

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CHRISTI ANN LEE,

Complainant,

v.

CASE NO.: ESREP-305-00

**APPALACHIAN POWER CO./
AMERICAN ELECTRIC POWER,**

Respondents.

**CHIEF ADMINISTRATIVE LAW JUDGE'S
FINAL DECISION**

A public hearing in the above captioned-matter was convened on July 8 and 9, 2002 and on August 23, 2002 and also September 27, 2002 and October 25, 2002, at the office of the West Virginia Human Rights Commission, Charleston, West Virginia, in Kanawha County, West Virginia.

The complainant, Christi Ann Lee ("Lee"), appeared in person and her case was presented by Andrew Katz of The Katz Working Families Law Firm. The respondents, Appalachian Power Company/American Electric Power, Company ("APCO/AEP"), appeared in person by their representatives, Bryan R. Cokeley and Keith Lively of Steptoe and Johnson and its corporate representative, Larry Dickerson ("Dickerson").

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the

extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary 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.

On June 11, 2002, a hearing was held at the Commission's Office during which Lee, by and through her counsel moved to dismiss Dickerson as a party respondent. Dickerson is represented by Attorney Elizabeth Harter. Attorney Bryan Cokeley represented APCO/AEP. An Order was entered on June 13, 2002 dismissing Dickerson as a party respondent with prejudice as to all claims that have been brought or could have been brought under the West Virginia Human Rights Act. (July 11, 2002-transcript at 4 and 5) This matter is proceeding against respondents APCO/AEP only. The evidentiary video deposition of Hughlen Jonathan Jones ("Jones") was made a part of this record at the public hearing (Hr. Tr. Vol. II, at 207) and considered by me in reaching a decision in this matter.

I.

STATEMENT OF THE CASE

Christi Ann Lee, complainant, filed a complaint with the West Virginia Human Rights Commission against the respondents APCO/AEP and Dickerson individually. She alleges that her supervisor, Dickerson, created a hostile work environment, that she reported the sexual harassment to APCO/AEP who did not address the problem and take action to ensure that the workplace was free from sexual harassment. As result, it is alleged APCO/AEP violated the West Virginia Human Rights Act. She also alleges that her subsequent discharge was in retaliation for her complaints of sexual harassment by

Dickerson and not because of poor job performance and downsizing. Lee dismisses Dickerson as a party respondent on June 13, 2002. Lee's complaints of sexual discrimination and retaliation proceed against APCO/AEP only.

The record does not support these contentions. Rather, the record taken as a whole supports a finding that APCO/AEP responded immediately and often to Lee's allegations of sexual harassment and that it was Lee who told APCO/AEP that the matter is resolved. The record also supports a finding that APCO/AEP terminates Lee because of poor performance and downsizing. Lee dismissed her complaint against Dickerson so the case moves against APCO/AEP.

When Lee leaves APCO/AEP she signs a Severance Agreement which purports to waive any rights she might have under the West Virginia Human Rights Act. APCO/AEP pays Lee \$21,008.00 The Agreement, however, does not comply with the Commission's legislative rule on waiver and therefore, Lee is able to file a complaint with the Commission without "tendering back" the severance pay she receives under AEP's severance agreement.

II.

SUMMARY OF DECISION

1. Looking at the record as a whole, the totality of the circumstances, and the case law, Lee fails to prove, by a preponderance of the evidence, a claim of sexual harassment discrimination and retaliation against APCO/AEP.

2. The Severance Agreement that Lee signed does not comply with the Commission's legislative rule found at 6 W. Va. C. S. R. § 77-6-3-2. Therefore, the

Commission cannot compel Lee to return the money she receives under the Severance Agreement before proceeding to a public hearing.

III.

PARTIES CONTENTIONS

Lee contends that Dickerson, her supervisor, approached her from behind, touched and massaged her shoulders on or about fifteen times in a manner that in her opinion constituted sexual harassment and that as a direct result of complaining about Dickerson's behavior to his supervisor, Matt Harmon, as well as Jamie Beckelhimer ("Beckelhimer") and Sheila Painter ("Painter") in Human Resources, she lost her job when APCO/AEP downsized in 1999. Also, Lee contents that she is not required to return the severance pay she receives because APCO/AEP's Severance Agreement does not comply with the wavier requirements of the Commission's legislative rule on wavier.

APCO/AEP contends Lee is terminated because of poor job performance and downsizing and that the Severance Agreement she signed substantially complies with the Commission's legislative rule on waiver. Therefore when Lee files her human rights claim, she should have "tendered back" the consideration she was paid under the Severance Agreement.

IV.

FINDINGS OF FACT

1. Lee works for Kentucky Power from August 1981 through July 1986. (Hr. Tr. Vol. I, p.79). From 1983 to 1996 Lee worked as a clerk in the accounting department. From September 1996 to November 1999 Lee worked in the Kentucky region first in drafting

and then in graphics. She begins her supervision under Dickerson November 1, 1998 and actually transfers to the graphics division in North Charleston office in Charleston, West Virginia on January 3, 1999. She works there from January 1998 to November 19, 1999. (Hr. Tr. Vol. 1.at 63, 64, 84).

2. APCO/AEP, is a company doing business in West Virginia. Dickerson works for APCO/AEP for approximately 39 years. He begins working for Appalachian Power on June 11, 1963. He retires on July 19, 1999. (Hr. Tr. Vol. IV, at 132, 267).

3. Lee experiences little direct supervision in her graphics job in Ashland. She works in an office with only two additional persons, and is left to work alone the vast majority of the time. (Hr. Tr. Vol. I, at 222 - 223).

4. In the Summer of 1998, APCO/AEP, makes a corporate-wide decision to reorganize its entire operation. The reorganization affects every region in APCO/AEP, including Kentucky and West Virginia, and results in a significant number of employees taking a cut in salary, being relocated (or both) or being laid off. (Hr. Tr. Vol. I, at 80 and Vol. III, at 151, 220, 251, 287, 305,315 and 320).

6. Lee's job in Ashland, Kentucky is eliminated as a result of the reorganization. (Hr. Tr. Vol. I, at 80).

7. At the time APCO/AEP decided to reorganize its operations there are three graphics departments in the Southern West Virginia region: one in Huntington that Dickerson supervises and is staffed in part by Mike Barbour ("Barbour"); one in Charleston that Clifford Wolfe ("Wolfe") supervises and is staffed in part by Mike Cochran ("Cochran"), Greg Pauley ("Pauley"), and Hughlen Jones ("Jones"), and one in Logan that Lassie

Muncey ("Muncey") supervises and is staffed by Mack Johnson ("Johnson"). Matt Harmon ("Harmon") supervises the three offices.

8. As a result of the reorganization, APCO/AEP consolidates the three graphics departments into one department, headquartered at the North Charleston facility. All of the graphics technicians in the three offices are reassigned to the North Charleston office. Harmon makes the decision to name Dickerson the supervisor of the newly consolidated North Charleston office. (Hr. Tr. Vol. I, at 91 - 92).

9. Prior to consolidation, the North Charleston office under Wolfe's supervision operates under a tremendous backlog of work orders. (Hr. Tr. Vol. II, at 140, 254).

