tr. Vol. III, at 99).

145. Moses admitted that if there were verbal coachings on Hall he would have looked for them and noted it in the appropriate box on the written coaching form. (Hr. Tr. Vol. III, at 106-107).

146. Moses admitted that he did not follow WAL-MART Corporate Personnel and Disciplinary Policies to some extent because he could not find any verbal coachings to attach to the written coaching.

WAL-MART Corporate Personnel and Disciplinary Policies

147. An employee with a below standard evaluation is to be re-evaluated in ninety (90) days. After a ninety (90) day review, an employee may become re-eligible for a pay raise. (Commission's Exhibit No.23).

148. Whenever an employee is required to prepare a "Plan of Action", the employee's supervisor is required to meet with the employee and go over the plan with the employee. (Respondent's Exhibit 1).

149. WAL-MART has very detailed and extensive employee policies that have not changed very much over the years. (Commission's Exhibit 1; Respondent's Exhibit 1).

150. WAL-MART has a reputation among its employees as being strict about adherence to its policies. (Hr. Tr. Vol. II, at 336-337; Hr. Tr. Vol. III, at 119).

151. WAL-MART's employee policy sets out a progressive disciplinary procedure under the heading of "Coaching for Improvement." There are three levels of coaching. (Respondent's Exhibit No. 1 at 89).

152. The first level is verbal coaching. The employee is to be informed that this is the first level of the "Coaching for Improvement" process. This form of coaching does not require the employee to sign a form. It is a verbal reprimand. The policy does require the supervisor to document the time, place and content of the conversation and keep the documentation in a separate file, not in the employee's personnel file. The policy requires that if the employee advances to a "written coaching" that the supervisor's documentation reflecting the verbal coaching is attached to the "written coaching" and become part of the personnel file. (Respondent's Exhibit No. 1 at 89).

153. The second level is a "written coaching." This level of coaching is the first formal documented level of "Coaching for Improvement" and it is documented on a Coaching for Improvement Form and signed by the employee. It is used when verbal coaching has not been successful in changing or correcting the unacceptable behavior or performance. (Respondent's Exhibit No. 1 at 89). The Form, with an acceptable detailed action plan must be completed and signed by the employee.

154. The third level is a "Decision Making Day." This is the final opportunity for an

employee to evaluate his or her behavior in view of WAL-MART's expectations before termination. At this level, the employee is given one (1) day off with pay to decide whether he or she will make the required improvement. The "Decision Making Day" is the employee's next scheduled work day. The employee is to be paid for the number of hours he or she was actually scheduled to work." The employee is required to "complete and sign a detailed action plan." The employee's supervisor is required to meet with the employee to review the employee's "action plan" and to "discuss his or her decision as to making the required improvement." The employee is to be paid for the number of hours he or she was actually scheduled to work." (Respondent's Exhibit No. 1 at 89).

155. Demotion may be part of the "Decision -Making Day" for both job performance and misconduct issues.

156. WAL-MART policy makes a distinction among three levels of behaviors which are to be addressed by the disciplinary policy. The three levels of behavior are job performance, misconduct and gross misconduct. (Respondent's Exhibit No. 1).

V.

CREDIBILITY FINDINGS

Bare's testimony lacks credibility because of numerous inconsistencies in his testimony regarding whether WAL-MART policy was followed, whether Hall was offered certain opportunities, whether Hall was offered 30 days to improve and an alleged offer to transfer Hall to another department manager position. This claim is important because, if true, it cuts against the Commission's claim that Hall was treated in a manner different from white male department managers, who were transferred rather than demoted.

Bare testified that he offered Hall the department manager position in the Cosmetics Department, and both on the occasion of the written reprimand on January 10, 2001, (Hr. Tr. Vol. II, at 58-59, 149-157), and "again" on May 14, 2001, (Hr. Tr. Vol. II, at 65-66) which he characterized as the Decision Making Day. The record evidence does not support this claim because Bare could not reconcile this claim with the fact that he did not participate in the January 10th discipline session. (Hr. Tr. Vol. I, at 100-104). Bare tried to

claim that he was "in the room for part of it," but could not recall the identity of any of the people who were there. (Hr. Tr. Vol. II, at 146). Neither Moses (who was present) nor the documentary evidence place him there. Bare then changed his story to say that the offer was extended to Hall at an earlier point in time, on the sales floor (Hr. Tr. Vol. II, at 150). Bare's shifting explanations are not credible.

While Bare was at least present at the May 14th meeting, the credible evidence reflects that he did not offer Hall a transfer at this meeting either, notwithstanding his claim.

Courts have been extremely skeptical of alleged reasons which are not asserted until the latter stages of a discrimination dispute. Gallo v. John Powell Chevrolet, Inc., 61 Fair Empl. Prac. Cas. 1121, 1129 (M.D. Pa 1991) (the fact that the employer's alleged reasons were not asserted until the hearing "casts doubt on their authenticity and suggests that they were fabricated after the fact to justify a decision made on other grounds"); Foster v. Simon, 467 F. Supp. 533 (W.D. N.C. 1979); Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. Pa. 1973). Similarly, shifting reasons or defenses between the time of the adverse action and the time of the hearing is strong evidence of pretext. Smith v. American Service Co., 611 F. Supp. 321, 328 (N.D. Ga. 1984); Townsend v. Grey Line Bus Co., 597 F. Supp. 1287 (D. Mass. 1984), aff'd, 767 F. 2d 11 (1st Cir. 1985)

In Townsend, Grey Line Bus Company (Grey Line) alleged that it rejected a black applicant for the position of motor coach driver because he was not qualified. First, Grey Line articulated that Townsend was not qualified because he did not have motor coach driving experience. The court found this reason unworthy of credence because testimony revealed that the defendant hired persons who lacked motor coach driving experience. Townsend, 597 F. Supp. At 1291-92. Then, at the trial, the defendant said Townsend was not qualified because he failed the driving test. The court also rejected this reason because the defendant, to support this asserted reason, proffered an altered document "rendering the authenticity of the markings on this document highly questionable." Id. At 1292.

Similarly, another court held that the backdating and altering of documents "undermine[d] the defendant's witnesses and strongly suggest[ed] discriminatory animus." Roberts v. Fri, 23 E.P.D. ¶¶ 31, 048, 31, 049 (D.D.C. 1980) (defendant changed documents

to indicate that the plaintiff declined the position).

Hall adamantly denied that she was ever offered a transfer to a different department manager position. (Hr. Tr. Vol. I, at 122; Hr. Tr. Vol. III, at 295).

