



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCHA MOORE, JR.
Governor

TELEPHONE: 304-348-2616

September 2, 1987

Carolyn E. Moss
Rt. 5, Box 396
Charleston, WV 25312

Reagent Chemical & Research, Inc.
P.O. Box 584
Institute, WV 25112

Robert Q. Sayre, Jr. Esq.
Goodwin & Goodwin
1500 One Valley Square
Charleston, WV 25301

Tom Hindes
Deputy Attorney General
812 Quarrier St.
Charleston, WV 25301

RE: Moss v. Reagent Chemical & Research, Inc.
ES-313-86

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,

A handwritten signature in cursive script that reads "Howard D. Kenney".

Howard D. Kenney
Executive Director

HDK/mst
Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Enr. H. B. 2628]

8

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an
2 application for review may be prosecuted by either
3 party to the supreme court of appeals within thirty days
4 from the receipt thereof by the filing of a petition
5 therefor to such court against the commission and the
6 adverse party as respondents, and the clerk of such
7 court shall notify each of the respondents and the
8 commission of the filing of such petition. The commis-
9 sion shall, within ten days after receipt of such notice,
10 file with the clerk of the court the record of the
11 proceedings had before it, including all the evidence.
12 The court or any judge thereof in vacation may
13 thereupon determine whether or not a review shall be
14 granted. And if granted to a nonresident of this state,
15 he shall be required to execute and file with the clerk
16 before such order or review shall become effective, a
17 bond, with security to be approved by the clerk,
18 conditioned to perform any judgment which may be
19 awarded against him thereon. The commission may
20 certify to the court and request its decision of any
21 question of law arising upon the record, and withhold
22 its further proceeding in the case, pending the decision
23 of court on the certified question, or until notice that the
24 court has declined to docket the same. If a review be
25 granted or the certified question be docketed for
26 hearing, the clerk shall notify the board and the parties
27 litigant or their attorneys and the commission of the fact
28 by mail. If a review be granted or the certified question
29 docketed, the case shall be heard by the court in the
30 manner provided for other cases.

31 The appeal procedure contained in this subsection
32 shall be the exclusive means of review, notwithstanding
33 the provisions of chapter twenty-nine-a of this code:
34 *Provided*. That such exclusive means of review shall not
35 apply to any case wherein an appeal or a petition for
36 enforcement of a cease and desist order has been filed
37 with a circuit court of this state prior to the first day
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a
40 final order of the commission within thirty days after
41 receipt of the same. or. if applicable. within thirty days
42 after a final order of the supreme court of appeals. a
43 party or the commission may seek an order from the
44 circuit court for its enforcement. Such proceeding shall
45 be initiated by the filing of a petition in said court. and
46 served upon the respondent in the manner provided by
47 law for the service of summons in civil actions; a hearing
48 shall be held on such petition within sixty days of the
49 date of service. The court may grant appropriate
50 temporary relief. and shall make and enter upon the
51 pleadings. testimony and proceedings such order as is
52 necessary to enforce the order of the commission or
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CAROLYN E. MOSS,

Respondent.

v.

DOCKET NO. ES-313-86

REAGENT CHEMICAL & RESEARCH, INC.

Respondent.

FINAL ORDER

On the 12th day of August, 1987, the Commission reviewed the proposed order and decision of Hearing Examiner, James Gerl, in the above-captioned matter. After consideration of the aforementioned and exceptions thereto, the Commission does hereby adopt said proposed order and decision, encompassing proposed findings of fact and conclusions of law as its own, with modifications and amendments set forth below.