10. In mid to late September 1998 Dickerson contacts Lee by phone to discuss bringing her to the North Charleston office. Despite Lee's lack of practical drafting experience, Dickerson feels her experience with computers is beneficial to the North Charleston office. (Hr. Tr. Vol.1, at 80 - 81).

11. In November 1998 Lee is officially hired as a graphics technician in the North Charleston office. Out of consideration for her over the holidays, Dickerson allows Lee to delay her physical move to the office until January 1999. Dickerson assigns projects to Lee that she can perform in Ashland, Kentucky. (Hr. Tr. Vol. IV. at 163).

12. During the same period APCO/AEP assigns Phil Kiser ("Kiser") and Sherry Scott ("Scott") from the Kentucky region to the North Charleston Office. (Hr. Tr. Vol. I, at 238).

13. During this same period, the working atmosphere at the consolidated

North Charleston office is tense. Many of the employees are disgruntled that the reorganization results in salary reductions and long commutes to work for several of them. (Hr. Tr. Vol. IV, 44-45; 93-95, 249).

14. On January 4, 1999, Lee reports for work at the North Charleston office. Lee begins taking notes in a diary on January 5, 1999. (Hr. Tr. Vol. I, at 85).

15. Dickerson's management style is more hands-on than Wolfe's style.

16. Lee writes in her diary that Dickerson comes up behind her and put his hands on her shoulders and massages them and wants to know if Lee wants to go on a break. (Hr. Tr. Vol. I, at 85). I find Lee credible.

17. Dickerson encourages employees to take breaks and not eat at their desks. (Hr. Tr. Vol. IV, at 171 - 172).

18. Dickerson has many problems with Lee's work performance and her continued refusal to comply with his expectations for communication.

19. During the entire time that Lee works at the North Charleston Office, she continually displays to Dickerson a manner that is hostile and non-communicative. Lee complains to fellow employees more than once that she does not care for Dickerson's management style, especially the way he asks her for frequent updates on the status of her work assignments as he does with all the graphics technicians in the office. (Hr. Tr. Vol. I, at 300 - 301).

20. On her second day of work, Dickerson talks to Lee about leaving work on her desk. (Hr. Tr. Vol. I, at 194).

21. Dickerson approaches Lee and other employees, stating that there

would be no radios at their desks, as he feels it is distracting to others in the office. Later that same day, a few graphics employees, (Lee not among them), approach Dickerson asking him to reconsider his position about radios in the office. After listening to the employees' input, Dickerson reconsiders his policy and allows radios at the desks. Dickerson allows employees to keep radios at their desks as long as the volume is kept low and do not bother any employees. (Hr. Tr. Vol. IV, at 170). Despite this, Lee takes her radio home and never has a radio at her desk during the rest of her employment at the North Charleston office. (Hr. Tr. Vol. I, at 201).

22. On or about February 17, 1999 Wolfe and Pauley tell Lee to "play it cool" around Dickerson because he did not like her. (Hr. Tr. Vol. I, at 216). The evidence in the record does not support a finding that Dickerson dislikes Lee.

23. In mid-February Lee moves to an apartment in Milton, West Virginia. She is upset with Dickerson because he declines to allot to her the maximum number of days for an employee to search for a place to live. Lee speaks by phone to Harmon, Dickerson's supervisor, who supports Dickerson's decision as the move was not over a long distance, and Lee has more than enough time in which to successfully complete her move. When it becomes clear Harmon was not going to acquiesce to her wishes, she hangs the phone up on him in mid-sentence. (Hr. Tr. Vol. I, at 107 - 108).

24. On or about March 9, 1999 Dickerson asks Lee what type of work she prefers to be assigned to. She replies that "a job is a job." (Hr. Tr. Vol. I, at 226).

25. Dickerson asks her if she is receiving the type of work that gives her the experience she needs to move up to the "next level." Lee replies that it is Dickerson's job,

not hers, to keep track of the work she is assigned and whether the assignments are providing her with the experience she needs. (Hr. Tr. Vol. I, at 227 - 228).

26. On March 12, 1999, Dickerson verbally reprimands Lee for sending a department-wide e-mail announcing on a Friday that she is taking a personal day the following Monday, without consulting him first to determine if it is acceptable, as she has been previously instructed. (Hr. Tr. Vol. I, at 230).

27. Five days after this incident, on March 17, 1999, Lee makes an appointment to see Beckelhimer in the Human Resources Department for the purpose of reviewing her personnel file. (Hr. Tr. Vol. I, at 109).

28. On March 25, 1999, Dickerson meets with former Kentucky employees: Lee, Sherry Scott, and Kiser. In this meeting Lee dominates the conversation, stating to Dickerson her problems with his management style. Also in this meeting Lee complains to Dickerson that she does not appreciate the way he sometimes touches her on the shoulder and arm when talking to her and that she considers it to be sexual harassment. (Hr. Tr. Vol. I, at 179; Vol. IV, at 181-182).

29. At the same meeting, the record reflects that Sherry Scott felt the same way about Dickerson touching her on the shoulder and telling her to take a break. (Hr. Tr. Vol. IV, at 181-182).

30. Dickerson is unaware that Scott and Lee take offense to his conduct and promises to never touch them in that way again. (Hr. Tr. Vol. IV, at 182).

31. Lee also tells Dickerson that she requires three feet of personal space at all times. Dickerson agrees. (Hr. Tr. Vol. I, at 103-105)

32. On March 25, 1999, Lee meets with Jaime Beckelhimer, in the Human Resources Department, to look at her employment file. She tells Beckelhimer that she is having a personality conflict with Dickerson. (Hr. Tr. Vol. I, at 109 - 110).

33. Beckelhimer offers to intercede; but Lee declines, saying that she and Dickerson discussed the matter and she will wait and see if the personality conflict resolves itself. (Hr. Tr. Vol. I, at 109 - 110).

34. After this meeting with Lee on March 25, 1999, Beckelhimer speaks with Dickerson by phone and discusses the "personality conflict" Lee alleges. Dickerson tells Beckelhimer about the meeting earlier the morning of March 25, 1999, when Lee tells Dickerson she does not want to be patted on the shoulder anymore, she wants three feet of personal space between them, all which Dickerson agrees to do. (Hr. Tr. Vol. III, at 190 - 193; Vol. IV, at 183 - 186).

35. From March 25, 1999, after Lee's notice to Dickerson until Lee's last day at the North Charleston office, Dickerson never touches Lee in any manner whatsoever, and even attempts to comply with her request for three feet of personal space.

36. Dickerson, with the approval of Human Resources, meets with Lee in the company of a third person, usually Muncey, to avoid any sense of impropriety. When Muncey was not available, Dickerson asked Della Simpkins ("Simpkins") to be present. (Hr. Tr. Vol. IV, at 187 - 188).

37. On April 19, 1999, Dickerson with Harmon's approval, promotes Muncey. She becomes the second in command under Dickerson. The decision to promote Muncey is based upon her supervisory experience and work performance. The decision to promote

Muncey is not popular among the group, especially with the former North Charleston employees.