Moses did not support Bare's testimony regarding offers to transfer Hall to another department manager position. Although he said that he might have talked with Bare about a possible transfer for Hall, he could not recall an offer ever being made to her in his presence. (Hr. Tr. Vol. III, at 40). Hall explicitly and credibly contradicted Bare on these points. Hall testified that at one point Bare offered to let her be a cashier, but claimed repeatedly and credibly that he never offered her any different or other department manager positions. (Hr. Tr. Vol. I, at 109-110, 122; Hr. Tr. Vol. III, at 295). Bare's testimony regarding his offer to Hall to transfer to a different department manager position just is not credible.

Furthermore, there was conflicting testimony regarding where, when and how Bare reviewed Hall's "Plan of Action." And there was Bare's testimony that he spent 15 minutes a day with each department manager in his store (Hr. Tr. Vol. II, at 118), a claim, which if true, would mean that he spent about 6 ½ hours doing nothing but talking to department managers. The evidence is that there were 28 departments in the store. If Bare covered four departments per hour, then it would take 6 ½ hours to cover the entire store. Bare's testimony is not credible.

There was significant inconsistency, particularly among WAL-MART's managers, both regarding what an acceptable level of "outs", how many "outs" there were in the Health and Beauty Aids Department, and as to how many "outs" there were in other departments.

According to Bare, WAL-MART expects to find 30 "outs" in a "consumable department." (Hr. Tr. Vol. II, at 29). Consumable departments were those with high volume (Hr. Tr. Vol. II, at 29-30) and included Health and Beauty Aids (Hr. Tr. Vol. II, at 18). Bare testified that Hall constantly had between 200 and 300 "outs." The evidence in the record does not support this testimony. Bare testified that he would have been satisfied if the Health and Beauty Aids Department had as few as fifty (50) "outs." (Hr. Tr. Vol. II, at 37-38). Bare's testimony is not credible.

Greg May, on the other hand, testified that the WAL-MART rule is that 30 "outs" are an acceptable number of "outs" for any department (Hr. Tr. Vol. II, at 261) and that no higher number is acceptable in the Health and Beauty Aids Department. He testified that any time there are more than 30 "outs", it is "definitely" a problem. (Hr. Tr. Vol. II, at 277-278). In fact, he claimed that if one of his managers was routinely putting up with more than 30 "outs" in a department, he would "absolutely" be concerned (Hr. Tr. Vol. II, at 278), and would consider it a disciplinary offense. (Hr. Tr. Vol. II, at 279). In contrast to Bare's testimony that he would treat 50 "outs" as acceptable, Greg May testified that if a manager were to routinely accept 50-70 "outs", it would be a "serious disciplinary offense." (Hr. Tr. Vol. II, at 279).

Moses testified that the number of "outs" that precipitated Hall's written coaching on January 10, 2001, was 20 to 25. (Hr. Tr. Vol. III, at 56). He also testified that as of January 2001, many departments might have been experiencing "outs" in the same range of 20 to 25. (Hr. Tr. Vol. III, at 59-61). Skaggs was unable to offer much information regarding how serious the problem was in Hall's department, or how serious it was compared to other departments. (Hr. Tr. Vol. III, at 239, 249).

Bare could also not decide whether "outs" were a "consistent problem" in the Health and Beauty Aids Department (Hr. Tr. Vol. III, at 119-120), or whether they were a recurring problem, which he and other managers repeatedly fixed, only to have Hall recreate the problem. (Hr. Tr. Vol. II, at 121).

What was very clear from the evidence was that "outs" were a chronic concern in many departments, and not a concern which was limited to the Health and Beauty Aids Department or to Hall. Bare acknowledged that every department at one time or another had a problem with freight. (Hr. Tr. Vol. II, at 230-231). There is documentary evidence that during 2001 Bare chided "all department managers to be working their freight in the stockroom all week." (Respondent's Exhibit No. 5, p. 311; Hr. Tr. Vol. I, at 85). There was evidence that the receiving room, where the freight arrives and is stored, has historically been a disorganized area. (Hr. Tr. Vol. I, at 259).

WAL-MART inventory control specialist Joann Griffith testified that the inventory

control problems in Hall's department were not worse than the other departments. (Hr. Tr. Vol. I, at 307). She identified several other departments which were very comparable. (Hr. Tr. Vol. I, at 308-309). Lahoma Mills, who previously worked as an assistant manager, and supervised Hall, testified that Hall did not have a particular problem with freight, and that all departments had problems with freight. She testified to specific other departments which had as much of a problem with freight as Hall. (Hr. Tr. Vol. I, at 337-338).

It is clear that the challenges with inventory in the Health and Beauty Aids Department were not of the Complainant's making. When she was demoted, Hall's replacements did not do any better (Hr. Tr. Vol. II, at 214), even with extra help. (Hr. Tr. Vol. III, at 298). Current overnight stocker Tammy Alderman, who was called to testify by the Commission, and current store manager Skaggs, who was called by the Respondent, both testified that currently, under the current Health and Beauty Aids Department manager who is not Hall, there are inventory and "outs" problems in that Department. (Hr. Tr. Vol. I, at 260-261; Hr. Tr. Vol. III, at 231).

Despite the importance of Hall's alleged problem with excessive "outs", the Respondent failed to provide any documentary evidence of the extent of this alleged problem. (Hr. Tr. Vol. II, at 120). This failure to produce any documentary evidence is particularly significant in light of the undisputed fact that such documentary evidence was supposed to be created on a regular basis during the period in question. Each department head was required to post the quality of "out-of-stock" in his or her department each Monday. (Hr. Tr. Vol. I, at 89-90). Notwithstanding that there was a regular tallying of "outs" by department, WAL-MART did not produce any documentation of the numbers of "outs" in Health and Beauty Aids while Hall was department manager, or any other department.

The credible evidence indicated that Hall was more conscientious about addressing the inventory challenged in her department than some other department managers. Hall carefully counted her "out-of-stock", and was truthful in putting figures on the list. (Hr. Tr. Vol. I, at 89-90). She noticed that "a lot of [other department managers] didn't even post [their "outs"]" (Hr. Tr. Vol. I, at 90-92), notwithstanding virtually all departments had some

"out-of-stocks" most of the time. (Hr. Tr. Vol. I, at 91). Hall's testimony on this point was corroborated by Bare. Bare claimed at the hearing that he was unaware that the "posting of "outs" had ever been a problem, and in particular that he could not remember Scott, department manager in the Paper and Chemicals Department, ever having a problem with posting "outs." (Hr. Tr. Vol. II, at 195 - 196). However, Bare was forced to acknowledge that he had recalled this very problem at his deposition (Hr. Tr. Vol. II, at 203), and had said it was a "significant" problem. (Hr. Tr. Vol. II, at 204-205).