In the subsection titled Relief, page 14, referencing the first paragraph, the sentence contained therein, which reads, "In 1987, she has earned no wages." is rejected as contrary to the evidence of record. In the same paragraph the final sentence which begins, "Accordingly..." is modified as follows: the date contained therein, "June 30, 1987," is stricken and substituted therefore, is the date "December 31, 1986." The monetary figure "\$7,703.14" is stricken and substituted, therefore, is the figure "\$1,629.09." The parenthetical reference in paragraph one is stricken in its entirety and substituted therefore, is the following language: "Commencing January 1, 1987, had complainant been employed by respondent her wages would have been \$6,074.05

through June 30, 1987. For that period of time, complainant is entitled to said backwages, less any interim earning she has accrued thereto. Thereafter, complainant is entitled to backwages at the monthly rate of \$1,012.34 less any interim earnings until she is offered reinstatement."

In the same subsection, referencing the second paragraph, the figure "\$8,000.00" is stricken and substituted therefore, is the figure "\$5,000.00."

Finally, although the Commission adopts the analysis as set forth in the first two sentences of the last paragraph of the Relief subsection, it rejects the Hearing Examiner's recommended course of action related to suspension of respondent's supervisory agents. Accordingly, the final two sentences of the last paragraph are deleted. Substituted, therefore, is the following sentence: "Based upon the foregoing, specific affirmative obligations are appropriate and imposed upon the respondent as shall be further set forth in the final order."

It is hereby **ORDERED** that the Hearing Examiner's proposed order and decision, encompassing findings of fact and conclusions of law, be attached hereto and made a part of this final order except as amended by this final order.

It is further **ORDERED** as follows:

1. The complaint of Carolyn Moss is sustained
2. Respondent shall cease and desist from engaging in unlawful sexual harassment of its employees.
3. Respondent shall unconditionally and immediately offer the complainant reinstatement into her former position at a rate

of pay comparable to what she would have received but for her constructive discharge.

4. Respondent shall pay complainant a sum equal to the wages she would have earned but for respondent's constructive discharge of complainant from employment. Such wages for the period from the date of complainant's discharge on October 23, 1985 to December 31, 1986 would have been \$1,629.09. Commencing January 1, 1987, complainant is entitled to an award of backpay calculated at the rate of \$1,012.34 per month until the complainant is reinstated, less any interim earnings accrued by complainant. Respondent shall also pay complainant accrued interest on the amount of backpay owed her at the statutory rate of ten percent.

5. Respondent shall pay to complainant the sum of \$5,000.00 for incidental damages for humiliation, embarrassment, distress and loss of personhood and dignity as a result of the discriminatory treatment toward her by respondent.

6. The respondent shall further take the following affirmative action:

- a. Official notice, apprising respondent's employees and applicants for employment with respondent of their non-discriminatory employment rights under WV Human Rights Act, shall be conspicuously posted and kept upon its premises.

[Said WV Human Rights Act poster is attached]

- b. In the same place as the official WV Human Rights Act notice is posted, the following statement of policy shall also be posted by respondent:

"The Management of Reagent Chemical Corp. wishes to emphasize the Company's fundamental policy of providing equal employment opportunity in all of its operations and in all areas of employment practice and to assure that there shall be no discrimination against any employee or applicant for employment on the grounds of race, color, religion, sex, national origin, age or handicap.

This policy extends to recruiting, hiring, training, compensation, overtime, job classifications, assignments, working conditions, promotions, transfers, employee treatment, and all other terms, conditions and privileges of employment.

The importance of fulfilling this policy cannot be overemphasized. Failure to comply with the letter or spirit of this policy will result in appropriate action."

- c. The respondent shall apply the EEOC Guidelines on Sexual Harassment, 29 CFR 1604 ratified and adopted by the WV Human Rights Commission, in and to all areas of its operations.
- d. The respondent shall direct a statement to all of its officials and supervisory personnel emphasizing the importance of its nondiscriminatory employment policy, advising them that they will be held strictly accountable for the effectiveness of such policy, and directing them to take all necessary steps to fully implement the policy and the Commission's Guidelines aforementioned in all areas and on all levels of respondent's operations.

It is finally **ORDERED** that respondent provide to the Commission proof of compliance with the Commission's final order

within 35 days of service of said final order by copies of cancelled checks, affidavits or other means calculated to provide such proof.