38. On or about May 21, 1999, Cochran tells Lee that Dickerson wants to set her up romantically with Barbour. Lee takes him seriously. Cochran's comment is meant as a joke. (Hr. Tr. Vol. I, at 264 - 65).

39. Barbour's cubicle was near Christi Lee because they knew and had been trained on how to use the mapping system called the Synercam System. Lee had been trained on the system while working in Ashland, Kentucky. Barbour had been trained while working in Huntington, West Virginia. They were put together to take care of the Huntington/Chesapeake area. (Hr. Tr. Vol. IV, at 165).

40. On June 7, 1999, Dickerson meets with Lee to discuss her alleged performance problems, and to present her with a "mock" Job Performance Review ("JPR") showing Lee exactly the areas she needs to improve. (Hr. Tr. Vol. IV, at 197 - 198; Respondent's Exhibit 1).

41. Lee responds by saying that her problems with communication are Dickerson's fault, too. (Hr. Tr. Vol. IV, at 198).

42. On June 9, 1999, Beckelhimer meets with Lee, at her request, to discuss the "mock" JPR. During the course of this conversation, Lee for the first time states to Beckelhimer that she feels she had been sexually harassed by Dickerson. Lee acknowledges that the incident in question occurred prior to March 25, 1999, and that she confronted Dickerson with her complaint on March 25, 1999, and that the matter had been resolved. The incident of sexual harassment she alleges to Beckelhimer is the same

incident of Dickerson touching her on the shoulder prior to March 25, 1999. (Hr. Tr. Vol. I, at 277).

43. Beckelhimer offers to set up a meeting with Lee, Dickerson and Human Resources to investigate the matter properly. Lee refuses, preferring to wait and see if an upcoming "building trust" seminar scheduled for the Graphics Department improve matters. (Hr. Tr. Vol. I, at 277).

44. At various times, Dickerson has touched other graphics technicians in the same manner as Lee described, both male and female. (Hr. Tr. Vol. I, at 277).

45. On June 10, 1999, Lee and the rest of the graphics department attend an on-site seminar entitled "Building Trust and Relationships." Donna Campbell ("Campbell"), an APCO/AEP employee, conducts the seminar. The purpose of the seminar is to improve communication in particular and the office atmosphere in general. (Hr. Tr. Vol. I, at 277 - 278).

46. Prior to the seminar, Campbell spends time with the employees who now make up the North Charleston Graphics Department. She meets with Lee, Wolfe, Pauley, Jones and Barbour. (Hr. Tr. Vol. IV, at 24 - 25). She observes and hears concerns about the Graphics Department employees related to mistrust, reorganization, new supervision and the fact that some employees are upset because their areas have been disbanded. She feels that many of the problems are related to reorganization. She describes Wolfe as being very angry because Dickerson became the supervisor. Pauley has a great deal of animosity because he feels he has been passed over numerous times for promotions. (Hr. Tr. Vol. IV, at 25 - 26, 44 - 46, 53 - 58).

47. Lee tells Campbell that Dickerson sexually harassed her. After hearing Lee's interpretation of what happened, Campbell explains to Lee that what she claims to be sexual harassment does not constitute sexual harassment. Lee never discusses the matter with Campbell again. (Hr. Tr. Vol. IV, at 30 - 31).

48. Campbell asks Dickerson and Muncey not to attend the seminar, because the group would be more likely to open up outside the presence of supervisors. During the seminar, Lee mentions an incident where Dickerson tells her to take over a project assigned to Kiser because Kiser was too slow on the computer. (Hr. Tr. Vol. IV, at 59, 202 - 203).

47. Lee tells the group that she flatly refuses to do the assignment as directed because she "didn't think it was right" for Dickerson to treat Kiser in such a way. (Hr. Tr. Vol. I, at 279).

48. Campbell feels that the seminar, her meetings with staff, and their monthly luncheons have turned the group around 360 degrees. (Hr. Tr. Vol. IV, at 27).

49. Lee does not participate in the monthly luncheons. She remains remote and negative. (Hr. Tr. Vol. IV, at 59, 62).

50. Dickerson, however, did change as a result of transition in the North Charleston Office and provides leadership. (Hr. Tr. Vol. IV, at 61).

51. On June 29, 1999, Dickerson, with APCO/AEP employee Simpkins as a witness, gives Lee a letter outlining her performance problems and how those problems can be corrected. (Hr. Tr. Vol. I, at 279, 281).

52. Dickerson makes it clear to Lee exactly what information he requires when he asks her to update him on the status of a project. The unresponsive one-word answers Dickerson receives from Lee thus far are unacceptable. (Respondent's Exhibit 1).

53. On July 28, 1999, Dickerson sent Harmon a memorandum outlining all the areas that result in a poor mock job performance review. (JPR). (Respondent's Exhibit 18 and 20).

54. Dickerson makes it clear to Lee that communication by e-mail of information that can be given verbally is an unjustifiable waste of time. Though the letter is dated June 10, 1999, Dickerson delays in delivering the letter due to overlapping vacation schedules. (Hr. Tr. Vol. IV, at 200 - 201).

55. This June 10, 1999-letter is another attempt on the part of Dickerson to give Lee an opportunity to improve before the official JPR is filed. The letter contains a list of Dickerson's expectations of Lee 's job performance.

56. On July 30, 1999, Lee sends an e-mail to Dickerson, responding to his June 10, 1999-letter that is delivered June 29, 1999. In her e-mail Lee calls Dickerson's style of management "dictatorial" and cites it as a primary reason for her "lack of respect for him." She points out that most of the graphics group, which included both males and females, have similar feelings to hers. Lee also tells Dickerson that her way of communicating, by e-mail, was best, and was the way it should be done. (Hr. Tr. Vol. I, at 298 - 300; Respondent's Exhibit 4).

57. On July 30, 1999, Lee, against established procedure for the North Charleston office, submits her daily time-sheet directly to the record's department without submitting it to Dickerson for approval. When Dickerson speaks to her about her failure to follow procedure, Lee shrugs it off and feigns ignorance of the procedure, stating "that's how we did it in Ashland." Dickerson tells Lee to have the time-sheet on his desk the next morning. (Hr. Tr. Vol. I, at 143 - 145).

58. Without looking up from her computer, Lee replies that she cannot, because the next morning is Saturday, and then laughs at him. (Hr. Tr. Vol. I, at 291 - 292).

59. As a result of Lee's behavior, Dickerson asks Beckelhimer to issue Lee, a written warning, citing unsatisfactory job performance. (Hr. Tr. Vol. IV, at 238 - 241).

60. On July 30, 1999, Dickerson signs a warning notice and sends it to Lee indicating her unsatisfactory job performance. (Respondent's Exhibit 2). Lee, in turn, contacts Beckelhimer regarding company policy. There is a hand written note by Beckelhimer indicating that he spoke with Harmon regarding this matter. Harmon suggests to Beckelhimer that he speak to Lee about it. (Respondent's Exhibit 3).

61. On or about August 2, 1999, Lee announces to the group that she receives a written warning and that, as a result, she did not want to be spoken to. She announces this even though she had earlier criticized Dickerson of having "poor judgment" for discussing her personal issues in front of others, and despite the fact that Dickerson encourages her to get to know the group better on a personal basis. Later that day, Wolfe asks Lee to clarify what she means by the announcement. Lee sends an email to the group stating that she can discuss work but she does not want to be bothered with small talk. (Hr. Tr. Vol. I, at 146).