At the time that Moses gave Hall a written coaching, he testified that Hall had 20 to 25 "outs" and that this number of "outs" was not unusual. Moses could not remember how many "outs" other departments were experiencing during the period he supervised Hall. He could not recall how many "outs" the Furniture Department, Cosmetics Department, Sporting Goods Department, Electronics Department, Domestic Department and Stationary Department experienced. He recalled the Housewares Department and Chemical and Paper Department "outs." (Hr. Tr. Vol. III at 58-61). Yet he recalled how many "outs" Hall had. It is impossible to determine how Hall's department compared to other departments during the period in question because there is no way to compare Hall's number of "outs" to other department managers' numbers of "outs." It is interesting that Moses remembers the number of "outs" Hall had, but not the number of "outs" the majority of the departments had under his supervision during the period in question.

Moses does not recall Hall complaining to him about other employees not doing their jobs and about not having a telezon to determine what merchandise should be on the pick list. (Hr. Tr. Vol. III at 68). Yet, these were the comments that Hall wrote on Moses written coaching form. There is no evidence that either he or Bare addressed these comments in an effort to help Hall be successful in implementing her "Plan of Action."

Moses' testimony is filled with vague answers such as "could have been", "I don't recall", and "I'm not sure."

VI.

DISCUSSION

A. THE COMMISSION HAS ESTABLISHED A CASE OF DISPARATE TREATMENT DISCRIMINATION.

1. THE WEST VIRGINIA HUMAN RIGHTS ACT PROHIBITS DISPARATE DISCIPLINE.

Among the guarantees of "equal opportunity" contained in the West Virginia Human Rights Act is the guarantee that an employee will not discipline in any manner which discriminates based on race or gender. Discipline is part of the "terms and conditions" of employment.

The law requires that an employer who imposes discipline must do so in an evenhanded way that does not discriminate on the basis of race or gender. This is true even if the conduct for which discipline was imposed was a serious infraction which might justify serious discipline. The United States Supreme Court addressed this issue in McDonald v. Santa Fe Train Transp. Co., 427 U.S. 273, 98 S. Ct. 2574, 49 L. Ed. 2d 493, 13 Fair Empl. Prac. Cas. 1577 (1976). In that case (which the West Virginia Supreme Court cited in State ex rel. State of W. Va. Human Rights Commission v. Logan-Mingo Area Mental Health, 174 W. Va. 711, 329 S. E. 2d (1985) the complainant had been fired because he stole cargo entrusted to his employer. The United States Supreme Court assumed both that the complainant had stolen the cargo and that this was a felony under state law. In spite of this, the court held that the complainant stated a cause of action under Title VII. The Court held that even if the misconduct might be a "legitimate basis for discharge," it was only acceptable under Title VII if persons of different races who were involved in "acts of comparable seriousness" received comparable discipline.

In the case involving Hall, the "conduct" of the Complainant is not of such seriousness. There is no misconduct even alleged against her. The reason given for Hall's demotion was inadequate job performance.

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. W.Va. Code §§ 5-11-1 to - 21. Section 5-11-9(1) of the Act makes it unlawful “for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions, or privileges of employment....”

The term “discriminate” or “discrimination” as defined in W.Va. Code § 5-11-3(h) means “ to exclude from, or fail or refuse to extend to, a person equal opportunities because of race.....[and] sex.....[and] age.” This includes equal opportunities with regard to tenure and conditions. W. Va. Code § 5-11-9.

Given this statutory framework, to recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful discrimination, or the Commission acting on his or her behalf, must ultimately show by a preponderance of the evidence that:

- (1) the employer excluded him or her from, or failed or refused to extend to Complainant, an equal opportunity; and
- (2) that one or more impermissible reasons were a motivating or substantial factor causing the employer to exclude the complainant from, or fail or refuse to extend to Complainant, an equal opportunity, Price Waterhouse v. Hopkins, 490 U.S. 288, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); and
- (3) the equal opportunity denied a complainant is related to any one of the following employment factors: compensation, hire, promotion, tenure, conditions or privileges of employment.

A discrimination case may be proven on a disparate treatment theory or by a disparate impact theory. See Barefoot v. Sundale Nursing Home, Syl. Pt. 6, 193 W. Va. 475, 457 S.E.2d 152 (1995); West Virginia University v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994); Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission, 181 W. Va. 251, 382 S.E.2d 88 (1989). A disparate treatment case requires proof (at least inferential proof) of discriminatory intent. Discriminatory intent may be established by showing that the decision maker acted out of stereotypical thinking, such as gender stereotypes, and need not involve some type of malice or hatred. Disparate impact has no “intent”

requirement, but rather a showing that a facially neutral employment practice has a disproportionate adverse impact on a protected class.

There are three different analyses which may be applied in evaluating the evidence in a disparate treatment discrimination case. The first, and most common, uses circumstantial evidence to prove discriminatory motive. Since discriminating employers usually hide their biases and stereotypes, making direct evidence unavailable, a complainant may show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. V. Green, 411 U.S. 792, 93 S. Ct. 817, 36 L. Ed.2d 668 (1973), and adopted by our Supreme Court in Shepherdstown Volunteer Fire Dept. V. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983). See Barefoot, 457 S.E.2d at 169 n.19.

The McDonnell Douglas method requires that the Complainant or Commission first establish a prima facie case of discrimination. The burden of production then shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the Complainant or Commission may show that the reason proffered by the Respondent was not the true reason for the employment decision, but rather a pretext for discrimination. In this case, all three analyses may be used.

Cases analyzed under the McDonnell Douglas test often turn on the credibility of the explanation offered by the Respondent for its decision. The term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 383 S.E.2d 490, 496 (1989), citing Black's Law Dictionary, 1069 (5th ed. 1979.) A proffered reason is pretext if it is not "the true reason for the decision". Conaway v. Eastern Associated Coal Corp., 174 W. Va. 164, 358 S.E.2d 423, 430 (1986). "Pretext may be shown through direct or circumstantial evidence of falsity or discrimination." Barefoot, 457 S.E.2d at 160. Where pretext is shown, discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. 513, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

Second, there is the “mixed motive” analysis. This analysis may also work with circumstantial evidence; the difference is that in the typical mixed motive case the pretext aspects of the McDonnell Douglas analysis are not applicable. Where an articulated legitimate, nondiscriminatory motive is shown by the Respondent to be nonpretextual, but is in fact a true motivating factor in an adverse action, a Complainant may still prevail under the “mixed motive” analysis. This analysis is applicable in a case where some criticisms aimed at an employee maybe legitimate, but they are not the explanation for the adverse action. This analysis flows from the legal requirement that employment decisions must not be motivated, even in part, by discriminatory intent.

