



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Herman H. Jones
Executive Director

December 5, 1997

Roberta P. Marquis
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Parkersburg, WV 26104

SW Graphics, Inc.
1007 Mary St.
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Walt Auvil, Esq.
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1208 Market St.
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Robert J. Kent, Esq.
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601 Avery St., PO Box 48
Parkersburg, WV 26102

Re: Marquis v. SW Graphics, Inc.
Docket No. EH-27-94A

Dear Parties and Counsel:

Enclosed please find the Order of the Commission affirming the Administrative Law Judge's Final Decision, with certain modifications. Please be advised that this is not a Final Order and that the parties may submit additional information regarding wages for the purpose of determining the precise amount of back pay damages to be awarded the complainant.

Sincerely,

A handwritten signature in black ink, appearing to read "Herman H. Jones".

HERMAN H. JONES
EXECUTIVE DIRECTOR

HHJ/jk

Enclosure

Certified Mail/Return
Receipt Requested

cc: Robert B. Wilson, Esquire
Administrative Law Judge

Mary Catherine Buchmelter
Deputy Attorney General
Civil Rights Division

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERTA P. MARQUIS,

Complainant,

v.

DOCKET NO. EH-27-94A

SW GRAPHICS, INC.,

Respondent.

ORDER

On November 12, 1997, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Robert B. Wilson. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, affirm the Administrative Law Judge's Final Decision as to liability, with the modifications and amendments set forth immediately hereinbelow:

On page 3, Findings of Fact Nos. 3 and 4 are modified as follows:

3. The complainant, Roberta Marquis, is a person with rheumatoid arthritis and has had that condition at all times pertinent to this complaint. By stipulation, Tr. p. 12.

4. The complainant filed a timely complaint with the West Virginia Human Rights Commission alleging that on or about January 28, 1993, she was informed that due to her disability she would not be eligible for promotions or advancements with SW Graphics because she was hired through the West Virginia Department of Rehabilitation; and that the respondent had hired new employees through a job service and was paying these individuals at significantly higher pay. The complaint was filed with the Human Rights Commission on August 23, 1993. Complaint and Amended Complaint.

On pages 10 and 11, the DISCUSSION section is modified as follows:

The language beginning on page 10 with the paragraph "To make a prima facie case of employment discrimination under the West Virginia Human Rights Act, . . ." and continuing on page 11 through the cite "St. Mary's Honor Society v. Hicks, 509 U.S. ___, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)[,]" is deleted, and the following new language is substituted:

In order to establish a case of discriminatory discharge under *W. Va. Code*, 5-11-9 [1989], with regard to employment because of a handicap, the complainant must prove as a prima facie case that (1) he or she meets the definition of "handicapped," (2) he or she is a "qualified handicapped person," and (3) he or she was discharged from his or her job. The burden then shifts to the employer to rebut the complainant's prima facie case by presenting a legitimate nondiscriminatory reason for such person's discharge. If the employer meets this burden, the complainant must prove by a preponderance of the evidence that the employer's proffered reason was not a legitimate reason but a pretext for the discharge.

Morris Memorial Convalescent Nursing Home v. West Virginia Human Rights Commission, Syl. pt. 2, 189 W. Va. 314, 431 S.E.2d 353 (1993).

On page 13, the DISCUSSION section is further modified as follows:

Beginning on line 7 at the end of the first paragraph ending with the phrase "protections afforded to employees of the respondent pursuant to the West Virginia Human Rights Act[,]" the following language shall be added:

Also, the employer in this case argues a difference between training which was designed to prepare the clients for entry into the private work sector and traditional employment. As examples of such focused training, the respondent cited an emphasis upon counseling the clients about work problems; the importance of discipline only in extreme cases; the provision of a "trainer" (in addition to a supervisor) to work with the client and monitor his or her progress; accommodations in clients' working hours for medication and therapy; a work adjustment support program which was not offered to nonhandicapped employees; and "staffing"

sessions during which problems regarding job training are discussed and modifications made in the clients' training. Goodwill Industries of Tidewater, 304 NLRB Dec. 767 (1991); NLRB v. Chinatown Planning Council, 875 F.2d 395 (2d Cir. 1989).

The respondent also cites Goodwill Industries of Southern California, 321 NLRB Dec. 536 (1977), in support of its contention that SW Graphics, Inc. is not an employer. On August 27, 1991, the NLRB issued two decisions which "overruled Goodwill Industries of Southern California to the extent that it might be read as indicating that an employer's worthy rehabilitative purpose is a basis for declining jurisdiction" Goodwill Industries of Denver, 304 NLRB Dec. 764 (1991); Goodwill Industries of Tidewater, 304 NLRB Dec. 767 (1991). The Board held that "when the relationship is guided to a great extent by business considerations and may be characterized as a typically industrial relationship, statutory employee status has been found."

