



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**1321 Plaza East  
Room 108A  
Charleston, WV 25301-1400**

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**Bob Wise  
Governor**

**Ivin B. Lee  
Executive Director**

**Via Certified Mail-  
Return Receipt Requested**

November 5, 2004

Debra K. Parker  
POB 590  
Oak Hill, WV 25901

Ralph C. Young, Esquire  
Hamilton, Burgess, Young, Pollard,  
Hewitt & Salvatore, PLLC  
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Civil Rights Division  
812 Quarrier St. - Suite 200  
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Retina Consultants, Inc.  
Attn: Practice Administrator  
POB 3970  
Charleston, WV 25339-3970

Harry P. Henshaw, III, Esquire  
Bank One Center, Suite 1204  
707 Virginia Street, East  
Charleston, WV 25301

John A. Singleton, Esquire  
John A. Singleton, PLLC  
POB 11496  
Charleston, WV 25339

**Re: *Debra K. Parker v. Retina Consultants, PLLC;*  
*Docket No: ESREP-252-02; EEOC No: 17JA200114.***

Dear Parties:

Enclosed please find the **Commission's FINAL ORDER** in the above-referenced matter. Attached hereto is the Administrative Law Judge's "*Final Decision*" and "*Supplement To The Final Decision Of The Administrative Law Judge Upon Remand From The West Virginia Human Rights Commission*", and an updated Notice of Right to Appeal. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review.

**Page 2**  
**November 5, 2004**

Please refer to the attached updated Notice of Right to Appeal for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ivin B. Lee". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

**Ivin B. Lee**  
**Executive Director**

IBL/jek  
Attachments  
cc: The Honorable Joe Manchin, Secretary of State

## **NOTICE OF RIGHT TO APPEAL**

If you are dissatisfied with this Order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This **must** be done **within 30 days** from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she **will not** file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

**IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY**, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed **within 30 days** from the date of receipt of this Order.

For a more complete description of the appeal process see **WV Code § 5-11-11** and the **West Virginia Rules of Appellate Procedure**.

**IMPORTANT:** If you elect to file your appeal in the Circuit Court you must notify the Commission either by letter or copy of the Notice of Appeal to the Circuit Court so that a certified record can be prepared and submitted to the court in a timely fashion in accordance with WV Code § 5-11-11. The Circuit Court of Kanawha County requires the Commission to file the certified record within 30 days from the date of receipt of the parties' Notice of Appeal to circuit court. Since the Circuit Court no longer notifies the Commission of these appeals; it is important that you notify the Commission of your appeal in a timely manner.

**IN THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

DEBRA K. PARKER,

Complainant,

v.

Docket No. ESREP-252-02  
EEOC No. 17JA200114

RETINA CONSULTANTS, PLLC,

Respondent.

**FINAL ORDER**

On November 4, 2004, this matter came before the West Virginia Human Rights Commission for consideration of the "Supplement to the Final Decision of the Administrative Law Judge [Robert B. Wilson] Upon Remand From the West Virginia Human Rights Commission." After thorough review of the aforementioned Supplemental Decision, as well as the transcript, exhibits, and arguments and briefs of counsel previously reviewed, the Commission does hereby find that the record supports the ALJ's supplemental findings of fact and conclusions of law as to damages.

Accordingly, the Commission hereby AFFIRMS the Administrative Law Judge's grant of Supplemental Relief, awarding Complainant incidental damages in the amount of \$3,277.45; back pay in the amount of \$56,025.00 through December 1, 2004, together with 10% simple pre-judgment interest of \$32,214.37 and 10% simple post-judgment interest from October 18, 2004, the date of the ALJ's Supplemental Decision, thereafter until payment is tendered to Complainant; and an increase in Complainant's wages and benefits to equal that which Mr. Leithead, the comparator employee, receives.

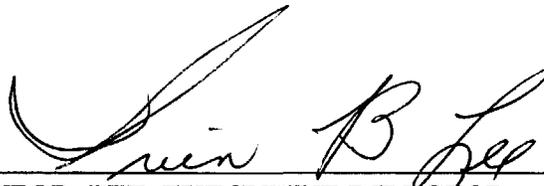
The rulings set forth in this Final Order supplement those previously made in the Order of Remand entered on October 12, 2004, and conclude the proceedings before the West Virginia Human Rights Commission.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 5<sup>th</sup> day of November, 2004, in Charleston, Kanawha County, West Virginia.



---

IVIN B. LEE, EXECUTIVE DIRECTOR  
WEST VIRGINIA HUMAN RIGHTS COMMISSION

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

DEBRA K. PARKER,

Complainant,

v.

Docket No. ESREP-252-02  
EEOC No. 17JA200114

RETINA CONSULTANTS, PLLC,

Respondent.

**CERTIFICATE OF SERVICE**

I, Ivin B. Lee, Executive Director of the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing Final Order by placing true and exact copies in the United States mail, postage prepaid, this 5 day of November, 2004, addressed as follows:

Ralph C. Young, Esquire  
Hamilton, Burgess, Young, Pollard, Hewitt & Salvatore, PLLC  
P. O. Box 959  
Fayetteville, WV 25840

Paul R. Sheridan, Esquire  
Deputy Attorney General  
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Debra K. PARKER  
P. O. Box 590  
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Retina Consultants, Inc.  
Attn: Practice Administrator  
P. O. Box 3970  
Charleston, WV 25339-3970

  
\_\_\_\_\_  
IVIN B. LEE, EXECUTIVE DIRECTOR  
WEST VIRGINIA HUMAN RIGHTS COMMISSION

***FINAL DECISION***  
***OF THE***  
***ADMINISTRATIVE LAW JUDGE,***  
***ROBERT B. WILSON***



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

1321 Plaza East

Room 108A

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**Bob Wise**  
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**Ivin B. Lee**  
Executive Director

**VIA CERTIFIED MAIL-  
RETURN RECEIPT REQUESTED**

April 21, 2004

Debra K. Parker  
POB 590  
Oak Hill, WV 25901

Retina Consultants, Inc.  
Attn: Practice Administrator  
POB 3970  
Charleston, WV 25339-3970

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Charleston, WV 25339

Rebecca L. Baker  
Certified Court Reporter  
POB 7822  
Cross Lanes, WV 25356

Re: Debra K. Parker v. Retina Consultants, PLLC;  
Docket No. ESREP-252-02

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 January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

**April 21, 2004**

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“§77-2-10. Appeal to the commission.