Finally, if it is available, the Complainant or the Commission may prove a disparate treatment claim by direct evidence of discriminatory intent. Proof of this type shifts the burden to the Respondent to prove by a preponderance of the evidence that it would have rejected the Complainant even if it had not considered the illicit reason. Trans World Airlines v. Thurston, 469 U.S. 111, 36 Fair Empl. Prac. Cas. 977 (1985). This analysis is similar to that used in mixed motive cases. Direct evidence of discriminatory motive is rare in discrimination cases, but in this case, there is direct evidence of racial discrimination in the employment decision making by the Respondent’s store manager, Skaggs.

All three of these analyses are applicable to this case. This is one of those rare cases where there is direct evidence of racial bias on the part of the decision maker, store manager, Bare. However, because there is so much evidence of less adverse action toward white male department managers, the circumstantial evidence is overwhelming and compelling.

This is also a classic case of mixed motive discrimination. The criticisms aimed at Hall regarding “outs” do not justify her demotion. With regard to white and/or male department managers, similar deficiencies did not result in a demotion. Clearly race was a part of the decision to demote Hall.

B. THE WEST VIRGINIA HUMAN RIGHTS ACT PROHIBITS AN EMPLOYER FROM DENYING AN EMPLOYEE AN EQUAL EMPLOYMENT OPPORTUNITY BECAUSE OF RACE.

1. THE COMMISSION ESTABLISHED A PRIMA FACIE CASE THAT SHEILA E. HALL WAS DENIED AN EQUAL EMPLOYMENT OPPORTUNITY BECAUSE OF RACE.

Hall established, through both direct and circumstantial evidence, a prima facie case of race discrimination. Establishment of a prima facie case raises an inference that the Respondent has discriminated against Complainant on the basis of the impermissible motive or motives. Barefoot v. Sundale Nursing Home, Syl. Pt. 6, 193 W. Va. 475, 457 S.E.2d 152 (1995).

A case involving a discriminatory demotion is similar to a case of discriminatory discharge. In both circumstances, an employee who has been placed in a position and has been performing the job is removed from the position. In a demotion, it is a removal to another position. In a discharge, it is removal from that position without remaining in the employer's workforce.

Except in the case of a layoff, both demotions and discharges are usually "explained" by alleged performance failures or misconduct by the employee. The objective of the analysis is to test the veracity of the employer's explanation.

In Conaway v. Eastern Associated Coal Corp., 178 W. Va. 164, 358 S.E.2d 423 (1986), the West Virginia Supreme Court articulated a general, three-part prima facie test for employment discrimination.

The prima facie case "is designed to allow a plaintiff with only minimal facts to smoke out a defendant—who is in control of most of the facts—and force it to come forward with some explanation for its action." Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 485-486; 457 S. E. 2d 152, 162-163 (1995).

The Conway test must be applied advisedly because of an unfortunate and misleading phrasing of the third prong; but, it is a useful test if this problem is noted. The Court in Conaway said:

In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. (1979), the plaintiff must offer proof of the following:

(1) That the plaintiff is a member of a protected class.

Hall is a 53 year old African American woman. (Hr. Tr. Vol. I, at 21.) All of her evaluations except the one done when Bare was store manager points to the fact that she was qualified for the position of department manager, a position she held for twelve (12) years.

(2) That the employer made an adverse decision concerning the plaintiff.

The record evidence establishes that Bare demoted Hall from manager of the Health and Beauty Aids Department to sales associate in a manner that violated WAL-MART Corporate Personnel Policies.

(3) But for the plaintiff's protected status, the adverse decision would not have been made.

There is overwhelming evidence that white male department managers who had performance problems at least as serious as Hall's were not demoted by Bare. When Skaggs replaced Bare as store manager, all of the white male department managers were demoted.

Whenever white male department managers had performance problems or were guilty of misconduct, Bare would transfer them to other departments. For example, Bare transferred Scott who had serious inventory problems and later was guilty of serious misconduct to another department. (Hr. Tr. Vol. I, at 138; Hr. Tr. Vol. II, at 196, 240-241; Hr. Tr. Vol. III, at 33-34, 257; Commission's Exhibit No. 32, p. 230; Respondent's Exhibit No. 4, p. 267). Also, Bare transferred Osborne because he could not keep the Sporting Goods Department organized. Bare moved Osborne to the Hardware Department (Hr. Tr. Vol. I, at 135-136; Hr. Tr. Vol. II, at 232-233; Commission's Exhibit No. 29, pp. 380, 381). Bare transferred Greg Hall, who had unacceptable problems managing inventory as Toy Department manager, to the Furniture Department. (Hr. Tr. Vol. I, at 135, Hr. Tr. Vol. II at 60, 227-228; Commission's Exhibit No. 28 at 323).

James Elkins was not transferred to another department manager position, but was allowed to continue as manager of the Pet Department despite his performance problems. Bowden, who replaced Hall as department manager of the Health and Beauty Aids Department, had been removed from the Garden Department because of misconduct. He was no more successful at managing inventory in Health and Beauty Aids than had been Hall had been, however, Bare did not demote Bowden.

In addition to the favorable treatment white managers received as compared to Hall, the record evidence does not support a finding that Hall's "outs" were any more "excessive" than her white counter parts. Moses stated that Halls "outs" were 20 to 25 and that there were other store managers who also had 20 to 25 "outs."

Furthermore, Bare caused Hall to receive a formal written reprimand on January 10, 2001 a few days after she returned from an extended five (5) week leave of absence for surgery (Hr. Tr. Vol. I, at 99 - 100). The surgery was necessary to correct a hernia she had as a result of pulling pallets of products to be place on the shelves in the Health and Beauty Aids Department. Bare held Hall responsible for "outs" in her department that occurred while she was out on sick leave. This action by Bare further strengthens the presumption of discrimination.

The evidence also clearly established that Bare failed to follow WAL-MART Corporate Disciplinary Policy with regard to Hall, skipping a definitive step known as a Decision Making Day, and failing to document the verbal coachings as required. (Respondent's Exhibit No.1, Hr. Tr. Vol. II, pp. 271-272). Then when Hall complained internally of discrimination, Michael McDowell, Regional Personnel Manager, conducted a superficial investigation. Bare also failed to reevaluate Hall in the fall of 2001, as required by WAL-MART Corporate Personnel Policy. This resulted in Hall missing a pay raise.

There is also compelling direct evidence that store manager Bare resisted the hiring of African American employees once he felt the store already had "enough". Bare operated with racial biases which affected his objectivity in applying the terms and conditions of employment to black employees and applicants.

Sarah Angle, Head Customer Service Manager during the period in question, credibly

testified that Bare gave her a percentage of the number of blacks and whites she should have and that Bare told her to be careful not to hire any more blacks. (Hr. Tr. Vol. I at 273-278).