Although the respondent urges reliance upon Arkansas Lighthouse for the Blind v. NLRB, 851 F.2d 180 (8th Cir. 1988), the Sixth and Second Circuits have addressed the standards which distinguish the economic or business characteristics and nature of the work from the claimed rehabilitative or therapeutic characteristics and nature of the employment.

In a case essentially similar on its facts to Arkansas Lighthouse -- Cincinnati Association for the Blind v. NLRB, [672 F.2d 567 (6th Cir. 1982)] -- the Sixth Circuit upheld an industrial classification. Like the Arkansas Lighthouse, the Cincinnati Association placed only minor emphasis on the development of skills other than those needed to perform specific duties at the company and failed to provide professional counseling for its workers. Unlike Arkansas Lighthouse, the Cincinnati Association did not fire workers for poor production, which suggests an even greater solicitude for workers. The only important difference was that the Arkansas Lighthouse paid its workers equal wages, whereas the company in Cincinnati did not -- a difference that alone should not determine whether

employment is classified as industrial or therapeutic.

Administrative Law, Scope of Review, Eighth Circuit Overturns NLRB Determination that Blind Workers Are Employed in an Industrial Setting, 102 Harv. L. Rev. 721, 723-24 (1989) (Footnotes omitted).

The Second Circuit looked at the amount of wages paid, the fact that the wages rose solely at the discretion of the employer, the deduction of taxes and social security payments as well as the provision of workers' compensation and disability insurance as indicative of a commercial and business enterprise. Although noting the employer's "theoretical goal" of providing "off-site" services such as counseling and interviewing techniques, the court held that the record amply demonstrated a failure to achieve that goal.

This case presents a situation which goes beyond the threshold question of whether or not SW Graphics, Inc. is an employer and thus subject to the West Virginia Human Rights Act. Respondent argues that since it provides support services and counseling, it is not an employer, but a service; and, that Ms. Marquis was not an employee but a client. Ms. Marquis claims and the ALJ agreed that those disabled "clients" who entered SW Graphics, Inc. through the auspices of Rehabilitation Services were forever stuck in that position. Even those clients who were clearly qualified to perform the essential functions of an employment position open at SW Graphics were not considered for that position by virtue of their disability and/or status as a client.

The ALJ had no doubt, and the record supports his finding, that Ms. Marquis was qualified to perform employment functions, and the respondent admits that Ms. Marquis performed the job functions of an employee from June 30, 1994, until September 9, 1994. (See Respondent's Petition for Appeal, p. 1).

The remaining portions of the DISCUSSION section of the Administrative Law Judge's Final Decision are affirmed without modification. Furthermore, the attorney for

complainant did not appeal the Administrative Law Judge's decision to reduce attorney fees to an amount lower than requested. Therefore, the Commission will permit the amount heretofore awarded by the Administrative Law Judge to stand.

The ALJ, although finding liability, did not assess back pay damages. The record clearly states that Ms. Marquis was not paid the same as other employees. The Commission, finding that the complainant, Roberta Marquis, worked as an employee of SW Graphics, Inc. from June 30, 1994, until September 9, 1994, hereby remands this case to the Administrative Law Judge to gather pay information in whichever way he deems appropriate so that an award of back pay damages can be assessed.

The parties are advised that it is the intent of the Commission to issue a Final Order encompassing all monetary relief, including back pay, interest, benefits, and incidental damages, to be awarded the complainant on or before January 16, 1998.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 5th day of December 1997, in Charleston, Kanawha County, West Virginia.



HERMAN H. JONES, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Herman H. Jones
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

June 18, 1997

Roberta P. Marquis
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SW Resources, Inc.
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1208 Market St.
Parkersburg, WV 26101

Re: Marquis v. SW Resources, Inc.
EH-27-94A

Dear Parties:

Enclosed, please find the final decision of the undersigned, administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

June 18, 1997

Page 2

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

June 18, 1997
Page 3

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

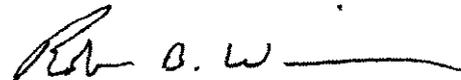
10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Herman H. Jones, Executive Director
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERTA MARQUIS,

Complainant,

v.

DOCKET NUMBER(S): EH-27-94A

SW GRAPHICS, INC.,

Respondent.

FINAL DECISION

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

The complainant, Roberta Marquis, appeared in person and by counsel, Walt Auvil with the firm Pyles & Auvil. The respondent, SW Graphics, Inc. a division of SW Resources, Inc., appeared by its representative, Craig Greening, Director of Operations for the respondent and by counsel, Robert J. Kent and Elizabeth Harter, with the firm Bowles, Rice, McDavid, Graff & Love.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record

developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The respondent, SW Graphics, Inc. is a division of SW Resources, Inc. Tr. p. 808. SW Resources, Inc. is a private non-profit, community rehabilitation program whose mission is to provide vocational rehabilitation services to persons with disabilities. Tr. p. 795.

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

3. The complainant, Roberta Marquis, suffers from rheumatoid arthritis and has suffered from that condition during all times pertinent to this complaint. By stipulation, Tr. p. 12.