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 administrative law 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 an 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 an 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 administrative law 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.a. In conformity with the Constitution and laws of the state and the United States;

April 21, 2004

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10.8.b. Within the commission's statutory jurisdiction or authority;

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

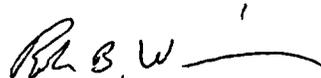
10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. 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 an 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 Ivin B. Lee, Executive Director of the commission at the above address.

Yours truly,

A handwritten signature in black ink, appearing to read "R. B. Wilson", with a horizontal flourish extending to the right.

Robert B. Wilson  
Administrative Law Judge

RBW/jek

Enclosure

cc: Ivin B. Lee, Executive Director  
Lew Tyree, Chairperson

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**DEBRA K. PARKER,**

**Complainant,**

**v.**

**Docket No.: ESREP-252-02  
EEOC No.: 17JA200114**

**RETINA CONSULTANTS, PLLC,**

**Respondent.**

**FINAL DECISION**

A public hearing, in the above-captioned matter, was convened on September 22, 2003, and September 23, 2003, in Kanawha County, in Conference Room B of the West Virginia Human Rights Commission Offices at 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Debra K. Parker, appeared in person and by counsel Ralph C. Young, Esq. The Respondent appeared in person by its representatives, Richard A. Wilton, Practice Administrator, and Dr. Mark Hatfield, Manager Doctor; as well as by counsel, John A. Singleton, Esquire, and Harry P. Henshaw, III, Esquire. The public hearing reconvened on December 5, 2003. The parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof, and response briefs through March 1, 2004.

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 necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

**A.**

**FINDINGS OF FACT**

1. Respondent, Retina Consultants, PLLC, has not contested that it is an “employer” and a “person” as those terms are defined in W.Va. Code §§5-11-3(a) and (d) respectively.
2. At the time of hearing, the Complainant, Debra K. Parker, was a 38 year old female resident of Oak Hill, West Virginia. Tr. Vol. I, page 13.
3. Complainant is presently employed by Respondent, as an Ophthalmic Photographer/Angiographer, also referred to as a Retinal Photographer. Tr. Vol. I, pages 13 and 14.
4. Complainant became interested in photography in High School. She took photography courses and was involved in the yearbook. She was also involved doing freelance work taking pictures for school dances and weddings during high school.

Complainant graduated from Oak Hill High School in 1980. In 1984, Complainant went to work taking photographs for Wild River Photos, as well as doing color processing in their lab, and ordering the supplies. Complainant worked one year there, then went to Foto 1, where she was the manager for one year. Thereafter, Complainant was employed for eleven years, as manager of Fast Foto. At Fast Foto, Complainant was involved in the purchasing and set up of the equipment for that venture. Complainant did all the hiring and firing for Fast Foto, and trained all the employees regarding the operation of the equipment. Complainant had the authority to set salaries for the ten or eleven employees that worked for her over that time, and testified credibly that education was not a factor in setting those salaries. That business closed when the owner refused to renew the lease. Complainant attempted to run the business for three months thereafter, but was forced to quit when the landlord doubled or tripled the rent on the building where the business was located. Tr. Vol. I, pages 15-24.

5. Complainant went over to Retina, after being told of an opening there by a school counselor; and sent a resume in response to a blind ad in the paper. The ad in the paper had no mention of any educational requirements. She was scheduled for an interview with Mr. Richard A. Wilton, the Respondent's Practice Administrator. Complainant explained that she had been making \$15.00 per hour in her former work. He told her that the highest paid photographers were only paid \$9.50 per hour. Mr. Wilton offered her \$7.50 per hour. Complainant asked for \$9.00 per hour. Mr. Wilton refused and Complainant agreed to work

for \$7.50 per hour. Tr. Vol. I, pages 24-27, and 153.

6. Complainant was hired by Respondent in February 1999 and was paid \$7.50 per hour. At the time Complainant was hired she did not receive any benefits. Complainant worked in Respondent's Beckley office, which was open three days per week. Complainant worked two days per week at the Charleston Office while she was being trained. It took her three weeks, rather than the six weeks average, to be trained. Complainant was then allowed to work by herself as the photographer in the Beckley office. While working in the Charleston office, Complainant would take photographs, develop film, process slides and mount them. She would do this on occasions, when she was needed to fill in for other photographers, at Respondent's Charleston office. Tr. Vol. I, pages 28-30; Vol. III, page 56.

7. The Complainant was hired to work primarily in Respondent's Beckley office. Complainant did not perform color slide mounting, color film developing or Ocular Coherence Tomography in Beckley, nor digital photography at the time of the initial public hearing because none of the computer equipment had been installed at that time. At the time the public hearing convened, Complainant had already been trained on the digital photography equipment three years earlier. When Respondent first began converting to digital equipment and installed it in the Charleston office, Complainant used that equipment when she worked in the Charleston office (which Complainant estimates to have been 20 - 30 occasions over 4-1/2 years). When ordering supplies for the Beckley office, Complainant would simply put down the number of units needed for each item. Complainant does not

deal with the vendors, negotiate prices, or compare quality of equipment. Neither does Complainant prepare power point presentations or put film in patient files (which are stored in Charleston), as do the photographers based in Respondent's Charleston office. Tr. Vol. I, pages 51, 79 and 81-85.