By this final order, a copy of which shall be sent by certified mail to the parties, the parties are hereby notified that they have ten days to request a reconsideration of this final order and that they may seek judicial review.

Entered this 1st day of September, 1987.

RESPECTFULLY SUBMITTED,

BY Betty A. Hamilton
~~CHAIR/VICE CHAIR~~
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

RECEIVED

JUN 25 1987

W.V. HUMAN RIGHTS COMM.
Answered

CAROLYN E. MOSS,

Complainant,

vs.

Docket No. ES-313-86

REAGENT CHEMICAL & RESEARCH, INC.

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on March 19, 1987 in Charleston, West Virginia. Vice Chairperson, Betty Hamilton served as Hearing Commissioner. The complaint was filed on December 5, 1985. The notice of hearing was issued on September 24, 1986. Respondent answered on October 8, 1986. A telephone Status Conference was convened on October 17, 1986. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. Respondent was permitted to file a reply brief because of the late filing of complainant's brief.

All proposed findings, conclusions and supporting arguments submitted by parties have been considered. To the extent that the proposed findings, conclusions, and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith,

they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent sexually harrassed her and that respondent constructively discharged her. Respondent maintains that most of the incidents of sexual harrassment did not occur and that complainant was not constructively discharged.

FINDINGS OF FACT

Based upon the preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

1. Complainant is a woman.
2. Complainant began working for respondent as a temporary secretary, through Kelly Services, in March, 1983.
3. Complainant was hired by respondent as a full-time employee at its Institute, West Virginia plant in November, 1983.
4. Prior to hiring complainant full-time, Mulflur, the manager of respondent's Institute plant, told complainant that he did not want a woman working at the plant and that he was hiring complainant against his better judgement.
5. Complainant was the only female employee at respondent's Institute plant from March 1983 to November, 1985.
6. Kuhn, complainant's immediate supervisor, unfastened complainant's bra on one occasion in respondent's lab. Visitors

were present in the lab during this incident.

7. On another occasion, Kuhn unfastened complainant's bra in respondent's lunch room. Employees present in the lunchroom witnessed this incident.

8. Each time that Kuhn unfastened complainant's bra, complainant had to adjourn to the restroom to rearrange herself and to calm down. Each time complainant admonished Kuhn to stop, telling him that it upsets, bothers and embarrasses her.

9. On 3 or 4 occasions, Kuhn fastened mirrors to the top of his shoes, came up behind complainant, and attempted to use the mirrors to look up complainant's dress.

10. On one occasion, Kuhn came up behind complainant, who was seated, placed his hands under her arms and grabbed her breasts with his hands. This incident occurred in September or October of 1985. After Kuhn fondled her breasts, complainant twice told him not to do that.

11. On one occasion, Kuhn touched complainant's buttocks with an instrument known as a "spark tester." This was painful for complainant and left a one and one-half inch welt on her body. Complainant became very angry and on this occasion Kuhn apologized.

12. On one occasion, Kuhn said to complainant, "When Michelle (Kuhn's wife) and I have sex, I am always thinking of you, I always pretend it's you."

13. Kuhn regularly said to complainant, "Here, you want to sit down? Sit on my face."

14. Kuhn's verbal sexual harrassment of complainant lasted from May or June of 1985 and worsened during complainant's last months of employment with respondent.

15. Mulflur was seldom at respondent's plant. He insisted that employees with grievances or complaints go through Kuhn and that Kuhn come to Mulflur.

16. Respondent's employee Smith, who also supervised complainant, constantly asked complainant to go out to dinner, invited her to his house when his wife was out of town.

17. Starting in approximately September, 1985, Smith began touching complainant, kissing her, and attempting to corner her.

18. Complainant consistently told Smith that she was not interested in him and that his advances were unwelcome.

19. Complainant resigned from her employment at respondent on October 23, 1985. The reason for complainant's resignation was that the sexual harrassment had become so bad that Kuhn and Smith became possessive and attempted to have another employee, Jordan, fired because he was dating complainant.