Clearly, Hall has established a prima facie case. The establishment of a prima facie case creates a "presumption" that the employer unlawfully discriminated against the Complainant. Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342, 352 (1983).

"[T]he burden now shift[s] to the defendant....to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason". Burdine, 450 U.S. at 254. Though the burden on Respondent under this test is only one of production, not persuasion, to accomplish it a Respondent "must clearly set forth through the introduction of admissible evidence regarding the reason for the [complainant's] rejection." Id. The explanation provided "must be clearly and reasonably specific," id. At 258, "must be legally sufficient to justify a judgment for the defendant," and it must be both legitimate and discriminatory. Id. at 254.

The Respondent has asserted several reasons for demoting Hall. The reasons are that Hall had an excessive number of "outs" in the Health and Beauty Aids Department; that Bare used WAL-MART's discipline policy and gave Hall an opportunity to improve her performance; that Hall was provided with reasonable assistance; that Hall was given an opportunity to transfer to a different department manager position; and that all similarly situated department managers were handled in the same way. The evidence in the record, taken in its entirety, however, does not support any of the Respondent's claims.

2. THE RESPONDENT FAILED TO TREAT SHEILA E. HALL IN THE SAME MANNER AS ITS WHITE MALE DEPARTMENT MANAGERS.

The evidence clearly reflects that when Bare administered standards and discipline regarding department managers, he did not do so with consistency. White male managers were not demoted for poor performance as Hall had been.

Bowden was a white male employee who replaced Hall as department manager in Health and Beauty Aids. (Hr. Tr. Vol. II, at 88). According to Greg May, Bowden had chronic problems when he managed the Health and Beauty Aids Department. (Hr. Tr. Vol. II, at 316-318). Bowden also missed a great deal work. (Hr. Tr. Vol. II, at 319-320). Bowden's standards were never what Greg May thought they should be. (Hr. Tr. Vol. II, at 317).

In addition to chronic performance problems, at the time Bowden was transferred into the Health and Beauty Aids Department, he had already been found guilty of misconduct for fraternizing with a subordinate. It was not clear from the record whether Bowden was written up by Bare for this offense, but it was clear that Bowden was transferred between department manager positions rather than being demoted. Bare testified that he knew Bowden violated WAL-MART's policy against fraternization (Commission's Exhibit No. 30), (Hr. Tr. Vol. II, at 124-128, 132). Fraternization is a form of misconduct, and Bare acknowledged that misconduct was a more serious offense than performance problems. (Hr. Tr. Vol. II, at 124). At the public hearing, Bare testified that he did not fire Bowden because, he claimed, this is not what the complaining associate wanted.

Not only did Bare deal with Greg Hall's deficiencies as a department manager in a far less severe manner, Bare paid Greg Hall more than Hall. As of February 2001, Greg Hall, with less than six years of experience as a department manager, was paid \$10.80 per hour (Commission's Exhibit No. 28, p. 320), almost a dollar more per hour than Hall, who has been a department manager for 12 years. (Commission's Exhibit No. 28, p. 203; Commission's Exhibit No. 29, pp. 384, 397). Greg Hall was paid significantly more as a

department manager, in spite of problems in his department manager position. His pay continued to increase, so that by January 2003, he was making \$11.89 per hour. (Commission's Exhibit No. 28, p.317).

Osborne was a department manager in the Sporting Goods Department. It is acknowledged that he had problems keeping his department organized. (Hr. Tr. Vol. II, at 232). These problems were serious enough that when Skaggs returned as store manager in 2002(after Bare left), Skaggs removed Osborne from the department manager position and moved him to overnight receiving. (Commission's Exhibit No. 29, p. 380). However, Bare did not demote Osborne over his inability to solve the problems in his department. Instead, in October 2001, Bare moved him to be department manager of the Hardware Department, which was easier to manage because it was seasonal. (Hr. Tr. Vol. II, at 233; Commission's Exhibit No. 29, p. 381; Hr. Tr. Vol. I, at 135-136).

In addition to receiving more favorable disciplinary treatment, Osborne who at the beginning of 2001 had five years of WAL-MART department manager experience to Hall's 12 years, was being paid more than Hall. (Commission's Exhibit No. 28, p. 203; Commission's Exhibit No. 29, pp. 384, 397). Bare testified that pay was set based upon experience. (Hr. Tr. Vol. II, at 229-230).

Scott was a white male department manager (Hr. Tr. Vol. III, at 257) who received a written reprimand on January 10, 2001, the same day as Hall's written reprimand. Scott had problems keeping inventory in stock (Respondent's Exhibit No. 4, p. 267) essentially the same problems noted in Hall's reprimand. Moses testified that the problems with Scott's out of stocks had been going on at least a month before January 10, 2001, when Scott received a write-up. (Hr. Tr. Vol. III, at 33-34). In contrast to Hall, who was out on sick leave for five weeks before January 10th, there is no evidence that Scott was away from his department at all in the six-week period preceding his write-up. It is far more likely that Scott was actually responsible for any deficiencies in his department on that date. (Hr. Tr. Vol. II, at 196.)

Scott was never demoted by Bare. There is no evidence that Scott's performance improved, but instead of demoting him, Bare moved Scott as a department manager of the

Paper and Chemicals Department, where he was failing to meet standards, (Hr. Tr. Vol. I, at 138), to the position of department manager of the Sporting Goods Department. (Commission's Exhibit no. 32, p. 230). Scott had problems in Sporting Goods. (Hr. Tr. Vol. II, at 233), but still was not demoted by Bare, even after he later took an unauthorized \$1,400 in markdown on a store item, which was acknowledged as an "integrity issue." (Respondent's Exhibit No. 4, p. 268; Hr. Tr. Vol. II, at 240-241). When pressed about it, at the public hearing, Bare acknowledged that misconduct was a more serious offense than performance problems. Hall never had any "integrity issues."

Scott's subsequent evaluations did not show improvement in his performance (Respondent's Exhibit No. 4, at 231; Hr. Tr. Vol. III, at 242-243), and shortly after returning as store manager, Skaggs found it necessary to remove Scott from his second position as department manager because of his inability to maintain the standards of the department. Skaggs saw to it that Scott received an actual Decision Making Day in accordance with WAL-MART Corporate Personnel and Disciplinary Policies. (Hr. Tr. Vol. II, at 197-199). Skaggs testified that Scott had seventy-five (75) or more "outs" in his department. (Hr. Tr. Vol. III, at 255-256).