62. On August 24, 1999, Dickerson gives Lee her official job performance review or JPR. The JPR was reflected poor performance. Dickerson recommends that Lee's pay is frozen because she does not attempt to improve any of the areas identified in the mock JPR. (Hr. Tr. Vol. I, at 380 - 382; Vol. IV, at 247 - 248 and Exhibit 18).

63. Lee attends meetings with Dickerson and Muncey every Friday so that concerns are raised before they become problems. (Hr. Tr. Vol. IV, at 110).

64. Lee meets with Human Resources, namely Painter and Harmon at least three times concerning her complaints about Dickerson, and her mock JPR and JPR. Each time Human Resources personnel listen to the same complaints from Lee. Lee's complaints against Dickerson never rise to the level of sexual harassment and retaliation. Rather her complaints are related to personality conflicts with Dickerson; her refusal to communicate with him and follow recommendations that would improve her job performance.

65. On August 27, 1999, Lee meets with Painter, an APCO/AEP Human Resources' employee, at the Company's North Charleston Service Center. Lee tells Painter about the written warning she receives from Dickerson. Lee tells Painter she has been sexually harassed about fifteen times. This includes the "sexual harassment" allegations she makes to Dickerson in March 1999, and again to Beckelhimer in June 1999. Lee admits that Dickerson has not touched her since the March 25, 1999 meeting. (Hr. Tr. Vol. III, at 291 - 293).

66. Lee admits to Painter that she does not believe the touching is intended as a sexual advance, but rather it was probably just Dickerson's way of "trying to be friendly." Nonetheless, Lee insists that the touching bothers her. Painter insists on conducting an immediate investigation into Lee's allegations but Lee refused, reiterating that the offensive behavior had not occurred since the March 25, 1999 meeting when she had told Dickerson to stop. (Hr. Tr. Vol. III, at 292 - 293, 351).

67. Painter told Lee that if the touching stopped once Lee informed Dickerson that she did not like it, then, Lee does not have a sexual harassment claim. (Hr. Tr. Vol. III, at 296).

68. Lee tells Painter that since March 25, 1999, Dickerson harasses her. (Hr. Tr. Vol. III at 297 - 320). Lee discusses several issues with Painter who responds to each issue during the meeting. Read Findings of Fact numbers 69-83.

69. Lee says that Dickerson walked up behind her and asked about some work orders lying around on her desk that should not have been there. Painter says that Lee admits there was no touching on January 5, 1999. Dickerson asks about the work orders in "more of a demanding type voice." Painter says there is no retaliation in Dickerson's actions. (Hr. Tr. Vol. III, at 297 - 298).

70. Lee says Dickerson tells the staff that he cannot remember things and will come to her desk several times asking the status of different jobs she is working on. Dickerson asks other employees the same question. Painter says this goes to management style. This is not retaliation. (Hr. Tr. Vol. III, at 299 - 300).

71. Lee says Dickerson confronts her about e-mailing everyone in the office about her vacation. This is not retaliation. This goes to management style. (Hr. Tr. Vol. III, at 300 - 301).

72. While she was out looking for a place to live, Dickerson allegedly tells three employees that he does not like Lee's personality. There is no evidence in the record to corroborate this statement. (Hr. Tr. Vol. III, at 301).

73. Lee says Dickerson discusses personal information with the rest of the staff. This goes to management style and not retaliation. (Hr. Tr. Vol. III, at 301).

74. Lee says the maps are in bad shape and need to be updated. Painter is unaware if this is correct or not. This statement has nothing to do with Dickerson's alleged retaliation against Lee. (Hr. Tr. Vol. III, at 302).

75. Lee discusses her preliminary JPR and questions whether it is company policy to give an off schedule or a mock or preliminary job performance review (JPR). Painter tells Lee that if a person is having problems adapting, or doing their job, management will give a mock JPR to identify the areas the employee needs to improve on. There is a communication problem between Lee and Dickerson. (Hr. Tr. Vol. III, at 303 - 304).

76. Lee complains about Muncey and Simpkins sitting in on her meetings with Dickerson. Painter informs Lee that Muncey and Simpkins were supervisors prior to the reorganization. This is the prudent thing to do since Lee accuses Dickerson of sexual harassment. (Hr. Tr. Vol. III, at 305 - 306).

77. Lee has ideas on process improvement. Painter points out that this comment is related to management style and not harassment. (Hr. Tr. Vol. III, at 307).

78. Lee says that she feels Dickerson did not like her personally. Painter explains that two employees have to get along whether they like each other or not. (Hr. Tr. Vol. III, at 307).

79. Lee says she is a private person and does not think it is appropriate for Dickerson and Muncey to make small talk in front of other employees. Painter says that she hopes employees do talk to each other. This does not constitute retaliation. (Hr. Tr. Vol. III, at 308).

80. Lee feels that if she talks to Dickerson, he will start touching her again. She fails to give any facts to support this fear. Painter reiterates to Lee that once Lee told Dickerson to stop, he did. (Hr. Tr. Vol. III, at 308 - 309).

81. Lee prefers to communicate by e-mail. Painter tells her that all communication cannot be by e-mail. (Hr. Tr. Vol. III, at 309).

82. Lee addresses consistency. She says that Dickerson tells everyone what is going on. Painter sees no retaliation in this. (Hr. Tr. Vol. III, at 310).

83. Lee says "Larry should not jump down my throat on things and should not try to change her personally." When Painter asks for specifics such as dates and times, Lee has none. (Hr. Tr. Vol. III, at 312 - 313).

84. Painter concludes from her own investigation that Lee's allegations of sexual harassment cannot be substantiated. (Hr. Tr. Vol. III, at 298 - 299). Lee's remaining allegations do not constitute sexual harassment or retaliation.

85. Sometime in the summer of 1999 and continuing until her termination, Lee hangs a cartoon in her cubicle which depicts a supervisor hanging from the gallows. The cartoon hangs in plain sight of anyone standing at Lee's desk. (Hr. Tr. Vol. I, at 292 - 293).

86. Cochran admits giving Lee the cartoon. (Hr. Tr. Vol. II, at 184).

87. Harmon sees the cartoon hanging in Lee's cubicle one day when he visits the North Charleston Graphics Department. (Hr. Tr. Vol. II, at 314- - 315).

88. Painter discusses with Lee the message she sends when she posts this type of cartoon in her cubicle. (Hr. Tr. Vol. III, at 340 - 341).

89. On September 14, 1999, Lee meets with Harmon, Dickerson's supervisor, and Painter. At this meeting, Harmon directly and explicitly addresses several concerns Lee raises. (Hr. Tr. Vol. II, at 364-366, Respondents' Exhibit 16).

90. Among these concerns, Lee wants Dickerson to cease discussing with

employees their performance outside his office because co-workers can overhear him. Harmon tells Lee that Dickerson will hold such discussions in his office. (Respondents' Exhibit 16).