20. Although complainant was the only employee of respondent, other than Mulflur, who was not issued a uniform, she at all times dressed appropriately.

21. The sexual harrassment of complainant by Kuhn and Smith was unwelcome.

22. Complainant informed Mulflur of all of the incidents of sexual harrassment after she submitted her resignation letter

but before the effective date of her resignation.

23. As a result of complainant's allegations, Mulflur conducted an investigation. He did discover that at least several of the allegations as to Kuhn were true. Mulflur did not discipline Kuhn. Mulflur told complainant that he could not guarantee that it would not happen again.

24. Complainant did not inform Mulflur of the sexual harrassment prior to this occasion because she was afraid she would lose her job.

25. At the time of her resignation, complainant earned \$5.50 per hour. In 1984, when complainant worked for respondent for the entire year, she earned \$12,148.10.

26. During 1985, complainant earned \$10,839.39 from respondent and \$330.00 from other resources.

27. During 1986, complainant earned \$11,727.88, from employers other than respondent.

28. Complainant was deeply humiliated by the sexual harrassment she suffered from Kuhn and Smith. Many of these incidents were witnessed by co-employees and by visitors at the plant. Because she needed her job, complainant felt frustrated at being unable to stop the sexual harrassment. She felt that the sexual harrassment was causing her to lose her self respect. Complainant found it very difficult to explain her ruined clothing to her parents.

CONCLUSIONS OF LAW

1. Carolyn E. Moss is an individual claiming to be aggrieved by an alleged unlawful dicriminatory pratice and is a

a proper complainant for purposes of the Human Rights Act.
West Virginia Code, §5-11-10.

2. Reagent Chemical & Research Inc. is an employer as defined by West Virginia Code Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Respondent discriminated against complainant on the basis of her sex in violation of West Virginia Code, Section 5-11-9(a) by subjecting complainant to repeated unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature, and by constructively discharging her.

DISCUSSION OF CONCLUSIONS

Sexual harrassment in the workplace violates the provisions of the Human Rights Act which prohibits discrimination on the basis of sex. Graves v. West Virginia Belt Sales and Repair Docket No. ES-373-81 (W.V.R.C. May 15, 1986). The West Virginia courts look to the Federal anti-discrimination laws and decisions for guidance, although Federal law is not binding upon the Human Rights Commission, in interpreting the West Virginia Human Rights Act. West Virginia Human Rights Commission v. United Transportation Union, Local 6551 280 S.E. 2d 653 (1981).

The Federal Equal Employment Opprotunity Commission has adopted comprehensive findings which pertain to the topic of sexual harrassment. The EEOC Guidelines are treated with deference by the courts because they constitute a body of experience and informed judgement. Griggs v. Duke Power 401 U.S. 424, 433-434 (1971).

The EEOC Guidelines on Discrimination Because of Sex define the parameters of sexual harassment as follows:

". . . Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or]

2. submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or

3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

29 CFR §1604.11(a) (1985).

The gravamen of any type of sexual harassment claim is that the alleged sexual advances are unwelcome. Meritor Savings Bank v. Vinson ___ U.S. ___, 106 S. Ct. 2339, 54 U.S.L.W. 4703, 4706 (June 19, 1986). The test for unwelcomeness is an objective test, and the proper inquiry involves the facts rather than plaintiff's frame of mind. Jennings v. DHL Airlines 34 F.E.P. 1423 (N.D. Ill. 1984).

Where sexual harassment is so pervasive as to create an intimidating, hostile or offensive work environment or interfere with work performance, it is unlawful sex discrimination. Meritor Savings Bank v. Vinson ___ U.S. ___, 54 U.S.L.W. 4703, 4706 (June 19, 1986).