Bare promoted James Elkins, a white male, to a department manager position in February 2001 (Commission's Exhibit No. 33, p. 282, Hr. Tr. Vol. III, at 253). Bare testified, "he [Elkins] struck me as a strong individual with drive and with the will power to perform, to do better for himself." (Hr. Tr. Vol. II, at 211). Bare testified that when he promoted Elkins that, he [Bare] did not consider the possibility that Elkins might not succeed. (Hr. Tr. Vol. II, at 211-212). In fact, Elkins did not succeed. (Hr. Tr. Vol. II, at 212, 214; Commission's Exhibit No. 33). It was clear that Elkins did not handle his freight properly. Bare gave him a verbal warning on September 9, 2001, which in contrast to the warnings allegedly given to Hall, was specific and documented. (Commission's Exhibit No. 5, p. 311). Elkins was also given a specified period of time in which to manifest improvements. (Commission's Exhibit No. 5, p. 311) Although, Elkins failed to meet the expectations that had been laid out for him, the evidence in the record substantiates a finding that Bare made no move to demote him.

Shortly after Skaggs returned to the Beckley store as manager, Elkins was disciplined and removed as Pet Department manager. Following WAL-MART Corporate Personnel and Disciplinary Policies, Skaggs ensured that Elkins was given a Decision Making Day. He was also given a specified two weeks to improve his performance and was not demoted until he failed to improve his performance. (Hr. Tr. Vol. III, at 249-252, 269-270; Respondent's Exhibit No. 5, pp.311, 312).

The credible evidence in the record substantiates that inventory problems existed in many departments of the Beckley WAL-MART Store, but that the problems were not any worse in Hall's department than they were in other departments, or in the Health and Beauty Aids Department under Hall's successor. In addition, the substantial evidence in the record reveals that several other managers, who had performance problems that were equal to or worse than those of Hall, were in other respects problem employees. Nevertheless, the record clearly reveals that store manager Bare did not demote any of the white department managers mentioned at the public hearing, no matter how poorly they performed. The compelling inference which must be drawn from this evidence is that Hall was demoted because of her race and gender.

C. THE WEST VIRGINIA HUMAN RIGHTS ACT PROHIBITS AN EMPLOYER FROM DENYING AN EMPLOYEE EQUAL OPPORTUNITY BECAUSE OF SEX.

In West Virginia, equal opportunity for employment is a human and civil right. The denial of equal opportunity in employment by reason of race, religion, color, national origin, ancestry, **sex**, age, blindness, disability and/or familial status "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." W. Va. Code § 5-11-2.

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. W. Va. Code §§ 5-11-1 to -21.

To recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful discrimination, or the Commission acting on her behalf,

must ultimately show by a preponderance of the evidence that:

- (1) the employer excluded her from, or failed or refused to extend to her, an equal opportunity; and
- (2) that one or more impermissible reasons were a motivating or substantial factor causing the employer to exclude the Complainant from, or fail or refuse to extend to her, an equal opportunity, Price Waterhouse v. Hopkins, 490 U.S. 228. 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); and
- (3) the equal opportunity denied the Complainant is related to any one of the following employment factors: compensation, hire, promotion, tenure, terms, conditions or privileges of employment.

A preponderance of the evidence in the record clearly shows that Bare did not treat Hall the same as the white male department managers when applying WAL-MART Corporate disciplinary policy. Male department managers who had performance problems were not demoted.

D. THE RESPONDENT FAILED TO FOLLOW ITS OWN PERSONNEL AND DISCIPLINARY POLICIES

WAL-MART has very detailed and extensive employment policies. (Commission Exhibit No. 1; Respondent's Exhibit No. 1). These policies are available to all WAL-MART employees through an on-line information system known as the "pipeline." (Hr. Tr. Vol. III, at 104). WAL-MART also has a reputation among its employees as being strict about adherence to its policies. (Hr. Tr. Vol. II, at 336-337; Hr. Tr. Vol. III, at 119).

WAL-MART's WalMart Corporate Personnel and Disciplinary Policies sets out a progressive disciplinary procedure under the heading of "Coaching for Improvement." There are three levels of "coaching for improvement.

The first level is "verbal coaching." Although this form of reprimand is delivered orally, and does not call for an employee to sign any document, the policy requires the supervisor to "document the time, place and content of this conversation and keep the

document in separate file.”

The second level of WAL-MART’s progressive disciplinary policy is a “Written Coaching.” This level of coaching must be documented on a form which is signed by the employee. (Respondent’s Exhibit No. 1, p. 89).

The third level of WAL-MART’s progressive disciplinary policy is a Decision Making Day. This level must also be documented in writing, and signed by the employee. This level is designed to give the employee a last chance to correct the problem. “After the Level Three session, the [employee] is given one (1) day off with pay to decide whether he or she will make the required improvements. The Decision Making Day is the employee’s next scheduled workday. The employee should be paid for the number of hours he or she was actually scheduled to work.” The employee is required to “complete and sign a detailed action plan.” The policy also requires that following a Decision Making Day, the supervisor is to meet with the employee to review the employee’s “action plan,” and to “discuss his or her decision as to making the required improvement.” (Respondent’s Exhibit No. 1, p. 89).

The record clearly reflects that Bare did not follow WAL-MART Corporate Policies when he reprimanded and demoted Hall. There is no documentation of any verbal reprimands of Hall.

Bare claims that Hall’s January 10, 2001 written coaching was the result of a series of walk-throughs he and Moses carried out over a period of several weeks before January 10, 2001. The record evidence reflects, however, that Hall was out on extended sick leave five weeks prior to January 10, 2001, having surgery for a hernia that resulted from pulling heavy pallets full of merchandise at the Beckley WAL-MART Store.

Bare refused to acknowledge that the so-called verbal counseling of Hall was not done in accordance with policy. (Hr. Tr. Vol. II, at 137-138), claiming that he considers the policy to be merely a “recommendation”. (Hr. Tr. Vol. II, at 138). Asked to explain why he failed to follow the “recommendation” in this instance, Bare testified that he had “no particular reason”. (Hr. Tr. Vol. II, at 138). Later, Bare acknowledged that he did not follow WalMart Corporate Personnel and Disciplinary Policies regarding verbal coachings. (Hr. Tr. Vol. II, at 141). Such inconsistency in action gives credence to an inference of

discrimination against Hall.

Greg May initially denied that it was WAL-MART policy to require a verbal coaching, but then acknowledged that it was when presented with the policy itself. (Hr. Tr. Vol. II, at 331; Respondent's Exhibit No. 2). In contrast, Lahoma Mills, who worked in the Beckley WAL-MART as an assistant manager, testified credibly that when she engaged in verbal reprimands, she kept notes. (Hr. Tr. Vol. I, at 335 - 336).