4. The complainant filed a timely complaint with the West Virginia Human Rights Commission alleging that on or about January 28, 1993 she was informed that due to her handicap she would not be eligible for promotions or advancements with SW Graphics because she was hired through the West Virginia Department of Rehabilitation; and that the respondent had hired new employees through a job service and was paying these individuals at significantly higher pay. The complaint was filed with the Human Rights Commission on August 23, 1993. Complaint and Amended Complaint.

5. The complainant made \$4.25 per hour at the time of the January 28, 1993 meeting and received a raise to \$4.50 per hour in November, 1993. Tr. p. 480.

6. The respondent contracted with a personnel agency to supply two workers at SW Graphics beginning in April 1993 and ending in June 1994. These two individuals were each paid \$5.00 per hour; while the personnel agency charged SW Graphics \$6.25 per hour for each individuals' labor. Respondent's Exhibit No. 78 and No. 79.

7. The spot laborers or temporaries performed work erecting signs for SW Graphic's customers at their places of business, which complainant did not perform. Tr. p. 617.

8. The complainant was taken off of client status and made a member of full time staff on June 1, 1994. Complainant subsequently resigned her position on September 9, 1994. Tr. p. 543.

9. The complainant sought services from the Division of Rehabilitation Services in Institute, on June 21, 1983, because she was unable to perform her homemaking tasks and could not seek employment due to her condition of severe rheumatoid arthritis. Complainant's counselor with the Division of Rehabilitation Services was Cynthia L. Woody. Joint Exhibit No. 1, Evidentiary Deposition, Cynthia Woody, pp. 9, 10 and 20.

10. Complainant took a summer class in drafting at South High School and enjoyed it. Complainant attended classes in drafting thereafter at the Rehabilitation Center in Institute, graduating as student of the year there in 1987. Tr. pp. 457, 458, 461 and 462.

11. Cynthia Woody, complainant's counselor at Division of Rehabilitation Services, entered a case note dated 11/28/88 stating that Sandy Brunson with the Sheltered Workshop of Wood County, the previous name for SW Resources, had come in with a release for information concerning the complainant. Ms. Brunson had indicated that complainant would be started on Nashau stuffing envelopes, but had promised to discuss complainant's qualifications with Sonny Keever regarding SW Graphics placement in competitive employment in drafting. Joint Exhibit No. 1, p. 14.

12. Complainant began work at SW Resources on December 1, 1988, stuffing envelopes for Nashau, under an authorization from the Division of Rehabilitation Services for two months subsidized Work Adjustment Training "WAT". The Division of Rehabilitation Services considered complainant to be employed once she was placed at SW Graphics, and after working there for sixty days, complainant's case was closed by them as a rehabilitated employed closure on August 3,

1989. Complainant had been placed at SW Graphics on May 30, 1989. Tr. pp. 18 and 27.

13. Complainant initially worked on quality control, filing and telephone tasks for SW Graphics. Complainant subsequently learned and performed the sublimation, cutting vinyl, metal photo and computer engraving processes, for SW Graphics. Tr. pp. 469 and 470.

14. Complainant was paid during this period with all State, federal, income tax and FICA withheld. Tr. p. 474.

15. Complainant testified credibly that at a regular business meeting held periodically at SW Graphics, she asked Mr. Greening whether there was any way that clients could get raises and insurance, and to have advancement in position. Mr. Greening informed those present that there would be no raises due to the financial status at SW Graphics, and made comments which were interpreted by some at the meeting to mean that there was no way anyone coming from Rehab could hold a staff position. Mr. Greening did not discuss insurance and terminated the meeting. Full time staff employees had insurance and extra vacation based on length of service, which clients such as complainant did not receive. Tr. pp. 43, 44, 474, 476 and 477.

16. Vickie Williamson worked as the receptionist at SW Graphics division from June 1988 to May 1993 and worked with the operations managers at SW Graphics, Sonny Keever and Jerry Buckley. Ms. Williamson was involved in the hiring interview process for the front desk positions. Ms. Williamson testified credibly that employees (i.e. clients) would state their interest in positions which became available and she would pass those along to Mr. Keever, but that nothing ever came of those. Eventually she advised Maria McGee, one

of the clients who had expressed previous interest in the front desk openings in the past, to submit a resume for the position, which Ms. Williamson personally handed to Mr. Greening, the Operations Manager of SW Resources, Inc. At that time he stated "Well that does not go with policy, we cannot hire the handicapped (i.e. clients), in the staff positions." Tr. pp. 51, 52, 57, 58, 66 and 67.

17. William Dearien, was the President/CEO of SW Resources, Inc. which was also known previously as the Sheltered Workshop of Wood County, from 1979 until October 1994. Tr. pp. 149, 155, 792 and 793.