In sexual harassment cases, the tripartite allocation of proof as set forth in Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E. 2d 342, 352-353 (W. Va. 1983) is usually not helpful. The issue is

generally one of credibility, a swearing contest where one party accuses and the other denies. In such cases the prima facie case, legitimate reason, pretest analysis, which was designed to help prove more subtle types of discrimination, is often inappropriate. Rather than a tortured analysis, such cases should be decided primarily upon the credibility of the testimony of the witnesses. Of course, in some cases the tripartite analysis may be helpful and should be employed, but where inappropriate, it should not become a hinderance. In the instant case, the testimony of complainant and her witnesses is more credible than the testimony of respondent's witnesses. Complainant's demeanor was very credible and believable. Complainant's testimony is buttressed by the credible testimony of Lemaster and Beitz, each of whom witnessed incidents of sexual harrassment of complainant.

Kuhn admits some of the incidents of his sexual harrassment of complainant, but he denies grabbing complainant's breast or looking up her dress with mirrors. Kuhn's testimony in making these denials is not credible because of his evasive demeanor and because of various problems in his testimony. First, respondent's witnesses have inconsistent stories. Mulflur testified that Kuhn was reprimanded, at least in part, for sexually harrassing complainant. Kuhn testified, however, that he was reprimanded only for failing to report that a driver had been drinking. Second, Kuhn's testimony revealed that he views complainant as a sex object. For example, Kuhn

testified that he attempted on one occasion to have complainant kiss him in front of another male employee to make him jealous. Kuhn's testimony in denying various incidents are of harrassment is not credible. Such incidents are consistent with the various incidents of sexual harrassment which he admits to have perpetrated.

Smith denies that he ever asked complainant out or propositioned her. Smith's testimony is not credible because of his evasive and nervous demeanor and because his testimony reveals that he was overly concerned with complainant's physical appearance and marital status of her dates. Smith testified that he often wondered why somebody who looked like complainant would go out with married men. Smith's testimony is not credited.

Complainant clearly made it known to Kuhn and Smith that their sexual harrassment was unwelcome. Complainant told both of them to stop in terms that could not have been misunderstood. The record is clear that complainant did not dress or speak in a sexually provocative manner. Respondent cites testimony that one incident was not malicious. Although the harrassment need only be unwelcome to be unlawful, the record reveals that the harrassment of complainant was in fact malicious.

Complainant has also demonstrated that the sexual harrassment she suffered was sufficiently pervasive to create a hostile work environment. In the course of her employment at respondent: complainant was constantly subjected to verbal conduct of a sexual nature; her supervisor twice unfastened her bra; her supervisor fastened mirrors to his shoes 3 or 4 times in

order to look up complainant's dress; her supervisor grabbed her breasts; and her supervisor zapped her buttocks with a spark tester. Also, during the latter months of her employment, another supervisory employee of respondent was constantly touching, kissing, and propositioning complainant. Certainly this widespread campaign of sexual harrassment was sufficiently pervasive as to create an intimidating, hostile or offensive work environment for complainant.

Respondent argues repeatedly in its brief that any harrassment could not have been enough to create a hostile environment because complainant did not complain to Mulflur for over a year from the onset of the discrimination. Respondent's argument is rejected. First, complainant was clearly afraid that if she complained to Mulflur she would lose her job. Mulflur had told complainant when she became a permanent employee that he did not want any female employees in the plant. It was reasonable to assume that complainant's job would be jeopardized. Indeed, when he investigated complainant's allegations, Mulflur found evidence of sexual harrassment, yet Kuhn's testimony makes it clear that he took no disciplinary action against the perpetrator of the sexual harrassment. Second, respondent's argument seems to imply that there was a long gap between the isolated incidents of sexual harrassment and complainant's allegations that the harrassment occurred. Rather, the record reveals that the sexual harrassment of complainant was repeated, continuous and a part of an ongoing pattern of harrassment. It must be concluded that the harrassment

endured by complainant rendered her work environment to be hostile.