91. Lee requests a list of what she needs to improve about her performance. Harmon provides her with a list of tasks Dickerson indicates Lee needs to learn. Harmon encourages Lee to discuss the list with Dickerson so that they can effectively achieve the goals set forth in the list. (Respondents' Exhibit 16).

92. Lee wants to communicate with Dickerson through e-mail. Harmon explains this is not always an effective means of communication. He explains to Lee that she needs to make an effort to be friendly, helpful, courteous and cooperative with her fellow employees and supervisors. (Respondents' Exhibit 16).

93. Lee wants her privacy respected. Harmon explains that special effort will be made not to discuss things of a personal nature with her, but this does not excuse her of a duty to communicate on business-related issues. (Respondents' Exhibit 16).

94. Lee wants to know why Muncey is often present during Dickerson's private meetings with her. Harmon explains that it is part of Muncey's supervisor training, and, that Dickerson wants to have a female present in light of the sexual harassment allegations Lee raised on March 25, 1999. Harmon informs Lee that Muncey will continue to be present at future meetings. Harmon ends the meeting by expressing the company's belief in Lee's talent and its desire to see her improve. (Hr. Tr. Vol. I, at 280 - 281; Respondents' 16).

95. Lee wants consistency on rules and instructions. Harmon informs Lee some of the graphics work groups may have been working on mapping from one district and others

on mapping from other districts. Past practices in those districts were different so a particular procedural change may have only affected part of the work group. (Respondents' Exhibit 16).

96. Lee wants to know if the July 12, 1999 disciplinary notice was part of discipline and why didn't Dickerson put correct information on a time sheet rather than putting the PSP number like she recorded her time. Harmon informs Lee that the disciplinary notice she received was due to her failing to follow the established procedures in her group which she had previously followed for six months and not for failing to use the correct activity code on her time sheet. On July 12 and 13, Lee took her time sheet directly back to the Information Section, bypassing her supervisor. This is the same procedure she had followed for the past six months. (Respondents' Exhibit 16).

97. During this meeting, Harmon encourages Lee to place any suggestions she has for improving operations in the office suggestion box. (Respondents' Exhibit 16).

98. On or about September 20, 1999, Lee is in an auto accident. She misses a couple of days of work due to her injuries. When Lee returns to work, Dickerson explains that he needs more information about her injuries for the records' department. Lee replies that if the records' department asked her for more information she will give it to them. Later in the day, Simpkins from the records' department goes to Lee and asks for the same information that Dickerson had asked for earlier.

99. On September 24, 1999, pursuant to Lee's prior meeting with Harmon and Painter, Dickerson provides Lee with a "Plan for Development" outlining the training she needs to accomplish the goals set for her. Lee offers no input, only to say that she prefers

on-the-job training as opposed to vocational classes because she is taking night courses at Marshall University. (Hr. Tr. Vol. I, at 329; Respondents' Exhibit 7).

100. On October 14, 1999, Lee tells Dickerson during a Friday meeting that the meetings are a "waste of time." (Hr. Tr. Vol. IV, at 252).

101. In October 1998, AEP Corporate informs the West Virginia region that its budget will be cut by an additional 5%. A reduction in personnel is necessary. (Hr. Tr. Vol. IV, at 263).

102. It is decided to first offer a voluntary severance to all the employees in the region. (Hr. Tr. Vol. I, at 329).

103. On October 28, 1999, Dickerson informs the graphics department of the company's offer of voluntary severance. (Hr. Tr. Vol. I, at 158).

104. On October 28, 1999, Lee sends an e-mail to Painter asking for more information about the severance pay. Painter responds with an e-mail outlining the details of the voluntary severance offer. (Hr. Tr. Vol. I, at 160; Respondent's Exhibit 6 and 4).

105. In late October 1999, it is decided by upper management, including Harmon, that there would not be enough employees taking the voluntary severance to cover the 5% budget reduction. Dickerson offers to cut the graphics department by one. This decision is made due to the number of employees in the West Virginia graphics department being larger than any other region in APCO/AEP. Dickerson selects Lee because she has the least graphics experience, her lack of cooperation, lack of communication, unwillingness to be a team player and her attitude. (Hr. Tr. Vol. IV at 263 - 265).

106. Lee makes no attempt to correct any of the deficiencies identified in the mock job performance review (JPR). (Hr. Tr. Vol. IV, at 248).

107. On or about October 28, 1999, supervisors in each department are required to write summary paragraphs concerning employees under their supervision, upon which decisions of involuntary severance will be determined in part for those departments that were chosen to be cut. (Hr. Tr. Vol. III, at 321 - 322, 346).

108. Painter forwards to James M. Perry and Larry E. Gearhart the paragraphs on the employees who are under consideration for severance packages in the West Virginia region. (Complainant's Exhibit 16). Muncey and Dickerson prepared the paragraphs for the Graphics Department at the North Charleston office. (Complainant's Exhibit 17). Each paragraph identifies the employee's classification, for example, 15 T or Technician 15. The paragraphs that are forwarded to James M. Perry and Larry E. Gearhart and used as a basis for determining who will receive involuntary severance packages are found in Findings of Fact numbers 106 - 115.

109. Muncey's paragraph states that she is classified as a Technician 17, highly motivated, a self starter, knowledgeable and possesses excellent computer skills. It goes on to say that she is well organized and works extremely well on projects with others or by herself. She has superior communication skills. She is an exemplary employee. (Complainant's Exhibit 16).

110. Barbour is classified as a Technician 15 who is an extremely well-rounded Graphics Technician and possesses many talents. He is precise, thorough, has good computer skills, an artistic ability, and he is also the instrument person for special regional surveying projects. He is an excellent mentor and interacts well with all who work with him. He is a self starter and resourceful along with being a good team player. (Complainant's Exhibit 16).

111. Jones, a Technician 15 has, very good computer skills in both Metamap and Micro-Station and is very productive. He also has a good working knowledge of the job. He is a self-starter and requires little direction. He has good ideas on how to improve the work processes from time to time but is reluctant to speak up in a group meeting. (Complainant's Exhibit 16).

112. Johnson is a Technician 15. He has excellent overall computer skills in both mapping and general manipulation. He is technically inclined and very knowledgeable in the drafting standards for permit type drawings. He works well as a team member and contributes many ideas for improvements. On rare occasions he may need a prodding to move projects along on schedule. (Complainant's Exhibit 16).

113. Pauley is a Technician 15 who is primarily responsible for maintaining the regional one-line maps. He excels in this area. He takes pride in his work and is very thorough and neat. Sometimes he is over meticulous, however. He works well by himself or as a team member. He communicates well (however lengthy). He is also a self starter and needs little direction. (Complainant's Exhibit 16).

114. Kiser is a Technician 11 who has good technical and computer skills, and excels in his manual drawings. He is very thorough and neat. He has demonstrated outstanding initiative in his work habits. He has good interpersonal skills and relates well with his fellow employees. (Complainant's Exhibit 16).

115. Cochran is a Technician 15, who has excellent computer skills in both Metamap and Micro-Station and various other technical computer applications. He is very productive in using Metamap. He will offer suggestions and work with people helping them

with computer problems. He has some difficulty expressing himself verbally. (Complainant's Exhibit 16).