18. Mr. Dearien authored a document titled "Policy For Upward Mobility Of Production Employees"; which document contained the following statements:

It is the practice of SWWC not to encourage the direct assimilation of persons with disabilities who are clients of the Rehabilitation Services Program, and receiving sheltered employment services under a Department of Labor certificate in the nature of extended employment, work adjustment or supported employment, into a staff role interacting in a leadership or model role with persons who continue to function in the above capacity. There should be an intervening period of six months or more performance in a non sheltered or supported mainstream community based competitive employment situation.

Although Mr. Dearien, contends that the document in question was never presented to or adopted by the Board of Directors of SW Resources, Inc., he had previously testified that the Board of Directors were not involved in the day to day operations of the respondent. Tr. pp. 803, 854 and 856 and Complainant's Exhibit No. 7.

19. Both Mr. Greening and Mr. Dearien testified that under SW Resources' definition of competitive employment, the client had to be

off of SW Resources payroll, making minimum wage or better. Tr. pp. 836, 958, 959 and 1693.

20. The respondent, through its President/CEO could not list any persons who had been hired from client directly to staff. Tr. p. 891.

21. The respondent had in the past hired two persons for staff positions who had been referred by Rehab, and had hired numerous disabled persons as staff.

22. The respondent had a policy which excluded or discouraged clients of the respondent denominated as clients or Production Employees from applying for or being hired in staff positions.

23. David Marmie was a client employee of SW Graphics, who expressed his interest in obtaining Pam Parsons' staff position of Production Supervisor to Sonny Keever the Manager of SW Graphics upon her departure. Mr. Keever initially stated that he would see what he could do about getting Mr. Marmie that position and recommended Mr. Marmie as a replacement in that position to Mr. Dearien. Mr. Dearien told Mr. Keever that there was no way the position would go to rehabilitation that it would go to staff. Tr. pp. 118-121.

24. Despite the Manager of SW Graphics recommendation of hiring Mr. Marmie as Production Supervisor, a staff position, and despite the fact that Mr. Marmie had been working at SW Graphics for several years longer than Mr. Lawrence; Mr. Dearien did not support Mr. Marmie for the position of Production Supervisor and that post was subsequently offered to Mr. Lawrentz, who had not been a client of SW Resources and had been hired initially as a spot temporary at SW Graphics. Tr. pp. 94, 122 and 859.

25. To the extent that Mr. Dearien testified that he did not tell Sonny Keever that no client would be hired as staff, or that he had other motives for not hiring Mr. Marmie as Production Supervisor other than the policy as authored by him and set forth in Complainant's Exhibit No. 7, Mr. Dearien's testimony is not credible in the least.

26. Sonny Keever was the General Manager of SW Graphics until 1992 and has been employed by SW Resources since 1979. Mr. Keever states that complainant was a client of SW Resources and that he attended her S & P meetings with complainant's case manager for SW Resources and quite often a case worker from the Division of Rehabilitation Services. S & P meetings would cover a range of things from good performance to disciplinary actions; to places that needed improvement; and how well the person is following their written plan. Tr. pp. 1089, 1091 and 1092.

27. From the time complainant started at SW Graphics, Mr. Keever indicated that she basically functioned at level of production in terms of both quantity and quality of work as a non handicapped individual; achieving a 100% rate of comparison with that expected from a non handicapped individual from July 1, 1991 through late 1992 when Mr. Keever left his position as manager of SW Graphics. Complainant was a very hard worker, who came in early and left late. Complainant's work drew letters from SW Graphics customers praising her work on a regular basis. Tr. pp. 1099, 1101, 1104 and 1108; and Complainant's Exhibits Nos. 31, 32, and 33.

28. During the time relevant to the complaint, complainant's case manager at SW Resources was Sandy Butcher. Sandy Butcher is not

a psychologist, psychiatrist, social worker, counselor, rehabilitation therapist or physician. Tr. pp. 601, 286 and 287.

29. SW Resources provided case management services to complainant through Ms. Butcher and occasionally other case managers. These services seem to largely consist of nothing more than descriptions of what duties are to be performed by complainant at SW Graphics and how complainant was performing, as reflected in the Individualized Treatment Plans "ITP's", reports of S & P meetings, progress notes and related documents from the supervisors of the complainant at SW Graphics. Although some documents reflect counseling for various employment related issues advising complainant of what was expected of her; none arise to any level which would suggest poor over all performance, nor is there any evidence that any service is being performed for the complainant beyond what would be covered in any normal employer/employee performance evaluation and review context. See Generally, Respondent's Exhibits Nos. 5, 6, 11-65, 70 and 74.

30. Complainant never asked respondent for a position, but rather simply requested insurance and a raise. Tr. P. 622.

31. The difference in pay between the temporaries and complainant, did not make the complainant mad or upset, but rather only made her wonder. Tr. P.p. 620 and 621.

32. Complainant did testify that she felt demeaned by a directive from Mr. Buckley, that all questions were to be directed to Mr. Lawrentz only, and that she was not to confer with the other Production Employees (clients) when she had questions. This directive affected her emotionally and contributed to her mental reactions to

the January 1993 confrontation that led to her filing the complaint. Further, complainant testified that she filed her complaint in 1993 and was thereafter subjected to stress and pressure on the job. Tr. pp. 520 and 522-524.