Moses admitted that WAL-MART Corporate Personnel and Disciplinary Policies was not followed when Hall was given a written reprimand on January 10, 2001. (Hr. Tr. Vol. III at 117).

Hall did not receive a "Decision-Making Day" as required by WalMart Corporate Personnel and Disciplinary Policies. There is no documentation of the January 14, 2001 meeting, which would have been Hall's Decision-Making Day.

All of these actions by Bare are clearly violations of WAL-MART Corporate Personnel and Disciplinary Policies.

Bare acknowledged that Corporate Disciplinary Policies are directive (Hr. Tr. Vol. II, at 176-177) and that this directive was not followed in Hall's case, but claimed that it was done this way with the approval of Greg May, district manager, and for the benefit of Hall. (Hr. Tr. Vol. II, at 71, 177-179). Bare testified: "We [Greg May and I] decided not to document because we didn't want to hurt Sheila's chances for being department manager on down the road." He claimed that Greg May "had authority to waive this requirement". (Hr. Tr. Vol. II, at 179). However, district manager May, testified that he later reviewed Hall's file and there was no record of a decision day. Greg May was concerned because "any time something's missing from a file it's a concern." (Hr. Tr. Vol. II, at 271-272).

Bare claimed that "in every respect except...the actual form being filled out," she was given a Decision Making Day. (Hr. Tr. Vol. II, at 158). However, this claim is not supported by the evidence, since it is clear that Hall was not given the next day off with pay, as the policy directs.

Regarding the disciplinary session on May 14th, Bare testified that he recalled being in the room "part of the time" that this meeting was going on, and testified that Hall was

told that she could go home for the day and that she would be paid for the day off, but she declined. (Hr. Tr. Vol. II, at 67, 159). Yet, Bare earlier testified that he had absolutely no recall of the specifics of any conversation at the meeting or even who was present at the meeting, (Hr. Tr. Vol. II, at 155 - 156), Bare changed his story again, claiming that Hall's desire to stay at work that day was relayed to him by the co-manager or assistant manager. (Hr. Tr. Vol. II, at 160-164). Bare changed his testimony-again, recalling his direct testimony (Hr. Tr. Vol. II, at 70-71) claiming that the reason Hall was not given a Decision Making Day was intentional and benevolent: "We didn't want anything in Sheila's file to keep her from being a department manager later that year [if] she wanted to." (Hr. Tr. Vol. II, at 164, 165-166). Bare went so far as to say that he was "certain" that this was the reason no form was filled out for the Decision Making Day. (Hr. Tr. Vol. II, at 166). However, in his sworn Affidavit, created and submitted in response to the complaint back in January 2003, Bare claimed, "I do not recall why Hall was not given a Decision Making Day." (Commission's Exhibit No. 31; Hr. Tr. Vol. II, at 169).

WAL-MART Corporate Personnel and Disciplinary Policies requires the Store Manager to meet with the employee about a plan of action. Bare never met with Hall.

Bare first testified that he had a conversation with Hall about a Plan of Action. (Hr. Tr. Vol. II, at 171-172). Then, he revised his testimony to claim that he directed someone else that he needed a Plan of Action from Hall. (Hr. Tr. Vol. II, at 172-173). Bare testified that he received the plan (Commission's Exhibit No. 19) from her within a week of requiring it. (Hr. Tr. Vol. II, at 174-175, 186). He testified that it was in her personnel file, and that it was a detailed and specific plan which was acceptable to him. (Hr. Tr. Vol. II, at 175). He testified that he gave her an opportunity to implement the plan. (Hr. Tr. Vol. II, at 175-176, 251).

But the record does not support Bare's claim. Rather, Hall was not allowed to complete her "Plan of Action." The plan called for a thirty (30) day implementation period. Bare removed Hall before the thirty days expired.

Also, there is no evidence in the record that Hall received support and guidance from Bare or Moses in implementing her "Plan of Action."

DAMAGES

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

Hall, under the "make whole" rule, is entitled to receive back pay including benefits with prejudgment interest at ten percent per annum. Also, she is entitled to receive the maximum available incidental damages for her claim against Respondent. She is entitled to be placed in the next available position for which she is qualified, at a comparable rate of pay and responsibility, and awarded front pay until she is placed in the position. Gino's Pizza of West Hamlin v. West Virginia Human Rights Commission, 187 W. Va. 318, 418 S.E.2d 764 (1992); Casteel v. Consolidation Coal Co., 181 W. Va. 501, 383 S.E.2d 305, 311 (1989) W. Va. Code § 5-11-13, 181 W. Va. 501, 383 S.E.2d 305 (1989); Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d 494 (1992). The Complainant is entitled to interest on back pay. Interest is payable on back pay awards at a rate of ten percent (10%) per annum. Rodriguez v. Consolidation Coal Co., 206 W. Va. 317, 524 S.E.2d 672 (1999); Hensley v. West Virginia Dep't of Health and Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998); Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986); Bell v. Inland Mutual Ins. Co., 175 W. Va. 165, 332 S.E.2d 127 (1985); W. Va. Code § 56-6-31.

It has been the policy of the Commission, in keeping with the "make whole" objective of the Act, to calculate back pay awards on a periodic basis, and to calculate interest on back pay at a ten percent simple interest rate as back pay accrues. The Commission does not compound interest.

The Complainant is entitled to incidental damages with respect to her claim against Respondent. Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977); Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989). Bishop Coal provides that the \$2,500 cap on incidental damages may be adjusted

from time to time to conform to the Consumer Price Index. Bishop Coal, 380 S.E.2d at 247. In keeping with this language, the Commission has periodically raised the cap on incidental damages. Currently the cap for emotional distress damages is \$5,000.00 for each claim. The Complainant is entitled to such damages from the Respondent in no less than this amount. The Commission takes the position that in virtually all cases where discrimination is held to have occurred, the Complainant will have suffered at least the maximum worth of damages. The Complainant here has suffered injury well in excess of the \$5,000.00 available under the cap. Accordingly, Respondent should be charged with the maximum available award.

The Commission and the Complainant are entitled to a cease and desist order. The Commission in its cease and desist order may make provisions which will aid in eliminating future discrimination. The cease and desist order may require an affirmative action program and a sworn affirmation from a responsible officer of the Respondent that the Commission's order has been implemented and will continue to be implemented. Whittington v. Monsanto Corp., Docket No. ES-2-77, and Pittinger, et al. v. Shepherdstown Volunteer Fire Dep't, Docket No. PAS-48-77; *see also* Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983). The Complainant is entitled to a cease and desist order.