116. Wolfe's paragraph states he is classified as a Technician, grade 18 and is very knowledgeable in many drafting applications. The job[s] assigned are done well. He prefers to work alone in his cubicle. He has the ability to be an asset to the department. (Complainant's Exhibit 16).

117. Muncey, Barbour, Jones, Johnson, Pauley, Kiser, Cochran and Wolfe are selected to remain in the Graphics Department in North Charleston. (Complainant's Exhibit 16).

118. Lee is a Technician 7. She is rated a 2-below normal requirements in her latest job performance review. Lack of communication and teamwork are her main problems. She has good computer skills but the volume of postings completed continue to decline. Dickerson has been willing to meet with her each Friday to try to resolve the problems with communications, but little progress has been made. She has the least job knowledge and experience in the Graphics Section and has only computer skills with little or no technical skills. She received a Written Warning for "Unsatisfactory Job Performance" dated 7/30/99. (Complainant's Exhibit 16).

119. Lee is selected to participate in the involuntary severance package. Although they anticipated a lawsuit, Harmon, Dickerson and Gearhart, the senior manager, were in agreement that Lee should receive an involuntary severance package. (Hr. Tr. Vol. 2, 303 and 304).

120. It is the regional director or vice president who makes the decision as which employees are affected by a reduction in force. (Hr. Tr. Vol. III, at 343).

121. On November 1, 1999, Harmon informs Lee that she has been chosen for the involuntary severance in the graphics department. The reasons given to Lee were the budget cuts and the need to bring the West Virginia graphics department more into line with other regions. (Hr. Tr. Vol. I, at 163).

122. Lee makes a report of sexual harassment against Dickerson to Melinda Ackerman. She is in Human Resources in Columbus, Ohio and knew Lee from her time in Kentucky. (Hr. Tr. Vol. III, at 347). Ackerman asks Painter to conduct an investigation. Painter does so and learns that the majority of employees at the Graphics Department state that the conflict between Dickerson and Lee is a personality conflict. (Hr. Tr. Vol. III, at 399).

123. Lee's last day of employment is November 19, 1999.

124. On November 30, 1999, Lee is presented with a severance package which includes a "Severance and Release of All Claims Agreement" ("Severance Agreement") which contains a waiver of all claims arising directly or indirectly from her employment and/or separation from AEP. (Hr. Tr. Vol. I, at 345, Respondent's Exhibit 8).

125. After November 30, 1999, and prior to January 13, 2000, Lee consults with an attorney to review the Severance Agreement. (Hr. Tr. Vol. I, at 345).

126. On January 13, 2000, Lee signs the Severance Agreement that contains a waiver of any and all claims she may have had against AEP, arising directly or indirectly from her employment with AEP. She receives \$20,008.63 in gross pay. (Hr. Tr. Vol. I at 345).

127. The Severance Agreement Lee sign does not comply with the waiver requirements provided in 6 W. Va. C. S. R. § 77-6-3.2 all relating to waiver under the West Virginia Human Rights Act.

128. Lee uses the proceeds from the Severance Agreement to finance her

education and to support herself.

129. In the fall of 2000, Lee enrolls in nursing school and graduates in May 2002. (Hr. Tr. Vol. I, at 177).

130. Lee now lives with her parents in Ashland, Kentucky and works as a nurse at King's Daughters' Hospital. (Hr. Tr. Vol. I, at 177).

V.

DISCUSSION

When AEP reorganizes its entire operation in Kentucky and West Virginia, Dickerson offers Lee an opportunity to transfer to the Graphics Department in the North Charleston, West Virginia office despite the fact that she does not have any real graphic experience. Dickerson feels that because Lee is a fast typist and has good typing skills, she can learn the job.

As a result of the reorganization, Dickerson becomes the new supervisor of the North Charleston office. Wolfe had been the office supervisor for 20 years. It is during Wolfe's tenure as supervisor that the North Charleston Office fails to process thousands of work orders in a timely manner. When Dickerson arrives to the North Charleston office there are thousands of unprocessed work orders.

This particular office had numerous problems which are exacerbated when APCO/AEP consolidates several offices into one and employees from Huntington, West Virginia, Kentucky and southern West Virginia are reassigned to the North Charleston Graphics Department.

Wolfe resents this change and the evidentiary record supports a finding that he and the employees who were originally in the office before consolidation are not supportive of the changes, and resent Dickerson as the new supervisor. Some of their actions contribute to the confusion and turmoil that exist in this office during the time that Lee works there.

It is evident they encourage Lee to behave as she does toward Dickerson. There is general distrust among the employees. The original employees who worked in the North Charleston office do not want to work as a team. Many had worked independently for a long time and do not want to be supervised by a supervisor who is task oriented like Dickerson. A review of the record taken as a whole as well as my observations at the hearing and the demeanor of Wolfe, Cochran, Jones and Pauley persuade me to give little credibility to their testimonies regarding the relationship between Dickerson and Muncey and Lee's allegations of alleged sexual misconduct.

Lee works independently for a long time and has problems accepting Dickerson's supervision. It is in this environment of mistrust and resentment, that the allegation of sexual harassment and retaliation festered and grew to a point that Lee files a complaint with the Commission.

When Campbell conducts a "Building Trust and Relationships" workshop, it probably is not enough to immediately eliminate the deep-seated resentment that exists. No matter what Dickerson does to work with Lee, Wolfe and the original North Charleston office staff, Dickerson cannot succeed because these are not cooperative.

The West Virginia Human Rights Act (Act) prohibits employers from discriminating against an individual with respect to the terms and conditions of employment because of sex. The Act, like Title VII, imposes a duty on employers to ensure, as best they can,

that their workplaces are free of sexual harassments that create a hostile or offensive working environment. Hanlon v. Chambers, 195 W. Va. 99, 464 S. E. 2d 741 (1995); Patterson v. McLean Credit, 491 U. S. 164, 180, 109 S.Ct. 2363, 2374, 105 L. Ed.2d 132, 153 (1989); Meritor Sav. Bank, FSB v. Vinson, 477 U. S. 57, 65, 106 .Ct.2399, 2404, 91 L.Ed2d 49, 58 (1986).

The Act specifically bars employment discrimination on the basis of sex. W. Va. Code § 5-11-9(a)(1). See also, Hanlon, 195 W. Va. At 106-08, 464 S. E. 2d at 748-50; Westmoreland Coal Co. v. West Virginia Human Rights Comm'n, 181 W.Va. 368, 382 S.E. 2d 562 (1989). 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 . . . sex” This includes equal opportunity with regard to hire, tenure, terms and conditions or privileges of employment. W. Va. Code § 5-11-9.

Given this statutory framework, to recover against an employer on the basis of a violation of the West Virginia Human Rights Act, a person alleging to be a victim of unlawful sex discrimination, or the Commission acting on her behalf, must ultimately show by a preponderance of the evidence that sex was a motivating or substantial factor for the employer’s failure to extend an equal opportunity.