B.

DISCUSSION

To make a prima facie case of employment discrimination under the West Virginia Human Rights Act, a complainant must offer proof that:

1. The complainant is a member of a protected class;
2. the employer made an adverse decision concerning the complainant; and,
3. but for the complainant's protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

The "but for" test of discriminatory motive making up the third prong of the Conaway test is merely a threshold inquiry, requiring only that a complainant show an inference of discrimination. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995).

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792,

93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a prima facie case of discrimination; the respondent then has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by the respondent was not the true reason for the employment decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real motive; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway, supra. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Barefoot, supra. Where pretext is shown discrimination may be inferred, Barefoot, supra, though discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the "mixed motive" analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. "Mixed motive" applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not

pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the "mixed motive" analysis, the complainant need only show that complainant's handicap played some role in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant's handicap. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

West Virginia Code § 5-11-3(m) provides that the term "handicap" includes a person who has a physical impairment which substantially limits one or more major life activities, including caring for one's self and working. The West Virginia Human Rights Act makes it unlawful for any employer to discriminate against individuals with respect to compensation, hire, tenure, terms, conditions and privileges of employment even if such individual is handicapped. W.Va. Code § 5-11-9(1). The complainant is a member of the protected class of handicapped individuals as Ms. Woody testified that she suffered from severe rheumatoid arthritis and sought the services of the West Virginia Division of Rehabilitation Services because she was unable to perform her homemaker tasks or apply for work. Respondent argues that the Act does not apply to respondent because they can not be considered complainant's employer because complainant was a client of respondent and not their employee. The undersigned finds no merit in this argument as complainant performed services for pay for the respondent and paid taxes upon those earnings. Regardless of complainant's status of client of respondent agency, complainant is also undoubtedly an employee of respondent as well. Any special status conferred by the U.S. Department of Labor in terms of

compensation of respondent's clients in a supported sheltered workshop is limited to the specific statutory provisions made applicable thereto. The respondent has not asserted a specific statutory preemption in the U.S. Code applicable to sheltered workshops that would remove such clients from the protections afforded to employees of the respondent pursuant to the West Virginia Human Rights Act.

The respondent has alleged that the jurisdiction of the West Virginia Human Rights Commission is preempted in this matter by ERISA, because complainant has asserted that she was denied the right to health insurance coverage as a result of the respondent's alleged policy not to allow clients referred to respondent for rehabilitation services, to become staff employees, who did receive health coverage. In support of this argument, respondent cites numerous cases for the proposition that state causes of action are preempted under ERISA. What respondent has failed to note in such cases is that this holding applies to those cases in which the ERISA plan itself is a defendant or in cases in which the ERISA plan would be subject to payment of benefits or subject to some requirement which would directly affect administration of benefits. Pizio v. Bethlehem Steel Corp., 884 F.2d 116, at 120 (4th Cir. 1989). The West Virginia Supreme Court has held that ERISA does not preempt the West Virginia Human Rights Act where there is no pension trust defendant, the relief is not the obligation of the pension fund, and the pension is merely peripheral to the issues in the case, in Donaldson Mine Co. v. Human Rights Com'n, 420 S.E.2d 902 (W.Va. 1992). Therefore it is the conclusion of the undersigned that the respondent is an employer of the complainant

subject to the jurisdiction of the West Virginia Human Rights Commission, and her complaint is not preempted under ERISA.

It is the contention of the complainant that respondent discriminated against her on the basis of her handicap, when she was told that she would not be eligible for advancements, raises or insurance at SW Graphics, because she had come through Rehabilitation, when the respondent subsequently had the resources to hire "temporary" spot labor at a higher pay. Respondent contends that it did not discriminate against its clients when making hires for staff positions. Respondent's claim, that it did not have such a policy of discouraging clients from applying for staff positions, is not believable. The respondent's President/CEO for the whole period in question, had authored a policy document which specifically stated that it was not the policy of the Sheltered Workshop to encourage the direct assimilation of persons in the Rehabilitation Services Program into staff positions there. Regardless of whether the Board of Directors officially adopted this Policy For Upward Mobility Of Production Employees, it was an expression of the views of the head of the respondent agency who oversees the day to day operations of the respondent. Both, Mr. Dearien, the President/CEO and Mr. Greening, the Operations Manager for respondent, admitted that clients of SW Resources, Inc. were not considered placed in competitive employment until they had been placed somewhere off of SW Resources' payroll. It is clear that there existed a policy which discouraged those in a client status at SW Resources from obtaining staff positions with respondent. The testimony establishes that on several occasions both Maria McGee and David Marmie, who were both clients of the