8. Approximately two years prior to the public hearing, Respondent hired Dr. Hunt and the Beckley office went to 4 days per week. Complainant was informed by Mr. Wilton at that time that she would be given full time status, employee benefits, raises, insurance, dental and health. Tr. Vol. I, pages 30 and 31.

9. Respondent hired Andrew Price as a photographer. He had no experience. Complainant trained Andrew Price and had to show him how to put film in the camera. Mr. Price worked for Respondent for six months. After he left, Complainant was told that Mr. Price had been making over \$11.00 per hour. Complainant verified this by talking to Mr. Price. Complainant then met with Dr. Hatfield on July 27, 2001, to question the disparity in pay between the Complainant and Mr. Price. Rick Wilton and Lynette Darringer then met with the Complainant in a closed door meeting in Beckley at Dr. Hatfield's direction. Complainant told them she found out what Mr. Price was making, and she wanted the same fair rate plus raises she had since she was hired. Mr. Wilton was angry and loud. He never gave any justification for the difference. Mr. Wilton said he'd send a letter with his decision. Respondent never sent the letter. Complainant talked to Dr. Hatfield four weeks later, and he told her to call Mr. Wilton and remind him. Complainant subsequently talked with Mr.

Wilton on the telephone. Mr. Wilton told her, "I didn't realize I was on a time schedule." He further stated that Dr. Hatfield said it was his decision to make and that when Complainant got the letter, she would not like it. The letter never came, nor was any reason given for the disparity in pay between the Complainant and Mr. Price. Tr. Vol. I, pages 38-47.

10. Respondent currently employs the Complainant, John Leithead, William Scott Smith, Daniel Gernert and Candace Anderson as Ophthalmic Photographers. Tr. Vol. I, page 231.

11. David Epperly is a CPA and a Certified Valuation Accountant retained by the Complainant to compare earnings of the Complainant with those of other Ophthalmic Photographers who work or had worked for the Respondent. He compared earnings against those of Andrew Price, Daniel Gernert, John Leithead, Charles Frostick and William Scott Smith. Three of those were hired after the Complainant. Mr. Price was hired in January, 2001; Mr. Gernert was hired in August, 2001, and Mr. Leithead was hired in June, 2002. Tr. Vol. I, pages 88, 89, 92 and 94-96.

12. Mr. Frostick was hired August 1, 1988, and Mr. Smith was hired March 19, 1992. Personnel records supplied in discovery indicate that Mr. Smith has a B.A. Degree and a two year Associates Degree as well. Respondent provided Mr. Epperly with something indicating that Mr. Frostick has a B.A. Degree, but there was nothing in his personnel information produced in discovery to indicate any educational attainment. Mr. Leithead has

an Associates Degree in Computer Aided Design and Photography. Mr. Wilton also indicated that at the time Mr. Leithead was hired, Mr. Leithead had a freelance business which was totally digital, no film. Counsel for Respondent represented at Public Hearing , that Mr. Gernert also has an Associates' Degree in Specialized Technology, majoring in photography. Tr. Vol. I, pages 113-115, 122, 157 and 222.

13. Dr. Hatfield indicated that going to digital systems is very important. He knew that change was coming as much as six or seven years ago. Mr. Smith's B.A. Degree in Engineering fit in with Dr. Hatfield's plans to connect all five of Respondent's offices with digitally based technologies which will allow virtually instantaneous availability of information at any of the Respondent's offices around the State. Dr. Hatfield indicated that Mr. Smith is going to be the Information Technologist for the office - a function he already performs. Mr. Smith is critical to digital systems maintenance and management, and spear-headed research for the digital camera system. Tr. Vol. I, pages 181, 184, 195, 246, 247, 251 and 257.

14. Mr. Gernert has developed an expertise in relation to the Ocular Coherence Tomography equipment by working with the manufacturer to understand how it works and to troubleshoot. Tr. Vol. I, pages 181, 184, 195, 246, 247, 251 and 257.

15. Mr. Price had a B.A. Degree, which Respondent's Counsel represents is in Art. Nothing in the record supports the testimony of Mr. Wilton that Mr. Price was in any respect "well versed in the digital world" or a "key man" and such testimony is not deemed credible.

Tr. Vol. I, page 123.

16. As of the final day of the public hearing on December 5, 2003, Respondent's Beckley office had been outfitted with all the digital equipment in place elsewhere, including digital camera equipment, computers and Ocular Coherence Tomography equipment. Complainant operates all such equipment, as of that date, and apparently performs maintenance and troubleshooting for that equipment as well. Tr. Vol. III, pages 33, 34, 79 and 80.

17. Respondent's Beckley office has a relatively high patient count. Respondent plans to go to five days per week at its Beckley office as soon as it completes its hiring of a new doctor. Tr. Vol. I, pages 222, 224 and 225.

18. There is a preponderance of the evidence to support Respondent's representations that Mr. Smith performs significant information technology functions for the Respondent, including researching and overseeing the implementation of the digital photography equipment now in place at all of Respondent's offices. There is a preponderance of the evidence to support Respondent's representation that Mr. Gernert has a certain degree of expertise in relation to Respondent's Ocular Coherence Tomography equipment. The Respondent has proven by a preponderance of the evidence that Mr. Smith and, to a lesser extent, Mr. Gernert, are "key men" upon which Respondent relies to acquire and look after its systems utilized in taking photographs and performing Ocular Coherence Tomography, as well as in the storage and transfer of this digital information.

19. Other than the fact that some of the equipment utilized in the Parkersburg office, to which Mr. Leithead travels to work on most days, was installed earlier than in the Beckley office, and the fact that he may have worked a few more days in the Charleston office than the Complainant did, the preponderance of the evidence is that Complainant performs the same duties as does Mr. Leithead. Tr. Vol. III, page 83.