To establish a claim for sexual harassment under the West Virginia Human Rights Act based upon a hostile or abusive work environment, a claimant must prove that:

1. The subject conduct was unwelcome;
2. It was based on the sex of the complainant;
3. It was sufficiently severe or pervasive to alter the terms of employment and create an abusive work environment; and,

4. It was imputable on some factual basis to the employer.

Willis v. Wal-Mart Stores, Inc., 202 W. Va. 413, 504 S. E. 2d 648 (1998). Syll. Pt.2; Conrad v. Szabo, 198 W. Va. 362; 480 S. E. 2d 801 (1996); and, Syll. Pt. 5, Hanlon v. Chambers, 195 W. Va. 99, 464 S. E. 2d 741 (1995).

First, the evidentiary record supports a finding that Dickerson's conduct was not welcome. Lee makes it clear at the March 25, 1999, meeting with Dickerson, Scott, and Kiser, when she informs Dickerson she does not appreciate the way he sometimes touches her on the shoulder and arm when talking to her and that she considers it to be sexual harassment. Dickerson explains that he is unaware that she takes offense to his conduct and promises to never touch her in that way again.

Lee also tells Dickerson that she requires three feet of personal space at all times. Dickerson agrees, in the hopes that this may help to resolve the developing personality conflict between Lee and himself. Lee makes it clear to Dickerson that the touching and massaging of her shoulders on that one occasion are not welcomed. Once Lee tells Dickerson to stop; he does.

Second, the evidentiary record does not support a finding that the conduct Lee complains about is sexual in nature. Several witnesses testify that they have seen Dickerson approach other employees from behind, touch them on the shoulders and tell them that it is break time as he does Lee.

Third, the evidentiary record does not support a finding that the conduct Lee complains about is so severe or pervasive as to alter the terms of employment and create an abusive work environment. Although, Lee alleges that Dickerson massages her shoulders fifteen times after that, the evidence does not support a finding that the conduct

complained of occurred more than once. Quite the contrary. Dickerson stopped placing his hands on her shoulders once she told him that she did not like to be touched in that manner. Dickerson abides by her request for three feet of space between the two of them.

Fourth, the record supports a finding that the APCO/AEP responds quickly to all of Lee's allegations regarding Dickerson and that it was Lee who stated each time she mentioned the March 25, 1999-incident to Human Resources said that the matter had been resolved and there the offensive touching had occurred only once and that was prior to March 25, 1999.

On the occasions that Lee met with Beckelhimer and Painter of Human Resources, they offer to investigate her complaints and have a meeting with her and Dickerson. On each occasion she refuses. For example, on March 17, 1999, Lee makes an appointment to see Beckelhimer to review her employment file. She tells Beckelhimer that she is having a personality conflict with Dickerson. Beckelhimer offers to intercede; but Lee declines, saying that she and Dickerson discussed the matter and she would wait and see if it would resolve itself.

Again, on June 9, 1999, Beckelhimer meets with Lee, at her request, to discuss the "mock" JPR. During the course of this conversation, Lee for the first time states to Beckelhimer that she feels she had been sexually harassed by Dickerson. Lee acknowledges that the incident in question occurred prior to March 25, 1999, and that she confronts Dickerson with her complaint on March 25, 1999, and that the matter had been resolved. The incident of sexual harassment she alleges to Beckelhimer is the same incident of Dickerson touching her on the shoulder prior to March 25, 1999.

Again, Beckelhimer offers to set up a meeting with Lee, Dickerson and Human Resources to investigate the matter properly. Lee refuses, preferring to wait and see if an upcoming "building trust" seminar with Campbell and scheduled for the Graphics Department improve matters. When Lee confides in Campbell that Dickerson sexually harassed her, Campbell tells Lee that based on the information she makes available, Dickerson's conduct did not constitute sexual harassment.

Lee never raises the issue of sexual harassment again until she learns that she is going to receive an involuntary severance package and would no longer be employed. She contacts Melinda Ackerman who asks Painter and Beckelhimer to conduct an investigation. This is the second investigation APCO/AEP conducts in an effort to try to respond to Lee's allegations. It becomes clear during the second investigation that even the majority of employees in the Graphics Department believe that a personality conflict exists between Dickerson and Lee. Lee subsequently files a complaint with the West Virginia Human Rights Commission.

Lee fails to prove a prima facie case of sexual harassment and fails to prove by a preponderance of the evidence that APCO/AEP discriminated against her. Therefore, there is no factual basis to impute liability to APCO/AEP.

To establish a claim of retaliation, Lee must establish a nexus or connection between protected conduct or class and any adverse employment action. Protected conduct in this context would mean either resisting and rejecting sexual advances in the workplace or reporting sexual harassment. Sex is a protected class.

To prevail, Lee must establish that she was retaliated against because of her protected class (sex) or because of protected activity (opposing or reporting sexual

harassment). A connection between protected conduct and an adverse employment action may be established by showing by a preponderance of the evidence that the protected conduct and the adverse employment action occurred within a time period which raises an inference of retaliation, or by other evidence which establishes a nexus or connection by some other means.

Actions taken by an employer for legitimate business reasons, even though they may be adverse or perceived as adverse by an employee, are not actionable and do not form a basis for a claim of retaliation. Tudor v. CAMC, 506 S.E.2d 554 (W. Va. 1997); Slack v. Kanawha County Housing and Redevelopment Authority, 423 S.E.2d 547, 558 (1992); Faragher v. City of Boca Raton, 524 U.S. 77 (1998).

The record taken as a whole does not support Lee's claim of retaliation. APCO/AEP has a legitimate business reason for letting Lee go.

Lee fails to make out a prima facie case on her claim of retaliation inasmuch as she has not offered any evidence linking her earlier claim of discrimination with her treatment in the reduction in force. Even assuming that a prima facie case has been established, the complainant has offered no evidence of pretext. APCO/AEP has articulated a legitimate, nondiscriminatory reason for its decisions in the reorganization.

VI.

CONCLUSIONS OF LAW

1. In order to prevail on a cause of action in a sexual harassment case based upon sexually hostile or abusive work environment, the complainant must prove that:

- (1) She was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;
- (2) the harassment complained of was based upon sex (that is, gender);
- (3) the harassment complained of was sufficiently severe and pervasive as to affect a term, condition or privilege of employment and create an abusive working environment;
- (4) that the employer had actual or constructive knowledge of the existence of a sexually hostile work environment either through specific complaints to the employer or by proof that the harassment was so pervasive that the employer's awareness may be inferred; and
- (5) that the employer took no prompt and adequate remedial action; and
- (6) the existence of sexual harassment must be determined in light of the record as a whole and the totality of circumstances.

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); Hanlon v. Chambers, Syl. Pts. 5, 9, 195 W.Va. 99, 464 S.E.2d 741 (1995).

2. In determining whether a sexually hostile work environment existed, the

fact-finder must consider the evidence from the perspective of a reasonable person. This is an objective standard, and the evidence must be looked at from the perspective of a reasonable person's reaction to a similar environment under similar circumstances.

The fact-finder cannot view the evidence from the perspective of an overly sensitive person. Rather, the fact-finder must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as the kind of behavior that would seriously affect the psychological well-being of a reasonable person.

Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801, 810 (1996); Highland v. KFC National Management Co., 805 F. 2d 644 (6th Cir. 1986); Burns v. McGregor Electric Industries, 955 F.2d 559 (8th Cir. 1992); Robinson v. Jacksonville Shipyards, 118 F. R. D. 525 (M.D. Fla. 1988).