respondents' Rehabilitation Services Program at the times in question, had expressed interest in or applied for staff employee positions with the respondent as Front Desk Clerk and Production Supervisor respectively with SW Graphics. The undersigned finds that the preponderance of the evidence supports a finding that these individuals were discouraged from applying for these staff positions and were not given fair consideration for those positions in accordance with an unlawfully discriminatory policy as set forth in Complainant's Exhibit No. 7. Mr. Lawrentz's testimony is generally found not to be credible in that he both admitted that he had falsely set forth his evaluation of complainant's performance and abilities in the letter of reference he prepared for her, but more significantly because of his inability to remember any specific details of incidents which occurred. Nevertheless, Mr. Lawrentz testified that Mr. Marmie had worked considerable overtime prior to he, Mr. Lawrentz, being hired as the Production Supervisor at SW Graphics. Mr. Dearien's testimony that he did not consider Mr. Keever's recommendation for Mr. Marmie to become Production Supervisor of SW Graphics because Mr. Marmie had refused to work overtime is contradicted by all the other evidence, that Mr. Marmie had worked extensive overtime in the period of time leading up to Mr. Dearien's refusal to consider hiring Mr. Marmie for this staff position, which subsequently was offered to Mr. Lawrentz. Thus the reasons advanced by Mr. Dearien for this initial refusal to hire Mr. Marmie in that slot are found to be mere pretext for the real motive in his reluctance which is embodied in the policy statement he authored but disavows as ever being followed. Mr. Lawrentz who had been a spot temporary worker, not a client of

respondent was offered the job immediately; while upon his leaving the respondent, Mr. Marmie was offered the opportunity to do the work of Mr. Lawrentz without the position of Production Supervisor to demonstrate his suitability for those duties. This opportunity had been afforded Mr. Marmie in the past without result except his taking on those duties and not being recompensed in any fashion in return. Mr. Marmie's refusal of such a situation is understandable.

The issue of whether the respondent took any adverse action against the complainant as a result of the January 28, 1993 meeting in which the complainant was told that she would receive no advancement or pay raises, and was apparently told nothing regarding her request for health insurance, is a much more difficult proposition. The complainant admits that she did not apply for any particular staff position with the respondent. The fact of the matter is that complainant did request health insurance and inquire as to the availability of raises and advancement on that date. She was told nothing regarding the options available to her with the respondent at SW Graphics where she had been employed for sometime, which would enable her to secure those benefits available to staff employees. To the extent it is found that respondent had in place an unofficial policy of discouraging clients of respondent's Rehabilitation Services from obtaining staff positions there, she was the victim of unlawful handicap discrimination as to the compensation, hire, tenure, terms, conditions or privileges of employment in that she was discouraged from obtaining the benefits associated with a staff position at SW Graphics. Thus it is found that the complainant was subjected to unlawful handicap discrimination, when she was subjected to the policy

of discouraging transition of clients to staff positions, by Mr. Greening's refusal to discuss insurance coverage for clients or discuss opportunities to obtain staff positions should they have existed. Complainant was subjected to this adverse employment action because of her client status with the respondent, which status is the direct result of her handicap. Therefore, complainant has established a prima facie case of handicap employment discrimination, and the respondent's legitimate basis for its behavior, that it did not have such a policy in existence, is found by a preponderance of the evidence to be pretextual, in that the direct and circumstantial evidence demonstrates that this policy was in fact the true motivation for the respondent to refuse to discuss these issues with complainant.

The complainant suffered emotional distress. She felt demeaned by Mr. Buckley's directive that she was not to speak to other Production Employees, i.e. clients, and was to direct all questions to Mr. Lawrentz only, which was a factor in her reaction to being told that she was not going to be receiving any raises or advancements at SW Graphics that year. Furthermore, she underwent stress and pressure on the job, subsequently to her filing of the the complaint in this action. Complainant has suffered humiliation, embarrassment and emotional and mental distress and loss of personal dignity as a result of the respondent's unlawful discriminatory conduct. The complainant is entitled to incidental damages in the amount of \$3,277.45. Pearlman Realty Agency v. West Virginia Human Rights Commission, 239 S.E.2d 145 (W.Va. 1977); Bishop coal Company v. Salyers, 380 S.E.2d 238 (W.Va. 1989). Bishop Coal, supra, provided for a cap on

incidental damages awarded by the Commission at \$2,500.00 to be adjusted from time to time to conform to the consumer price index.

Complainant contends that she is entitled to the difference in pay between what the respondent paid her and the amount paid to the temporaries hired in at a higher wage after she was told the respondent could not give advancements or promotions. The undersigned cannot conclude that there is any basis for an award of back pay. The complainant has failed to establish that she applied for and was denied any staff position with SW Graphics. There is no evidence in the record that establishes that there were any staff positions available with the respondent at SW Graphics in January 1993. Furthermore, there is no showing that the temporaries hired performed the same or equivalent duties as those performed by the complainant. It is within the province of the respondent to have both extended employment, work adjustment and supported employment under the sheltered employment services of the Department of Labor certificate; and staff employment positions. The undersigned does not propose nor does he hold that the respondent violates the West Virginia Human Rights Act by maintaining positions providing supported employment under the sheltered employment services of the Department of Labor certificate, which are different in terms of their compensation and benefits as are provided in staff positions.