Respondent argues that because complainant notified Mulflur of the alleged sexual harassment only after she resigned, that complainant is not entitled to any relief. The EEOC Guidelines on Discrimination Because of Sex impose liability upon the employer for all sexual harassment committed by the employer's supervisory employees and agents. 29 CFR §1604.11(c). The United States Supreme Court in interpreting Title VII of the Civil Rights Act of 1964, however, has rejected this standard for employer liability. Meritor Savings Bank v. Vinson, supra. Although the court refused to issue a definitive ruling on employer liability because of the inadequate record before it, the court did specifically reverse a holding by the Court of Appeals that employers are always automatically liable for sexual harassment by their supervisors. Id. The court held that while the absence of notice to the employer does not necessarily insulate the employer from liability, the court suggested that the proper analysis would involve the use of agency principles. Id.

The Human Rights Commission has interpreted the West Virginia Human Rights Act to impose liability upon employers for all sexual harassment committed by its supervisory employees and agents. Evans v. Gino's Pizza of West Hamlin, Inc., Docket No. ES-99-86 (W.Va. HRC 1987). The sexual harassment in the instant case, therefore is clearly unlawful.

Even assuming, arguendo, that the Human Rights Commission had followed the approach of the Supreme Court of the United States in Meritor Savings Bank v. Vinson, however, complainant will prevail in the instant case. The appropriate analysis under the Meritor doctrine involves application of agency principles. Here, the actions of Kuhn and Smith are clearly the actions of the respondent. It is extremely significant that they have the authority to discipline employees of respondent. Thus, the employer gave to Kuhn and Smith the ability to make important personnel decisions with respect to the plant. Kuhn and Smith also have responsibilities with respect to hiring, counseling, etc. Indeed, 85 percent of the time Mulflur is not at the plant. Also significant under the Meritor analysis is whether the respondent had a policy defining and forbidding sexual harrassment specifically, and whether said policy permitted the employee in question to go over the head of the alleged perpetrator to a higher level of management when making a complaint of sexual harrassment. In the instant case, respondent had no policy with regard to sexual harrassment. Respondent's grievance policy required that the grievance be filed in the first instance with the supervisor. Thus, respondent's grievance procedure would have required that complainant complain of sexual harrassment to one of the perpetrators of the sexual harrassment.

Constructive Discharge

Where an employee demonstrates that the employer's sexual conduct rendered the employees work environment so intolerable

that one might reasonably expect the employee to resign. The employer will be liable for backpay and reinstatement because the employee has been constructively discharged. Coley v. Conrail 561 F.Supp. 645 (E.D.Mich. 1965); Brown v. City of Guthrie 22 F.E.P. Cases 1627 (W.D.Okla. 1980).

In the instant case, it is clear that the sexual harrassment of complainant was so widespread and so degrading that any reasonable employee would resign. Few employees would continue to work in a situation where they are constantly kissed, touched, and propositioned, and where they are verbally harrassed, where their breasts are grabbed, where their bras are unfastened, where they are painfully sparked on buttocks, and where people attempt to look up their dresses. Certainly any reasonable employee would resign in this situation.

Respondent argues that complainant resigned only because her boyfriend, Jordan, was being fired by respondent. The evidence reveals, however, that complainant resigned while Jordan was being investigated but before he was fired. Complainant resigned because of the campaign of sexual harrassment against her by respondent which culminated in Kuhn and Smith becoming so possessive that they attempted to have Jordan fired because he was dating complainant. Jordan was definitely a factor in complainant's decision, but he was actually the straw that broke the camel's back rather than the only reason for complainant's resignation. Respondent's argument is rejected.

Relief

Because complainant was constructively discharged, an award of reinstatement and backpay is appropriate. As of 1984, complainant earned \$12,148.10 per year at respondent. In 1985, she earned \$10,839.39, or \$1,308.79 less than 1984. In 1986, she earned \$11,727.88, or \$320.30 less than 1984. In 1987, she has earned no wages. Respondent argues that this constitutes a failure to mitigate. Mitigation, however, is an affirmative defense that must be proven by respondent. Here, respondent has not proven failure to mitigate by complainant. Accordingly, the backpay award as of June 30, 1987 would be \$7,703.14 = (\$1,308.79 for 1985, \$320.30 for 1986 and \$6,074.05 for the first $\frac{1}{2}$ of 1987).