3. The key factors to consider in evaluating the complainant's claim of sexual harassment are whether the alleged mistreatment was directed at the complainant because of her gender and whether it was of such a nature, because of its seriousness or its pervasiveness, as to ruin the working environment for the complainant. If the complainant fails to show either of these factors, judgment should be entered in favor of the respondents. Conrad v. ARA Szabo, 480 S.E.2d 801, 810 (W.Va. 1996).

4. In considering the complainant's charge of sexual harassment, consideration should be taken of whether the complainant's personality had any part in the problems which she allegedly experienced at her workplace. Ramsey v. City and County of Denver, 907 F.2d 1004, 1011 (10th Cir. 1990).

5. In determining whether the complainant was offended by the conduct she alleged took place in her work environment, consideration should be taken of the lapse of time, if any, that took place between the alleged occurrence of the conduct and the complainant's reporting of such conduct. Highlander v. K.C. National Management Company, 805 F. 2d 644 (6th Cir. 1986).

6. Knowledge of workplace misconduct may not be imputed to the respondents by circumstantial evidence unless the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with the West Virginia Human Rights Act, would be aware of the conduct. Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741, 750 (1995).

7. The law states that an employer who has taken reasonable care to prevent and promptly correct sexual harassment should not be found liable for sexual harassment. Moreover, the law states that if an employee did not take advantage of the employer's remedial procedures and there was no reasonable basis for the employee's failure to do so, then the employer should not be found liable.

8. If the respondent shows by a preponderance of the evidence that (1) the respondent exercised reasonable care to prevent and promptly correct sexual harassment, and (2) Lee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the respondents or to avoid harm otherwise, then judgment should be entered in favor of the respondent. Burlington Ind., Inc. v. Ellerth, 524 U.S. 742, (1998); Faragher v. City of Boca Raton, 524 U.S. 77, (1998); Lissau v. Southern Food Service Inc.,

1998 WL 751224 (4th Cir.); Westmoreland Coal Co. v. West Virginia Human Rights Com'n., Syl. Pt. 1, 382 S.E.2d 562, 563 (1989).

9. A supervisor's or co-worker's insensitivity and/or meanness of spirit are insufficient to support a hostile work environment claim. Burgess v. Gateway Communication Inc., 26 F. Supp. 2d 888, 892 (S. D. W.Va 1998)

10. If the conduct complained of is equally offensive to male and female workers, then there is no actionable sexual harassment because men and women are accorded like treatment. Burgess v. Gateway Communications Inc., 26 F. Supp. 2d 888, 892 (S. D. W.Va. 1998).

13. A sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. In making its determination, the fact-finder must look at the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993); Faragher v. City of Boca Raton, 524 U.S. 77 (1998).

14. An employer can be held responsible for a hostile work environment only if, when an employee harasses a co-worker, the employer knew or had reason to know of the conduct and failed to take appropriate action. An employer acts unreasonably if the employer unduly delays its response to an incident or if the action the employer does take

is not reasonably likely to prevent the conduct from recurring. Tutsan v. WDM -- TV/CBS, Inc., 54 F. Supp. 2d 817 (ND Il. 1999).

16. The respondent had a complaint procedure. Moreover, it had provided training and education on the issues of discrimination and harassment. When the respondent was made aware of alleged sexual harassment involving the complainant and Dickerson, it responded in a prompt and adequate fashion. Any sexual harassment allegations the complainant makes involving her co-workers Johnson, Barbour and others should not be considered by this tribunal, as it is undisputed that not one of these incidents was ever properly reported to management. AEP is not strictly liable for any alleged sexual harassment involving the complainant and her co-workers.

17. There is no controlling West Virginia law or mandatory duty compelling the West Virginia Human Rights Commission to compel Christi Ann Lee to return the money she received under the Severance Agreement before proceeding to public hearing because the Severance Agreement does not comply with 6 W. Va. C. S. R. § 77-6-3-2.

18. 6 W. Va. C. S. R. § 77-6-3-2 provides for seven criteria that must be met under the Commission's legislative rule on waiver. The criteria are:

1. The Agreement is written in plain English.
2. The document specifically refers to rights or claims arising under the West Virginia Human Rights Act.
3. The document does not extend to rights or claims arising after the date the waiver is executed.
4. The document is in consideration for something of value.

5. The document advises in writing that the person consult with an attorney prior to executing the waiver and provides the number for the West Virginia State Bar.
6. A consideration period of 21 days is provided.
7. The document provides a seven day revocation period after execution and does not become effective or enforceable until the revocation period expires.

19. The West Virginia Human Rights Act's waiver language is modeled after the waiver language in the Older Workers Benefit Protection Act of 1990. See 6 W. Va. C. S. R. § 77-6-1.2.

20. The Commission's rule on Waiver is a legislative rule and therefore has the full force and effect of law. See 6 W. Va. C. S. R. § 77-6-1.1.

21. Smith v. WVHR Commission, No. 31645, slip op. At Syl. Pt. 5 (W. Va. Sup. Ct. July 2, 2004) states that "A regulation that is proposed by an agency and approved by the Legislature is a legislative rule" as defined by the State Administrative Procedures Act. W. Va. Code 29A-1-2(d) [1982] and such a legislative rule has the force and effect of law.

22. The U. S. Supreme Court of Appeals provides guidance on how to interpret the "tender back rule" of invalid OWBPA releases. Oubre v. Entergy Operations, Inc. 522 U. S. 422, 118 S. Ct. 838, 139 L. Ed. 2d 849 (1998).

23. The respondent's Severance Agreement fails to address all seven criteria. The Agreement addresses only four of the seven criteria, namely one, four, six, and seven. The Agreement does not address criteria two, three and five.

24. The legislative rule requires that each and every criterion be met for a valid waiver human right claims under the West Virginia Human Rights Act. Substantial compliance is not enough.

VII.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, this chief administrative law judge finds as follow and orders the following.

1. The Severance Agreement signed by Lee does not comply with the requirements of 6 W. Va. C. S. R. §77-6-3.2.

2. Appalachian Power/American Electric Power fails to prove by a preponderance of the evidence that their Severance Agreement complies fully with the Commission's legislative rule on waiver.

3. The Commission cannot compel Lee to return the consideration she received when she signed the Severance Agreement.

4. Lee was not required to return the consideration before or after she filed a sex discrimination claim or retaliation claim with the West Virginia Human Rights Commission.

5. Lee fails to prove all of the elements of a prima facie case for sex discrimination and retaliation.

6. Lee fails to prove by a preponderance of the evidence that Appalachian Power/American Electric Power discriminated against because of her sex and retaliated against her.

It is therefore **ORDERED** that the above captioned matter is dismissed against Appalachian Power Company/American Electric Power, with prejudice and stricken from the docket.

It is so **ORDERED**.

Entered this 27th day of March, 2006.

WV HUMAN RIGHTS COMMISSION

BY: *Phyllis H. Carter*

**PHYLLIS H. CARTER
CHIEF ADMINISTRATIVE LAW JUDGE
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