20. Longevity does not correlate with wage differential because the differences between Complainant's earnings and those of recent hire, John Leithead, and those between the Complainant and long-term employees, Mr. Frostick and Mr. Smith, is only \$1,800.00 and \$400.00 for the 4-1/2 years the Complainant has worked for the Respondent. Tr. Vol. I, pages 132 and 133.

21. Education is not a factor in the rate of pay for a Retinal Photographer. There is no mention of any educational requirement for the position in any of the ads run for this position. Furthermore, individuals are performing and have performed this job with various types and levels of education. Tr. Vol. I, page 147.

22. Respondent recently hired a female Retinal Photographer, Candace Anderson, at \$13.22 per hour. Ms. Anderson is a former youth Minister at Dr. Hatfield's church. Ms. Anderson has a B.A. Degree in Physiology and Adult Fitness. She will be cross-trained to perform scribe and screening duties after she completes photography training. Tr. Vol. I, pages 214, 215 and 232 - 234.

23. Mr. Gernert, whom Respondent identifies as a "key man" in regards to the

digital world, is paid less than new hire, Ms. Anderson, who has no special digital experience or education. Tr. Vol. I, page 233.

24. The Complainant has proven by a preponderance of the evidence that the reasons advanced by the Respondent for the difference in wages between Retinal Photographers, Andrew Price and John Leithead, and those paid to the Complainant are pretext for gender based discrimination.

25. Respondent hired Mr. Price as a Retinal Photographer in January, 2001, at \$10.58 per hour. Utilizing the Consumer Price Index (CPI hereafter), that wage would adjust to \$9.94 per hour at the time of Complainant's hire in February, 1999. At the time Respondent hired Mr. Leithead in June, 2002, he was paid \$16.00 per hour. Utilizing the CPI, that wage would be equivalent to \$14.63 per hour. Tr. Vol. I, pages 98 - 100.

26. Complainant is entitled to have her current wage raised by \$2.44 per hour as a result of Respondent's unlawful discrimination on the basis of gender. By way of example; if Complainant's current wage is \$10.05 per hour, the new wage would be \$12.49 per hour.

27. As a result of Respondent's unlawful gender discrimination, Complainant is entitled to a back pay award of \$10,370.17 through July 16, 2003, plus \$76.58 every two weeks thereafter; or, \$11,901.77 through April 21, 2004, as set forth more fully under Complainant's Exhibit No. 3, Tab 3, Page 3, Debra K. Parker Wage Differential Actual v. Lonzy A. Price, III. Complainant is entitled to simple pre-judgment interest of 10 % per year on that back pay award of \$5,058.18.

28. The Complainant has not offered any testimony concerning humiliation, embarrassment, emotional distress and loss of personal dignity; which she has suffered as a result of Respondent's unlawful gender based pay disparity.

29. The Complainant is entitled to an award of reasonable costs incurred in the prosecution of this matter in the amount of \$4,062.00, as set forth more fully in Complainant's Request for an Award of Litigation Expenses, attached to Complainant's Proposed Findings of Fact and Conclusions of Law, and reasonable Attorney's fees of \$22,600.00 reduced from the \$25,425.00, as more fully set forth in Complainant's Application for Attorney Fees, dated February 27, 2004 and filed April 12, 2004 with accompanying itemization of time expended, per the discussion below.

**B.**

**DISCUSSION**

West Virginia Code § 5-11-9(1) of the West Virginia Human Rights Act, makes it unlawful "for any employer to discriminate against an individual with respect to compensation . . . if the individual is able and competent to perform the services required . . ." 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 . . ." In order to make out a prima facie case of discrimination the Complainant must offer evidence, 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).

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 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 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 reason; 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 v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986). Pretext may be shown

through direct or circumstantial evidence of falsity or discrimination; and, where pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). Although, 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 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 the Complainant’s protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the Complainant’s protected class had not been considered. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

The Complainant is a member of a protected class in that she is a woman. Complainant has suffered an adverse employment decision in that Respondent failed to raise her wage to that paid to a less qualified male performing similar duties, in this case Mr. Price. There is substantial evidence from which it could be inferred that the lower compensation received by Complainant for her duties of Retinal Photographer are the result of her gender.

These include that fact that she was the only woman hired for such a position with Respondent until just prior to public hearing and that her wage for these duties was substantially less than that which Respondent has offered every other Retinal Photographer both before and after, even though there has been no contention that Complainant has performed her duties in anything less than satisfactory or above average fashion. Thus the Respondent has violated the provisions of West Virginia Code § 5-11-9(1), which makes it unlawful “for any employer to discriminate against an individual with respect to compensation”.

Respondent has offered several legitimate non discriminatory reasons for the disparity in pay between Complainant and the male retinal photographers working for Respondent. Some of these explanations are patently ridiculous, such as the suggestion that her male counterparts are paid more because they are paid for the time they commute from Charleston to the Respondent’s various satellite offices, while Complainant works primarily in the Beckley office to which she regularly reports. Pretext is further suggested by Respondent’s contention that Complainant has less duties than her male counterparts in Charleston. The fact of the matter is that these differences in duties have more to do with when the Respondent installed various equipment in the Charleston and various satellite offices and where they wanted Complainant to work than they do with the ability of the Complainant to perform those duties. In fact, the Complainant now performs virtually identical duties to those of Mr. Leithead as she now has digital equipment and Ocular Coherence Tomography

installed in the Beckley office and operates it to Respondent's satisfaction. Prior to the installation of that equipment, when working in the Charleston office, Complainant performed many of the duties listed on Complainant's Exhibit No 1, a listing of duties tendered by Respondent to its experts, which are not reflected in her performance of duties on that chart.