In view of the extreme nature of the humiliation, embarrassment and loss of dignity and personhood endured by complainant as a result of the sexual harrassment by respondent, it is recommended that she be awarded incidental damages in the amount of \$8,000.00.

Extensive cease and desist relief is appropriate in this case because of Mulflur's statement to complainant, after his investigation revealed that complainant had been sexually harassed, that he could not guarantee that it would not happen again. His inability to make this guarantee is the direct result of his unwillingness to discipline the perpetrators of the sexual harrassment. A suspension without pay of not less than 60 days for each perpetrator of the sexual harrassment is appropriate. A cease and desist order specific to the discipline

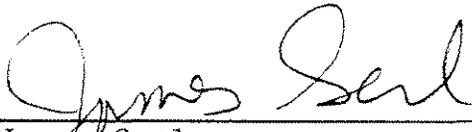
of Kuhn and Smith is necessary in this case.

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner recommends the following:

1. That the complaint of Carolyn E. Moss, Docket No. ES-313-86 be sustained.
2. That respondent rehire complainant into her former position at a rate of pay comparable to what she would be receiving but for her constructive discharge.
3. That respondent pay complainant a sum equal to the wages she would have earned but for respondent's constructive discharge of complainant's employment. Such wages for the period from the date of complainant's resignation to June 30, 1987, would have been \$7,703.14. Respondent should also be ordered to pay complainant interest on the amount of back pay owed here at the statutory rate of ten percent.
4. That respondent pay to complainant the sum of \$8,000.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of the discriminatory treatment toward her by the supervisory agents and employees of respondent.
5. That respondent be ordered to cease and desist from engaging in sexual harrassment of its employees.
6. That respondent be ordered to cease and desist from failing to appropriately discipline Kuhn and Smith for their sexual harrassment of complainant.

7. That respondent report to the Commission within forty-five days of the entry of the Commission's Order, the steps taken to comply with the Order.


James Gerl
Hearing Examiner

ENTERED: June 24, 1987

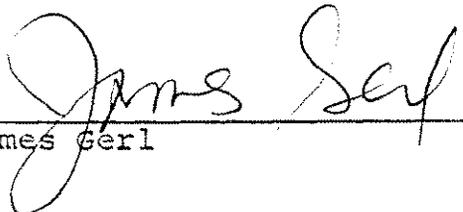
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served
the foregoing Proposed Order and Decision
by placing true and correct copies thereof in the United States
Mail, postage prepaid, addressed to the following:

Heidi Kossuth, Esq.
Asst. Attorney General
812 Quarrier Street
Charleston, WV 25301

Robert Q. Sayre, Jr., Esq.
Goodwin & Goodwin
1500 One Valley Square
Charleston, WV 25301

on this 24th day of June, 1987.


James Gerl

STATE OF WEST VIRGINIA



**NOTICE
THE WEST VIRGINIA HUMAN RIGHTS ACT**

**Prohibits
Discrimination in Employment
and
Places of Public Accommodations**

**Based on
RACE, RELIGION, COLOR, NATIONAL ORIGIN, ANCESTRY,
SEX, AGE (40 to 65), BLINDNESS, OR HANDICAP
AND**

Discrimination in Housing

**Based on
RACE, RELIGION, COLOR, NATIONAL ORIGIN, ANCESTRY,
SEX, BLINDNESS OR HANDICAP**

For Further Information or to File a Complaint, Call, Write or Visit:

WEST VIRGINIA HUMAN RIGHTS COMMISSION

**MAIL ADDRESS
STATE CAPITOL
CHARLESTON, WEST VIRGINIA 25305**

**TELEPHONE
304-348-2616**

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