The respondent has been found to have unlawfully discriminated against its clients in such positions by pursuing an undisclosed policy of discouraging those in such positions from applying for staff positions and in discriminating against such individuals in considering them for such staff positions. The respondent is found to

have discriminated against the complainant by failing to disclose that she would have to become a staff employee to obtain insurance benefits and in failing to explain what options complainant could pursue for obtaining a staff position. However, having not demonstrated that respondent had a staff position that complainant was unlawfully denied, no back pay award is appropriate for the complainant. The respondent has unlawfully discouraged its clients from obtaining staff positions and is therefore subject to a cease and desist order enjoining any further discrimination of this nature.

The West Virginia Supreme Court has set forth a twelve factor test for determining reasonableness of the attorneys fees set forth in Aetna Casualty and Surety Co. v. Pitrolo, 176 W.Va. 190; 342 S.E.2d 156 (1986); See also, Brown v. Thompson, 192 W.Va. 412, 452 S.E.2d 728 (1994). Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the question presented; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (5) the customary fee charged in similar cases; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and the length of the professional relationship with the client; and, (12) awards in similar cases. In the present case the complainant's attorney has submitted a fee application setting forth hours the reasonableness of which the respondent does not dispute. However, complainant's attorney has requested a rate of \$150.00 per hour, stating in his attached

affidavit that his services are comparable to those surveyed in the Parkersburg area and that such customary fees range from \$125.00 to \$150.00 per hour. Complainant's attorney entered into contingent fee arrangements at a \$125.00 per hour rate; but has since raised its rates to \$150.00 per hour for hourly fees. Respondent objects to the \$150.00 hourly fee and states that the non profit nature of respondent should be taken into consideration. The undersigned finds that after applying the twelve factors, \$125.00 per hour is appropriate for this type case as evidenced by the nature of the contracts of representation submitted.

C.

CONCLUSIONS OF LAW

1. The complainant, Roberta Marquis, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, W.Va. Code §5-11-10.
2. The respondent, SW Graphics a Division of SW Resources, Inc., is an employer as defined by W.Va. Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,
3. The complaint in this matter was properly and timely filed in accordance with W.Va. Code §5-11-10.
4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W.Va. Code §5-11-9 et seq.
5. Complainant has established a prima facie case of handicap discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful handicap discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is not entitled to backpay as the complainant has not established that she was denied a particular staff position by respondent, or that the temporaries were performing job duties that she could or did perform.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

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

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby ORDERED as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

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

3. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

4. The respondent shall pay ten percent per annum interest on all monetary relief.

5. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 108 A, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 18th day of June, 1997.

WV HUMAN RIGHTS COMMISSION

BY: Robert B. Wilson

ROBERT B. WILSON
- ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing

FINAL DECISION

by

depositing a true copy thereof in the U.S. Mail, postage prepaid, this

18th day of June, 1997

to the following:

ROBERTA P MARQUIS
PO BOX 4534
PARKERSBURG WV 26104

SW RESOURCES INC
1007 MARY ST
PARKERSBURG WV 26101

ROBERT J KENT ESQ
BOWLES RICE MCDAVID GRAFF
& LOVE
601 AVERY ST
PO BOX 48
PARKERSBURG WV 26102

WALT AUVIL ESQ
PYLES & AUVIL
1208 MARKET ST
PARKERSBURG WV 26101

Robert B. Wilson

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 108 A

Charleston, WV 25301-1400

TELEPHONE (304) 558-2616

FAX (304) 558-0885

TDD - (304) 558-2976

Cecil H. Underwood
Governor

Herman H. Jones
Executive Director

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

January 13, 1998

Roberta P. Marquis
PO Box 4534
Parkersburg, WV 26104

SW Resources, Inc.
1007 Mary St.
Parkersburg, WV 26101

Robert J. Kent, Esq.
Bowles, Rice, McDavid, Graff
& Love
601 Avery St.
PO Box 48
Parkersburg, WV 26102

Walt Auvil, Esq.
Pyles & Auvil
1208 Market St.
Parkersburg, WV 26101

Re: Marquis v. SW Resources, Inc.
EH-27-94A

Dear Parties:

Enclosed, please find the Supplemental Addendum to the Administrative Law Judge's Final Decision. If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,

A handwritten signature in black ink, appearing to read "R. B. Wilson".

Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Herman H. Jones, Executive Director
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERTA P. MARQUIS,

Complainant,

v.

DOCKET NUMBER EH-27-94A

SW GRAPHICS, INC.,

Respondent.