The Respondent has suggested that the digital expertise of the various male retinal photographers is critical to the differences in pay between Complainant and her male counterparts. The undersigned finds that Dr. Hatfield's testimony is credible in regards to the differences in pay in regards to Mr. Smith, who has a BA in Engineering, and who has been instrumental in regards to acquisition and installation of the digital systems including digital camera equipment, as well as, the fact that he has been, and will be functioning as the Information Technologies person for Respondents. Similarly, pay differences in relation to that of Mr. Gernert are somewhat explainable by his having developed some expertise with the Ocular Coherence Tomography equipment utilized by Respondent. There is no credible evidence that any special digital expertise is possessed by Mr. Leithead, other than the fact he may possess an Associates Degree in Computer Aided Design and Photography, there is no evidence that his knowledge is superior to that of Complainant when it comes to operation of Respondent's current equipment, or that this education is utilized by Respondent in the performance of his duties, which appear to be identical to those of Complainant at this point. The pretextual nature of the digital explanation is further belied by the fact that Respondent

hired in Ms. Anderson shortly before the public hearing in this matter, at a higher salary than that paid to one of its key men, Mr. Gernert, without any background at all in digital technology. The fact that Ms. Anderson was hired as a Retinal Photographer at a relatively high rate of pay, is offset by the fact that she was hired well after the complaint was filed in this matter. It is further discounted by the facts that she is a personal friend of Dr. Hatfield (having served as his church's youth minister and listing him as a personal reference just prior to being hired), and will be cross trained in areas of scribe and screening duties after she completes photography training in line with her training in the health field, including a B.A. Degree in Physiology and Adult Fitness.

Although the Respondent's argument that educational attainment explains the differences in pay, is somewhat plausible on the surface, the undersigned is unconvinced that this explanation is plausible in light of all the evidence. The fact of the matter is that attainment of College degrees is simply not necessary or helpful in any respect to the performance of duties of a Retinal Photographer. People of any educational attainment have and do perform these duties without regard to their education. With the possible exception of Mr. Smith, whose Engineering background has given him a distinct value in the area of Information Technologies, there simply isn't any need for education in the performance of the primary duties assigned to the majority of the retinal photographers. The fact that Mr. Price had a BS degree in Art, didn't stop Complainant from having to show him how to engage in the most basic task of loading film in the camera. It had no practical value to

Respondent in terms of his abilities to work as a Retinal Photographer. The fact that Complainant had twelve years as a manager of small photography businesses, had much more practical value to Respondent in terms of her abilities as a Retinal Photographer. Thus the undersigned concludes as a matter of law, that the Complainant has demonstrated by a preponderance of the evidence that these reasons advanced by Respondent for pay disparities, are pretext for gender based discrimination in the compensation paid to Complainant as a Retinal Photographer.

West Virginia Code § 5-11-9(7) of the West Virginia Human Rights Act, makes it unlawful:

For any person, [or] employer. . .to:

(A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit any acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section;

(B) Willfully obstruct or prevent any person from complying with the provisions of this article, or to resist, prevent, impede or interfere with the Commission or any of its members or representatives in the performance of a duty under this article; or,

(C) Engage in any form of reprisal or otherwise discriminate against any

person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

The undersigned has previously denied Complainant's arguments that claims of retaliation be added to this complaint, on the grounds that no finding of probable cause had been made regarding these allegations by the Commission, as the incidents alleged occurred after its initial probable cause determination. Nevertheless, it is disturbing that digital equipment destined for Beckley remained uninstalled, and that training in digital photography was cancelled (or delayed) during the pendency of the matter before him, even though the Beckley office was the busiest satellite office of Respondent by far. The undersigned hopes that the explanations tendered at hearing were sincere. The undersigned is encouraged by the fact that Respondent has trained the Complainant in use of all the digital equipment and the Ocular Coherence Tomography equipment and installed it at this time. It is further troubling that during the course of the public hearing of this matter, the Respondent engaged in threats that it would cut Complainant's hours in Beckley, (based upon the fact that she is not needed for the extra hour or so after doctors depart, according to Respondent's witnesses) so that her eligibility for employee benefits would lapse. It is particularly troubling, since the Beckley office is apparently destined to go to five day per week operations. Although the undersigned has not considered these allegations in terms of a complaint under the West Virginia Human Rights Act, for which a remedy is contemplated by the Commission, the undersigned's

finding of pretext above, appears to be born out by such tactics.

Having determined that Complainant has been subjected to unlawful gender based discrimination in the terms of her compensation for her duties of Retinal Photographer with Respondent, the task of assigning a monetary damage amount is problematic. The undersigned has found that Complainant's duties are essentially equivalent to those of Mr. Leithead. Complainant's Economics Expert, Mr. Epperly asserts that the wage differential between the two from her date of hire through the date of hearing was \$42,760.93. The undersigned has rejected this calculation because Mr. Leithead was hired after Complainant began receiving employee benefits, which Mr. Leithead does not accept from his employer. That means that the calculation would overstate his earnings in comparison by the value of those benefits, which Mr. Epperly did not back out of his calculations. Mr. Leithead appears to have an Associates Degree in CAD and Photography, and the undersigned did credit that Mr. Leithead did assist in the installation of the computer equipment and digital camera at the Parkersburg office. Considering the foregoing, the undersigned finds that the most appropriate comparator for purposes of determining a fair current wage and for calculating the appropriate back pay award would be Lonzy A. Price, III. Mr. Epperly asserts that the wage differential between Complainant and Mr. Price would be \$10,370.17, through July 16, 2003; and would accrue at a rate of \$76.58 every two weeks thereafter. At the time Mr. Price was hired neither Complainant nor Mr. Price received employee benefits. Complainant had already been trained and when she worked in Charleston, had used the digital equipment for

the taking of the retinal photographs. The duties would have been very similar, and Complainant's abilities would far have surpassed those of Mr. Price in terms of utilizing the old camera systems still in use at many of the satellite offices where he might be assigned. Mr. Epperly used the Consumer Price Index to discount Mr. Price's salary of \$10.58 per hour when he was hired in January 2001, to a figure of \$9.94 per hour as of the date of Complainant's hire, February 1999. On that basis the undersigned concludes that Complainant would have been paid \$9.94 per hour but for the unlawful gender discrimination of Respondent. Complainant's wage must therefore be raised by \$2.44 per hour.

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 services 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. The undersigned has reviewed the itemization of time spent attached to Complainant's Application for Attorney Fees, and

finds that the time expended for the prosecution of this matter was necessary and proper in light of the course of this litigation. Although the skill necessary to perform these services is not exceptional, it is nevertheless typical of the skill needed to prepare and present a case for trial, including the procurement of expert testimony. The case was a straight forward case of gender based wage disparity involving no novel issues of law. The hourly fee claimed is not out of line with prior awards of attorney's fees before the West Virginia Human Rights Commission. Complainant's Attorney accepted the case on a contingent fee basis and bore the risk of losing considerable expenses advanced and time value of his services in undertaking this representation. Complainant's Attorney, secured a substantial back pay award and increase in hourly wage on behalf of his client, thereby helping the West Virginia Human Rights Commission fulfill its function of enforcing important anti-discrimination provisions of the West Virginia Human Rights Act.

The undersigned has reviewed the number of hours worked in light of objections raised by Respondent in Respondent Retina Consultants, PLLC's Response To Complainant's Application For Award Of Attorney's Fees and rejects the claims that the hours claimed relate to paralegal time on December 18, 2001, July 21, 2003 and July 24, 2003, as the vast amount of time claimed relates to other services than just preparation of those damage calculations done by Complainant's Counsel's paralegal. Mr. Sheridan is the Commission's Attorney at the Civil Rights Division who would consult with Complainant's Attorney to describe the interests of the Commission where private counsel prosecutes a case

before the Commission. Similar objections that hours spent are excessive are also rejected, and the 113 hours attorney time spent are hereby approved as reasonable and necessary. The Complainant's Attorney claims an hourly rate of \$225.00, which is at the high end of the range his survey finds have been approved in the past. In light of the fact that the issues litigated were not novel or difficult, and the fact that Complainant's Counsel does not have extensive experience litigating before the Commission, the undersigned finds that an hourly rate of \$200.00 is appropriate in the present case. In light of the foregoing, the undersigned finds that an Attorney Fee Award of \$22,600.00 is warranted in this matter.

C.

#### **CONCLUSIONS OF LAW**

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

2. The Respondent, Retina Consultants, PLLC, is a "person" and an "employer" as those terms are defined under 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 West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

5. The Complainant has established by a preponderance of the evidence that she was paid a lower wage than that paid to her male counterpart, Mr. Price, on the impermissible basis of gender, as the reasons advanced by Respondent for that wage difference have been demonstrated by a preponderance of the evidence to be pretext for unlawful gender based pay disparity for her work as a Retinal Photographer.

6. As a result of the Respondent's unlawful discriminatory conduct, Complainant is not entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity, as no evidence was tendered to establish these type of damages.

7. As a result of the Respondent's unlawful discriminatory conduct, Complainant is entitled to have her current wage raised by \$2.44 per hour.

8. As a result of Respondent's unlawful gender discrimination, Complainant is entitled to a back pay award of \$10,370.17 through July 16, 2003, plus \$76.58 every two weeks thereafter; or, \$11,901.77 through April 21, 2004, as set forth more fully under Complainant's Exhibit No. 3, Tab 3, Page 3, Debra K. Parker Wage Differential Actual v. Lonzy A. Price, III. Complainant is entitled to simple pre-judgment interest of 10 % per year on that back pay award of \$5,058.18.

8. The Complainant is entitled to an award of its reasonable costs incurred in prosecution of this matter in the amount of \$4,062.00, as set forth more fully in Complainant's Request for an Award of Litigation Expenses, attached to Complainant's Proposed Findings of Fact and Conclusions of Law; and reasonable Attorney's fees of

\$22,600.00, as more fully set forth in Complainant's Application for Attorney Fees, dated February 27, 2004 and filed April 12, 2004 with accompanying itemization of time expended and reduced to an hourly rate of \$200.00.

**D.**

**RELIEF AND ORDER**

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

1. The above named Respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of the receipt of the undersigned's order, the Respondent shall pay the reasonable costs of the Complainant incurred in the prosecution of this matter, in the amount of \$4,062.00, as set forth more fully in Complainant's Request for an Award of Litigation Expenses, attached to Complainant's Proposed Findings of Fact and Conclusions of Law; and, reasonable Attorney's fees of \$22,600.00, as more fully set forth in Complainant's Application for Attorney Fees, dated February 27, 2004 and filed April 12, 2004 with accompanying itemization of time expended and reduced to an hourly rate of \$200.00.

3. Within 31 days of the receipt of the undersigned's order, the Respondent shall pay Complainant back pay in the amount of \$10,370.17 through July 16, 2003, plus \$76.58 every two weeks thereafter; or, \$11,901.77 through April 21, 2004, as set forth more fully

under Complainant's Exhibit No. 3, Tab 3, Page 3, Debra K. Parker Wage Differential Actual v. Lonzy A. Price, III; and, simple pre-judgment interest of 10 % per year of that back pay award of \$5,058.18. Respondent shall pay Complainant simple interest of 10% post judgment interest, from the date of this decision, thereafter until payment is tendered to Complainant.

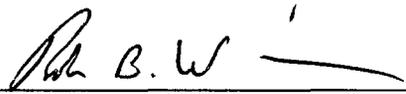
4. Within 31 days of the receipt of the undersigned's order, the Respondent shall increase Complainant's hourly wage by \$2.44 per hour.

5. In the event of failure of the Respondent to perform any of the obligations hereinbefore set forth, Complainant is directed to immediately so advise the West Virginia Human Rights Commission, William D. Mahan, Director of Compliance/Enforcement, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 21<sup>st</sup> day of April, 2004.

**WV HUMAN RIGHTS COMMISSION**

BY:   
**ROBERT B. WILSON**  
**ADMINISTRATIVE LAW JUDGE**

***SUPPLEMENT  
TO  
THE  
FINAL DECISION  
OF THE  
ADMINISTRATIVE LAW JUDGE  
UPON REMAND  
FROM THE  
WEST VIRGINIA HUMAN RIGHTS  
COMMISSION***



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

1321 Plaza East

Room 108A

Charleston, WV 25301-1400

TELEPHONE (304) 558-2616

FAX (304) 558-0085

TDD - (304) 558-2976

TOLL FREE: 1-888-676-5546

**Bob Wise**  
Governor

**Ivin B. Lee**  
Executive Director

**VIA CERTIFIED MAIL-  
RETURN RECEIPT REQUESTED**

October 18, 2004

Debra K. Parker  
P. O. Box 590  
Oak Hill, WV 25901

Retina Consultants, Inc.  
Attn: Practice Administrator  
P. O. Box 3970  
Charleston, WV 25339-3970

Ralph C. Young, Esquire  
Hamilton, Burgess, Young, Pollard,  
Hewitt & Salvatore, PLLC  
P. O. Box 959  
Fayetteville, WV 25840

Harry P. Henshaw, III, Esquire  
Bank One Center, Suite 1204  
707 Virginia Street, East  
Charleston, WV 25301

Paul R. Sheridan, Esquire  
Deputy Attorney General  
Civil Rights Division  
PO Box 1789  
Charleston, WV 25326-1789

John A. Singleton, Esquire  
John A. Singleton, PLLC  
P. O. Box 11496  
Charleston, WV 25339

Commissioners of the  
WV Human Rights Commission:

Charlene Marshall, Chair Person  
William L. Williams, Jr., Vice-Chair  
Lew G. Tyree  
Marion J. Capehart  
Joan Browning  
Kenneth Gilbert  
Betsy Haught  
H. R. Whittington  
George Rutherford

Re: Debra K. Parker v. Retina Consultants, PLLC;  
Docket No. ESREP-252-02.

Dear Parties and Commissioners:

Pursuant to the October 12, 2004, Order Of Remand of the West Virginia Human Rights Commission, in the above-captioned matter, the undersigned Administrative Law Judge has issued his **SUPPLEMENT TO THE FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE UPON REMAND FROM THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**, incorporating his Supplemental Findings Of Fact, Conclusions Of Law, and Relief and Order with regards to the substantive damages issues set out in the Order Of Remand.

As the parties have already taken their appeal to the Commission with the original Final Decision, any further appeal to this Supplement To The Final Decision will have to be taken by the parties *after* the Commission enters its Final Order in this matter.

If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the Commission, at the above address.

Yours truly,

A handwritten signature in black ink, appearing to read "R. B. Wilson", with a horizontal line extending to the right.

**Robert B. Wilson**  
**Administrative Law Judge**

RBW/jek

Enclosures

cc: Ivin B. Lee, Executive Director

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**DEBRA K. PARKER,**

**Complainant,**

**v.**

**Docket No.: ESREP-252-02**

**EEOC No.: 17JA200114**

**RETINA CONSULTANTS, PLLC,**

**SUPPLEMENT TO THE FINAL DECISION**  
**OF THE ADMINISTRATIVE LAW JUDGE**  
**UPON REMAND FROM THE WEST VIRGINIA HUMAN RIGHTS**  
**COMMISSION**

Pursuant to the previously entered Order Of Remand from the West Virginia Human Rights Commission in the above referenced matter, the undersigned Administrative Law Judge makes the following supplemental findings of fact , conclusions of law and order for relief:

**SUPPLEMENTAL FINDINGS OF FACT**

1. The Complainant has suffered humiliation, embarrassment, emotional distress and loss of personal dignity as a result of the Respondent's unlawful gender based discrimination in her rate of pay. Based upon her demeanor during the testimony and her testimony regarding what transpired, it is clear that Complainant was angry and frustrated upon discovering that Lonzy Price had been making considerably more than she was as a Retinal Photographer. Complainant went to Dr. Hatfield to discuss the situation and was subsequently treated to a humiliating closed door meeting with the Practice Manager, Mr. Wilton, and his Assistant, which was loud enough to be overheard by the other workers in

the Beckley office. Mr. Wilton never sent the letter he said would be forthcoming and never offered any explanation for the pay disparity. Complainant was obviously angry enough to consult a lawyer when it became clear nothing would be done to equalize her pay with what the male Retinal Photographers were making. Thus, the undersigned Administrative Law Judge's failure to consider indirect and circumstantial evidence of Complainant's incidental damages was contrary to law in the original Final Decision. Tr. Vol. I, pages 38-47.

2. Mr. Leithead is the proper comparator to establish Complainant's back pay and raise, as Mr. Leithead performs essentially the same duties as Complainant and Complainant has demonstrated an ability to perform the necessary digitally based tasks for the position, regardless of Mr. Leithead's attainment of an Associates Degree in Computer Aided Design and Photography, his free lance digitally based business, or his assistance in installing computer equipment. The weight of the evidence establishes that educational attainment has no bearing on the ability to perform the essential elements of the position of Retinal Photographer. Thus, the undersigned Administrative Law Judge's prior selection of Mr. Price as the comparator was not supported by substantial evidence. Tr. Vol. 1, page 147; and, Tr. Vol. III, pages 33,34,79, 80 and 83.

3. Based upon the economic expert's calculation of total lost wages of \$40,697.64 through July 16, 2003 and biweekly lost wages of \$425.76 thereafter; Complainant is entitled to an award of back pay in the amount of \$56,025.00 through December 1, 2004. Complainant's Exhibit No. 3, Tab 5.

4. Since the correct comparator should be Mr. Leithead, Complainant is entitled to a raise in her wages and benefits equal to that which Mr. Leithead receives.

#### **SUPPLEMENTAL CONCLUSIONS OF LAW**

1. The Complainant has suffered humiliation, embarrassment, emotional distress and loss of personal dignity as a result of the Respondent's unlawful gender based discrimination in her rate of pay and is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity.

2. As a result of the Respondent's unlawful gender based discrimination in her rate of pay, the Complainant is entitled to an award of back pay in the amount of \$56,025.00 through December 1, 2004.

3. As a result of the Respondent's unlawful gender based discrimination in her rate of pay, the Complainant is entitled to have her wages and benefits raised to equal that which Mr. Leithead receives.

#### **SUPPLEMENTAL RELIEF AND ORDER**

Pursuant to the above findings of fact and conclusions of law and those in the initial Final Decision in the above styled action, it is hereby ORDERED, that:

1. Within 31 days of the receipt of the undersigned's order, the Respondent shall pay Complainant incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity.

2. Within 31 days of the receipt of the undersigned's order, the Respondent shall

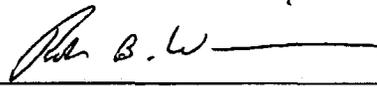
pay Complainant back pay in the amount of \$56,025.00 through December 1, 2004 as set forth more fully under Complainant's Exhibit No. 3, Tab 5, Debra K. Parker Wage Differential Actual v. John Leithead; and, simple pre-judgment interest of 10 % per year of that back pay award of \$32,214.37. Respondent shall pay Complainant simple interest of 10% post judgment interest, from the date of this decision, thereafter until payment is tendered to Complainant.

3. Within 31 days of the receipt of the undersigned's order, the Respondent shall increase Complainant's wages and benefits to equal that which Mr. Leithead receives.

It is so **ORDERED**.

Entered this 18<sup>th</sup> day of October, 2004.

**WV HUMAN RIGHTS COMMISSION**

BY:   
**ROBERT B. WILSON**  
**ADMINISTRATIVE LAW JUDGE**

IN THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

COPY

DEBRA K. PARKER,

Complainant,

v.

Docket No. ESREP-252-02  
EEOC No. 17JA200114

RETINA CONSULTANTS, PLLC,

Respondent.

**ORDER OF REMAND**

On August 19, 2004, this matter came before the West Virginia Human Rights Commission on appeal from the Final Decision of Administrative Law Judge Robert B. Wilson. After due consideration of the aforementioned Decision, and after a thorough review of the transcript and exhibits, as well as the arguments and briefs of counsel, the Commission does hereby find that the record supports the ALJ's findings of fact and conclusions of law as to liability. The Commission hereby AFFIRMS the Final Decision as to liability.

The Commission further AFFIRMS the ALJ's Final Decision as to an appropriate award of litigation costs and attorney fees, finding that the record supports the ALJ's findings and conclusions in this respect

However, the Commission is unable to ascertain the ALJ's rationale for failing to award the Complainant damages for humiliation, embarrassment, emotional distress and loss of personal dignity. In this regard, the ALJ appears to have considered the lack of direct evidence dispositive, without considering the indirect and circumstantial evidence presented. Further, the Commission is unable to ascertain the ALJ's rationale for excluding Mr. Leithead as the most appropriate

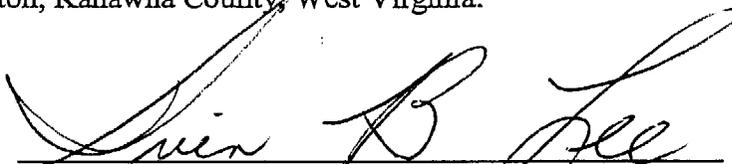
comparator for purposes of determining a fair current wage and for calculating an appropriate back pay award. The ALJ appears to have considered comparison of Complainant's and Leithead's wages to be an apples-and-oranges situation, since Complainant receives benefits while Leithead does not. However, assuming that the employer proved the value of Complainant's benefits, which is unclear,<sup>1</sup> the Petitioner/employer appears to concede at p. 7 of the Petition for Appeal that a simple arithmetical adjustment ("you must compare \$13.31 an hour to \$17.00 an hour") would suffice.

Accordingly, it is ORDERED that this case be REMANDED to Administrative Law Judge Robert B. Wilson for clarification, and/or reconsideration if appropriate, of his findings and conclusions on the substantive damages issues set forth above. It is further ORDERED that Judge Wilson's Supplemental Order be filed with the Commission no later than forty-five (45) days from the date of this Order of Remand.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 12 day of Oct., 2004, in Charleston, Kanawha County, West Virginia.

  
IVIN B. LEE, EXECUTIVE DIRECTOR  
WEST VIRGINIA HUMAN RIGHTS COMMISSION

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<sup>1</sup> The employer states, at p. 7 of the Petition for Appeal, that "[t]he fringe benefits that Debra Parker receives constitutes an additional \$3.26 per hour." However, the factual support for that statement is a vocational evaluation prepared by one Casey Vass, who did not testify at the hearing and whose evaluation does not appear to have been entered into evidence.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DEBRA K. PARKER,

Complainant,

v.

Docket No: ESREP-252-02  
EEOC No: 17JA200114

RETINA CONSULTANTS, PLLC,

Respondent.

CERTIFICATE OF SERVICE

I, **Ivin B. Lee**, Executive Director of the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing **ORDER OF REMAND** upon the following individuals, by U.S. Mail, postage pre-paid, addressed as follows on this the 12 day of October 2004.

Debra K. Parker  
POB 590  
Oak Hill, WV 25901-0590

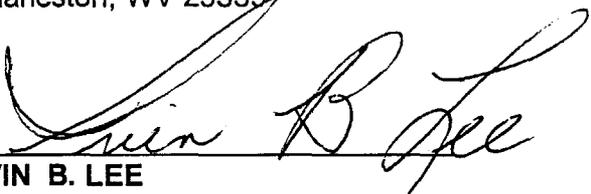
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