The greatest priority in civil rights law enforcement is the elimination of discrimination, and virtually every statute and ordinance provides for authority to issue cease and desist orders. Therefore, as a part of the remedy to each charge where discrimination is found, the Respondent should be prevented from initiating or continuing a discriminatory policy or practice. This cease and desist authority is always consistent with a make whole remedy, because the charging party is never made whole when the real possibility of future discrimination remains following resolution of the individual charge. A cease and desist order is particularly warranted in this case because of Respondent's Store Manager's blatant disregard of its own Corporate Personnel Policies.

A cease and desist order against the Respondent is appropriate to protect present and future employees of the Respondent against discrimination.

The Complainant, the Commission and its counsel should be awarded their costs and expenses associated with prosecuting this Amended Complainant. The Human Rights Commission has incurred or expended a total of \$1,684.45 in hearing and deposition transcript costs, and the Office of the Attorney General, Civil Rights Division, incurred travel expenses in the amount of \$308.60. These costs are assessed against the Respondent.

It is well settled that discrimination complainants, such as Hall, have a duty to mitigate their damages by accepting equivalent employment. Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990). An individual is required to mitigate damages by being reasonably diligent in seeking employment substantially equivalent to the position she was denied. Smith v. American Service Company of Atlanta, Inc., 796 F.2d 1430, 1431 (5th Cir. 1986). However, the burden of raising the issue of mitigation is on the employer. Mason County Board of Education v. State Superintendent of Schools, Syl. pt. 2, 170 W. Va. 632, 395 S.E.2d 719 (1982). Hall is still employed with WAL-MART and the appropriate mitigation should be made.

VII.

CONCLUSIONS OF LAW

1. The Complainant, Sheila E. Hall, is an individual aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act. W. Va. Code § 5-11-10.

2. At all times relevant hereto, the Complainant is a person within the meaning of W. Va. Code § 5-11-3(a), and was an employee of the Respondent, WAL-MART Stores, Inc. as defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(e).

3. The Respondent, WAL-MART Stores, Inc., is an employer as defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(d), and is therefore subject to the provisions of the West Virginia Human Rights Act. The Respondent is also a person within the meaning of W. Va. Code § 5-11-3(a).

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

5. The Complainant met her prima facie burden and proved that the Respondent engaged in unlawful race and gender discrimination, in violation of the West Virginia Human Rights Act, W. Va. Code §§ 5-11-9(1) and 5-11-9(7)(A)& C.

6. The nondiscriminatory defense to the Complainant's charge of race and gender discrimination articulated by the Respondent was pretextual.

7. The Commission proved by a preponderance of the evidence that the Respondent unlawfully demoted the Complainant because of her race and gender in violation of the West Virginia Human Rights Act, W. Va. Code §§ 5-11-9(1) and 5-11-9(7)(A)&©.

8. The Respondent discriminated against the Complainant in the terms, conditions or privileges of employment within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 *et seq.*

9. The Respondent is liable for back pay, benefits, and prejudgment interest for the illegal demotion of the Complainant.

10. As a result of the discriminatory actions of the Respondent, the Complainant is entitled to:

(a) Reinstatement into the next available department manager position with Respondent, and restoration of her seniority date, if affected, back to the date she was demoted and front pay until reappointment;

(b) Back pay from the date of demotion to the date of this Final Decision plus prejudgment interest thereon at the rate of ten percent (10%) per annum;

(c) Incidental damages in the amount of \$5,000.00 for the humiliation, embarrassment and emotional distress suffered by the Complainant as a result of the discriminatory actions of the Respondent;

(d) Reimbursement of deposition and hearing transcript costs and travel expenses associated with prosecuting this claim to wit: hearing and transcript costs to the West Virginia Human Rights Commission in the amount of \$1,684.45 and travel expense incurred by the Attorney General's Office in the amount of \$308.60.

(e) A cease and desist order aimed at preventing the Respondent from

continuing the illegal discriminatory practices evidenced in its actions; and

(f) An order requiring Respondent's managerial employees in the Beckley WAL-MART Store in West Virginia to undergo training related to race discrimination and harassment, and the West Virginia Human Rights Act.

VIII.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, this administrative law judge orders the following relief:

1. The above-named Respondent, WAL-MART Stores, Inc., shall cease and desist from engaging in unlawful discriminatory practices.

2. Respondent, WAL-MART Stores, Inc. is ORDERED to pay the Complainant, Sheila E. Hall, a back pay award that includes the value of lost benefits from the date of her demotion through the date of this Final Decision plus statutory interest at ten percent simple interest per annum. Complainant shall submit the final calculations to me and the Respondent by August 8, 2006. Respondent shall file its objection to the Complainant's calculations with me by August 28, 2006. A supplemental Final Decision on Damages will be issued by September 15, 2006. I direct the parties to confer on mitigation and the value of lost benefits. Please submit any documentation you are relying on to support your calculations. Please include the actual date Hall's demotion became effective.

3. Respondent, WAL-MART Stores, Inc. Is ORDERED to reinstate the complainant, Sheila E. Hall in the next available department manager's position at a salary equal to white male department managers in comparable positions. Also, Sheila E. Hall is entitled to front pay with statutory interest at the rate of ten percent simple interest per annum until such time he is reinstated to a comparable position like the one she was demoted from.

4. The Respondent WAL-MART Stores, Inc., is ORDERED, within thirty-one days of this Final Decision to conduct appropriate awareness training regarding racial and gender discrimination for all its employees including management employees at the Beckley WAL-

MART Store. Documentation to this effect shall be provided to Mr. George Bearfield, compliance officer at the Commission within 60 days of the receipt of this Final Decision.

5. As a result of WAL-MART Stores, Inc.'s unlawful discriminatory conduct, Respondent is ordered to pay Mrs. Hall an award of \$5,000.00 plus statutory interest at the rate of 10 percent simple interest per annum for humiliation, embarrassment, and emotional distress.

6. The Commission is entitled to its deposition and transcript costs in the amount of \$1,684.45. The Respondent is ORDERED to pay the Commission, within thirty-one days of this Final Decision, \$1,684.45 and to sent this amount to the Commission at 1321 Plaza East, Room 108A, Charleston, West Virginia 25301-1400. The check should be made payable to the West Virginia Human Rights Commission.

7. The Attorney General's Office is entitled to its travel expense in the amount of \$308.60. The Respondent is ORDERED to pay the Attorney General, within thirty-one days of this Final Decision, \$308.60 and to sent this amount to the Attorney General's Office c/o Assistant Attorney General Paul Sheridan at P. O. Box 1789, Charleston, West Virginia 25326-1789.

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

It is so **ORDERED**.

Entered this 17th day of July 2006.

WV HUMAN RIGHTS COMMISSION

BY: Phyllis Harden Carter

**PHYLLIS HARDEN CARTER
CHIEF ADMINISTRATIVE LAW JUDGE**