SUPPLEMENTAL ADDENDUM TO
THE ADMINISTRATIVE LAW JUDGE'S
FINAL DECISION

Pursuant to the West Virginia Human Rights Commission's order entered the 5th day of December, 1997, the undersigned previously Ordered the respondent to produce a statement of backwages due by comparing the highest wage paid to either of the temporary workers, for the period in which they were employed; and the value of benefits for Ms. Marquis during this period prior to her hire as a full-time regular employee with benefits.

Upon due consideration of the submission, titled 22-Dec.-97, Analysis of Robert Marquis' Wages, attached hereto as Exhibit A, it is hereby determined that complainant's backwages amounted to \$4,915.53; comprised of \$1,860.22 in wage differential, \$2,976.19 in medical benefits and \$79.12 in life insurance benefits which complainant did not receive prior to July 1994.

It is further ORDERED, that the Administrative Law Judges Final Decision, be, and hereby is, amended to include a Conclusion of Law that, "As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of

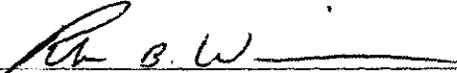
\$4,915.53;" and a Relief Order that, "Within 31 days of receipt of this decision, the respondent shall pay to the complainant \$4,915.53, plus prejudgement interest." These statements shall hereby be incorporated with the original Conclusions of Law and Relief and Order in the Administrative Law Judge's Final Decision.

It is so ORDERED.

Entered this 13th day of January, 1998.

WV HUMAN RIGHTS COMMISSION

BY


ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

22-Dec-97

Analysis of Roberta Marquis' Wages

Mth/Yr	Temps Yes/no	RPM Hrs Regular	RPM Hrs Overtime	RPM Hrs Vacation	RPM Hrs Holiday	RPM Hrs Sick	RPM Wage/Hr	Total Hrs	Wages Paid	Var to 5.00/hr	Medical Benefit	Life Ins Benefit
Apr '93	Y	164.75	19.75		8.00		\$ 4.25	196.75	\$ 860.19	\$ 123.56	\$ 204.91	\$ 4.90
May '93	Y	152.00			8.00	8.00	\$ 4.25	172.25	\$ 714.00	\$ 147.25	\$ 204.91	\$ 4.90
Jun '93	Y	172.72					\$ 4.25	176.97	\$ 734.06	\$ 150.79	\$ 204.91	\$ 4.90
Jul '93	Y	119.25		32.00	8.00		\$ 4.25	163.50	\$ 676.81	\$ 140.69	\$ 204.91	\$ 5.25
Aug '93	Y	139.50					\$ 4.25	143.75	\$ 592.88	\$ 125.88	\$ 213.90	\$ 5.25
Sep '93	Y	166.75	7.75		8.00		\$ 4.25	186.75	\$ 792.13	\$ 141.62	\$ 213.90	\$ 5.25
Oct '93	Y	168.00					\$ 4.25	172.25	\$ 714.00	\$ 147.25	\$ 213.90	\$ 5.25
Nov 1-15 '93	Y	88.00					\$ 4.25	92.25	\$ 374.00	\$ 87.25	\$ 106.95	\$ 2.67
Nov 16-30 '93	Y	71.00			16.00		\$ 4.50	91.50	\$ 391.50	\$ 66.00	\$ 106.95	\$ 2.67
Dec '93	Y	160.00			24.00		\$ 4.50	188.50	\$ 828.00	\$ 114.50	\$ 185.85	\$ 6.20
Jan '94	Y	124.25	1.50	16.00		24.00	\$ 4.50	170.25	\$ 749.25	\$ 102.00	\$ 185.85	\$ 5.29
Feb '94	Y	160.00	1.00				\$ 4.50	165.50	\$ 726.75	\$ 100.75	\$ 185.85	\$ 5.25
Mar '94	Y	184.00	2.75				\$ 4.50	191.25	\$ 846.56	\$ 109.69	\$ 185.85	\$ 5.25
Apr '94	Y	160.00	4.75		8.00		\$ 4.50	177.25	\$ 788.06	\$ 98.19	\$ 185.85	\$ 5.25
May '94	Y	168.50	5.75		8.00		\$ 4.50	186.75	\$ 833.06	\$ 100.69	\$ 185.85	\$ 5.12
Jun '94	Y	173.75	3.00				\$ 4.50	181.25	\$ 802.13	\$ 104.13	\$ 185.85	\$ 5.72
TOTAL		2372.47	46.25	48	88	32		2656.72	\$11,423.39	\$1,860.22	\$2,976.19	\$ 79.12
GRAND TOTAL												\$4,915.53

EXHIBIT A

CERTIFICATE OF SERVICE

I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing Supplemental Addendum to the Administrative Law Judge's Final Decision by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 13th day of January, 1998, to the following:

ROBERTA P. MARQUIS
PO BOX 4534
PARKERSBURG WV 26104

SW RESOURCES INC
1007 MARY ST
PARKERSBURG WV 26101

ROBERT J KENT ESQ
PO BOX 48
PARKERSBURG WV 26102

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1208 MARKET ST
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ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE