



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
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8 August 1991

Emogene Roe
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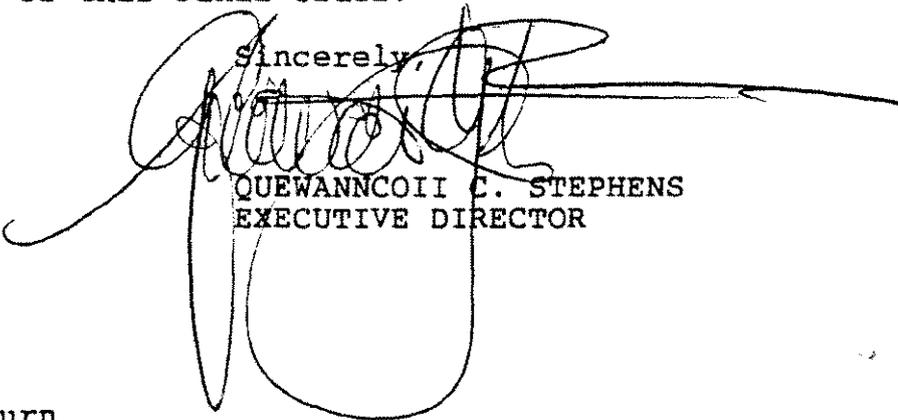
Charles F. Bagley, III, Esquire
Post Office Box 1835
Huntington, WV 25719

Re: Roe v. Western-Southern Life
Docket Nos. EA-1-90 & ES-2-90

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled and numbered case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1990, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,



QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

QCS/jm

Enclosures

Certified Mail/Return
Receipt Requested

cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General

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 Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., 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, landlord, etc., 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 West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

EMOGENE ROE,

Complainant,

v.

DOCKET NO. EA-1-90
ES-2-90

WESTERN-SOUTHERN LIFE,

Respondent.

FINAL ORDER

On June 12, 1991, the West Virginia Human Rights Commission reviewed the recommended findings of fact and conclusions of law as set forth in the Final Decision of the Hearing Examiner filed in the above-styled action by Hearing Examiner Pro Tempore Mike Kelly. After consideration of the aforementioned Final Decision of the Hearing Examiner, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition of appeal filed by the respondent, the Commission decided to, and does hereby, adopt said recommended Final Decision of the Hearing Examiner as its own, encompassing the findings of fact and conclusions of law set forth therein, without modification or amendment.

It is, therefore, ADJUDGED, ORDERED, and DECREED that the Final Decision of the Hearing Examiner, encompassing findings of fact and conclusions of law, be attached hereto as this Commission's Final Order and that a result thereof:

(a) The age discrimination complaint filed in this matter by Emogene Roe against Western-Southern Life, Case No. EA-1-90, be, and is hereby, dismissed; and

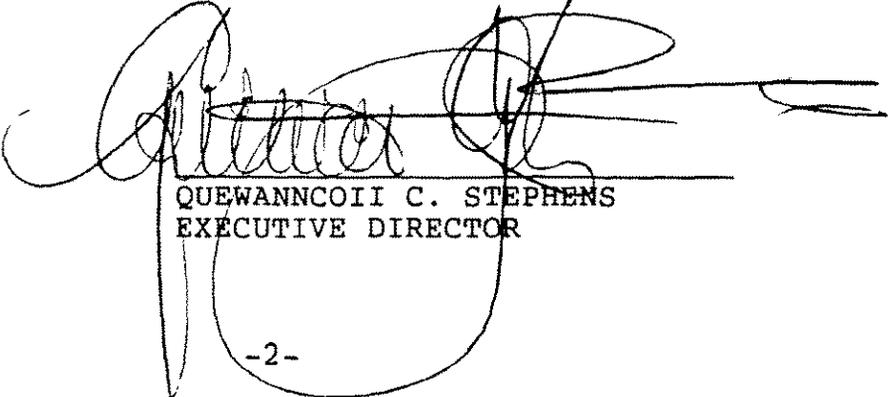
(b) The sex discrimination complaint filed in this matter by Emogene Roe against Western-Southern Life, Case No. ES-2-90, be, and is hereby sustained.

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, the parties are hereby notified that they have ten (10) days from the date of receipt of this Final Order to request that the Human Rights Commission reconsider this Final Order, or 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 5th day of August, 1991 in Charleston, Kanawha County, West Virginia.



QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

EMOGENE ROE,

Complainant,

v.

DOCKET NO. EA-1-90
ES-2-90

WESTERN-SOUTHERN LIFE,

Respondent.

FINAL DECISION OF THE HEARING EXAMINER

A public hearing in the above-styled matter was held on 13 and 14 December 1990 in Cabell County, West Virginia, at the offices of the respondent's counsel. Hearing examiner pro tempore Mike Kelly presided.

The complainant, Emogene Roe, appeared in person and by counsel, Dwight J. Staples. The respondent was represented by Mark Cook and its counsel, Charles F. Bagley, III.

All proposed findings of act and conclusions of law have been considered and reviewed. The hearing examiner additionally certifies that he has read the entire transcript, and has reviewed his contemporaneously taken notes and all exhibits admitted into evidence. 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 hearing examiner, and are supported by a preponderance of the evidence, they have been adopted. 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 a witness is not in accord with the findings as stated herein, it is not credited.

I. FINDINGS OF FACT

Based upon the credibility of the witnesses, taking into account each witness' motive and state of mind, strength of memory and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice, and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence, and upon examination of the exhibits introduced into evidence; the hearing examiner finds the following facts to be true:

A. Introductory Facts

1. Complainant Emogene Roe is a female who was born on 4 December 1935.
2. Respondent Western-Southern Life (hereinafter "WSL" or "Western-Southern") is an employer as that term is defined by W. Va. Code § 5-11-3(d).
3. On or about 20 January 1989 complainant was discharged from her employment with respondent, with her termination to be effective 27 January 1989.

4. On or about 30 June 1989 Ms. Roe filed two verified complaints with the West Virginia Human Rights Commission charging WSL with unlawful discrimination on the basis of age and sex in violation of the West Virginia Human Rights Act (hereinafter "HRA" or "Act"), and specifically W. Va. Code § 5-11-9(a)(1). Thereafter, WSL denied in writing that it had violated the Act and stated that Ms. Roe had been discharged for poor performance.

B. Relevant Work Histories of Emogene Roe and Mark Cook

5. Complainant was first employed by WSL in 1980, when she was 45 years of age. She started as a sales agent (sometimes referred to as a "sales representative") and worked in that capacity until June 1985, when she was promoted to sales manager.

6. The duties of a sales manager include the recruiting of new representatives into the company, the training of sales representatives (both veteran and new), supervision of the day-to-day activities of the representatives and reporting all pertinent information to the district sales manager, as necessary.

7. Ms. Roe worked as a sales manager for respondent until 5 February 1988, when she resigned and resumed a position as sales agent.

8. From 1980 through at least 1986, complainant was an exemplary employee in all respects. She won numerous accolades and awards from respondent and was generally regarded as one of WSL's top revenue producers nationwide.

9. For all times relevant herein, complainant worked out of respondent's Huntington, West Virginia office.

10. Mark Cook, born 14 June 1953, began his employment with respondent in November 1974 as a sales agent. He became a sales manager in 1978 and a district sales manager in 1982, managing respondent's Athens, Ohio office. In May 1986, Cook was transferred to the Huntington office as its district sales manager.

11. As district sales manager of the Huntington office, Mr. Cook supervised a workforce of five sales managers, approximately thirty sales agents and seven clerical workers. From May 1986 until 5 February 1988, complainant was one of the five sales managers and Cook was her immediate supervisor. The other sales managers reporting to the Huntington office during that time period were Robert Hughes, George White, Terry Shirley, and Clinton Galloway, all males.

12. Overall, respondent's Huntington workforce was roughly balanced between males and females and between persons over 40 years of age and those younger than 40. Cook characterized his workers as a close-knit group.

C. Work Relationship Between Roe and Cook

13. Sandra Byrd, who was at all time relevant herein and is currently employed by respondent, testified that when she and Roe were informed that Cook would be the new manager of the office, Roe referred to Cook as a "jerk." For reasons stated infra, Byrd was not a credible witness at hearing and her testimony is given little

weight. The credible evidence indicated that neither Cook nor Roe knew much about the other prior to Cook's transfer to Huntington.

14. In June 1986, after approximately one month as manager of the Huntington office, Cook called Roe into his office for a private meeting. Roe testified that it was after this meeting that her relationship with Cook began to deteriorate. She testified that Cook told her that she was too assertive for a woman and that her assertiveness was hard for other employees to handle. Cook also told her, she stated, that he felt that she was trying to run the Huntington office. For reasons relating to credibility stated *infra*, the testimony of Roe regarding the June 1986 meeting is credited and the testimony of Cook that he did not make such statements is not credited.

15. Roe testified credibly that after the June 1986 meeting, Cook began to treat her differently than he did the male managers. She testified to the following conduct and instances:

(a) The sales agents under her direct supervision were allowed to circumvent her and meet directly with Cook, while other agents met with Cook only in the presence of or with the knowledge of their sales manager.

(b) Cook would not come to her office to get her sales reports, as he did with the male managers, but would take hers from a chalkboard in the conference room.

(c) Cook seldom invited her into his office or went into hers, as he did with the males.

(d) Cook permitted Roe's sales staff to submit their daily sales reports directly to him, while the other agents were required to submit reports to their respective sales manager.

(e) On one occasion Cook screamed at Roe, saying that he "was tired of [her] shit," that she was a liar and that she was self-centered.

(f) Cook would not keep Roe informed of changes or updates in WSL's policies or practices and she would have to obtain such information from the other managers.

(g) Cook would seldom invite her to lunch, while he lunched nearly every day with the male managers.

16. The counter-testimony offered by Cook on the conduct and instances set forth above is discounted as not credible. Cook's testimony contradicted itself regarding Roe's sales agents meeting directly with him. He initially alleged that agents had to raise problems with their manager first, and then later stated that any agent could meet directly with him without first going to his/her manager. Generally, his demeanor on the stand could best be described as evasive and calculating.

17. Roe also testified that another sales manager, Dennis Smith, who is her nephew and still employed by WSL, once had lunch with her to tell her that he had been instructed by Cook not to talk to her. Smith said that Cook felt intimidated by Roe because she was a successful, older woman. Smith denied that such a conversation ever took place. The testimony of Roe on this point is found to be credible and the testimony of Smith is dismissed as not credible.

18. By a preponderance of the evidence, and after a careful determination of credibility, the hearing examiner finds as fact that Mark Cook, feeling intimidated and/or professionally threatened by Emogene Roe, an older woman with outstanding credentials, embarked on a deliberate attempt to isolate her from her staff and undermine her authority.

D. Testimony of Supporting Witnesses

19. Complainant's witness Jean Mead had no apparent interest in the outcome of this hearing and exhibited no bias or prejudice to one side or the other. She was candid, fair and very credible when testifying and her demeanor was of a person interested solely in telling the truth as she observed it. For these reasons, the hearing examiner places great weight on her testimony.

20. Mead was employed by respondent as a sales agent from March 1986 until August 1987. She left the company under friendly circumstances in order to further her education. She was not supervised by Roe during the course of her employment.

21. Mead described Roe as a "true company person" who was always available to help all agents, whether or not they were under her direct supervision. She also referred to Roe as a "real motivator" who "really made me feel good about [the business] because she did."

22. Mead testified that there was a chain of command which required that she take any problems to her immediate supervisor, Dennis Smith, and that if the problem could not be resolved, she

would "go with Dennis to Mark [Cook]." On this point, her testimony corroborated that of complainant and contradicted that of Cook.

23. Mead recalled seeing one agent under Roe's supervision, Sharon Frye, "in Mark's office a lot" without Roe. Again, this corroborated Roe's testimony that Frye was one of her agent's who was allowed to meet directly with Cook.

24. In extremely credible testimony, Mead described the deteriorating relationship between Roe and Cook. "Something happened between Mark and Emogene," she testified.

"I'm not exactly sure when or how. It was kind of a process because when Emogene would walk into that office, when she took a step, you knew she took a step and she walked with a passion and she liked -- she was so enthusiastic about the business and over a process of time, I'm not even sure how long it was, there was this kind of death that happened with Emogene. It didn't happen with the other guys there. Something was happening and I don't know what it was, but she started walking slow. Something was draining and I don't know."

25. The treatment that Cook accorded Roe, said Mead, ". . . was just kind of a coldness, kind of a standoffishness after a while. In the beginning I don't think it was like that." In regard to Cook's interaction with the male managers, Mead testified that, "It was more of . . . it was his more of a friendly attitude with maybe Dennis or George and maybe a little bit more relaxed, and with Emogene there was just always tension when there was any sort of -- I don't want to say confrontation, meeting. It was tense and I felt it."

26. While Mead did not recall any instance in which Cook raised his voice at Roe or directed profanity toward her, she did remember an incident in which Cook, while demonstrating a new sales approach, "made the remark that it would take a man to teach us women how to do this right or how to make money right."

27. Complainant's witness Bill Caudill was employed by respondent as a sales agent from October 1986 through February 1987. Roe was his sales manager.

28. Caudill offered credible testimony that as a sales manager, Roe "was very good. . . She was good in what she done . . . She was always there . . . She did a good job of training me." He described her work style as "always open with everyone."

29. Caudill testified that the only differences he noticed in the way Cook treated Roe as opposed to the male managers were that Roe "wasn't invited out to lunches" and "Mr. Cook did not spend much time with her as a I could see." Caudill's testimony was fair, without any apparent prejudice or bias, and is found by the hearing examiner to be credible.

30. Because they were sales agents and had to spend a majority of their time in the field, Mead and Caudill did not have as much opportunity to observe the interaction between Cook and Roe as some of the managers did.

31. Complainant's witness Robert Alan Hughes was a sales manager and then a sales agent during Roe's employment with respondent. He was discharged on the same day as Roe.

32. Hughes corroborated the testimony of Roe on the following points:

(a) Hughes testified that when he was a sales manager Cook would come to his office every day to get the previous day's sales report, but that he would get Roe's report from the chalkboard in the conference room.

(b) According to Hughes, Cook would not provide Roe with copies of important documents from the home office and that one of the male managers would have to make copies for her.

(c) While Cook was always helpful to him and very congenial, said Hughes, "If Ms. Roe would walk in the door, it was like walking into a refrigerator, I guess is the word. The tone of conversation, everything would just change." (This testimony was consistent with that of Mead.)

(d) Office policy was that sales agents could go to Cook only if their sales manager was with them. He often saw Roe's agents meeting with Cook alone.

(e) On one occasion, in April or May 1987, Hughes heard Cook yell to Roe, "I am tired of your shit."

33. Hughes additionally offered crucial testimony that Cook harbored sexist attitudes towards women. He testified that:

(a) Shortly after Cook arrived at the Huntington office, Cook told him that if it was up to him (Cook) there would be no females in management.

(b) Sometime in 1987, he heard Cook say that women were good for just one thing -- to keep a man from wasting his seed.

(c) That when the women agents once challenged the males to a sales contest, Cook told three of the male managers, "Well,

if it wasn't for the fucking men showing those women how to do it, there wouldn't be any fucking jobs around here."

(d) Cook told him that if "you turned two ladies upside down, they all looked the same." This comment was also heard by Roe, albeit inadvertently.

34. As an admitted close personal friend of Roe and having been discharged by WSL, Hughes' demeanor on the witness stand was closely observed by the hearing examiner. He seemed to answer all questions as best he could. He neither expressed nor exhibited any ill-will against Cook personally and admitted that his demotion and discharge were justified. Balancing his demeanor on the stand versus any possible bias or prejudice in favor of Roe, the hearing examiner finds his testimony to be more credible than not.

35. Respondent's witness James A. Helms is a vice president of WSL in charge of marketing services. From 1985 through 1990 he supervised a division of the company's sales force, which included the Huntington office. He directly supervised Mark Cook.

36. Helms testified that under normal company policy the sales agent would report to the sales manager, not the district manager. In 1987, however, there was a pilot program in Huntington in which at least one sale agent per sales manager would report directly to the district manager. Helms also testified that it was not unusual for a district sales manager to supervise one or two sales agents directly and that it is within their prerogative. Helms' testimony generally supported Roe's testimony that Cook's direct supervision of four of her agents was against company policy.

37. Helms further recalled telling Cook that he would have to supervise two or three of Roe's agents directly because they had failed their state license exams. However, no other witness testified in support of this very important allegation, not even Cook, and it is deemed not worthy of belief. For reasons set forth infra, Helms' testimony is given little weight.

38. Sandra Byrd has been employed by WSL as an agent and manager since 1984. She was supervised by Roe for several years, then assumed Roe's management position in 1988. She has since returned to sales agent status.

39. Byrd testified that she never observed Cook treating Roe any differently than he did the male managers. She also stated that company policy did not prohibit an agent from going directly to Cook with a problem.

40. Byrd recalled the incident in which the women challenged the men to a sales contest, but denied that Cook was infuriated by it or used profanity. Cook, Byrd testified, "stopped the contest because he did not want the men to feel intimidated." Byrd states that, generally, the female agents generated more sales revenues than the male agents.

41. Byrd was hostile and evasive on the stand, exhibiting noticeable dislike of Ms. Roe. Her anger may have stemmed from an incident between the two regarding an alleged forged policy. On the whole, Byrd's testimony is found by the examiner to be less than completely credible and it is afforded little weight.

42. Dennis Smith, a nephew of Roe and a current sales manager for respondent, testified that he never heard Cook raise his voice

or direct profanity to Roe. He believed, however, that there was a "personality conflict" between Roe and Cook.

43. Smith testified that it is normal office policy for an agent to take problems to a sales manager first and not go directly to the district manager.

44. Smith also recalled Roe once telling him that she felt that she was being discriminated against and harassed.

45. Respondent's witness Clinton Galloway, a former sales manager and currently a sales agent with WSL, testified that he did not observe Cook treat Roe any differently than he did the male managers. He further stated, however, that when he was a manager, an agent who wanted to talk to Cook would have to come to him first and then they both would go to Cook's office. He also stated that Cook would come to his officer to get his daily sales report. Galloway has worked for WSL for 27 years.

46. Respondent's witness George White has been employed by WSL for nearly 20 years as a sales agent and currently as a sales manager. White testified that he knew of no act of discrimination taken by anyone at WSL against Roe. He also stated that as a sales manager, sometimes his agents have reported directly to Cook.

47. On cross-examination, White stated that when she worked for WSL, Roe "was an excellent employee" and a "good manager."

48. The testimonies of witnesses Jack Arrowood and Ann Moore were not necessary factors in the determination of this matter and, though reviewed, are given no weight or consideration in these findings.

E. Roe Resigns from Sales Manager Position

49. In or about January 1988 Roe interviewed at WSL's home office in Cincinnati regarding a possible promotion out of the Huntington office. Cook had recommended her for promotion.

50. After her interview, Roe began developing a sales proposal that she intended to make to a customer named Houts. Cook demanded that she turn the Houts account over to him, which she did. She later found out that Cook and a younger male agent visited the Houts' home and made a sale.

51. In early February 1988, after she learned about the Houts' sale, Roe asked Cook what had transpired with the account. Cook became angry, shouting back, "You have it backwards. I am the boss. You don't ask me, I ask you." In a loud voice, he then asked Roe, "Are you taking promotion?" When she responded, "Maybe," Cook said, "I will get rid of your ass one way or the other, by promotion or demotion."

52. After this confrontation, Roe decided to resign as a sales manager and resume agent status, since, "I would not be in his presence as often because a sales rep is working out in the field more."

53. By letter to Cook dated 4 February 1988, Roe resigned her managerial position. She stated in the letter that she could "no longer work under the present conditions as a sales manager under your supervision due to sexual discrimination and harassment."

54. Cook forwarded Roe's resignation letter to his superior at the home office, James A. Helms. With Cook's consent, Helms

approved Roe's transfer to agent status. Cook denied that he had discriminated against or harassed Roe.

55. On or about 24 February 1988, Helms came to Huntington to investigate the charges made in Roe's resignation letter. He interviewed 10 or 11 agents or managers on staff, apparently all in the presence of Cook. He did not interview Hughes, Caudill or Mead.

56. Helms stated that during the course of his interview he could not find evidence to support the fact that Roe had been discriminated against because she was a female. Helms reported back to Roe in early March 1988 about the results of his investigation.

57. Helms was not a credible witness. His answers on examination were evasive and appeared purposely ambiguous. Moreover, his investigation is considered a sham, given that all employees were interviewed in Cook's presence, and it is given no weight.

F. Roe Resumes Working as an Agent

58. On 8 February 1988 Roe resumed work as an agent. Sandra Byrd assumed Roe's management position and became Roe's immediate supervisor.

59. There was considerable testimony regarding several accounts which were removed from Roe's control after she became an agent. Roe alleged that approximately six accounts were removed from her and given to other agents.

60. The policy holder of one of the accounts removed from Roe, Charles Butler, testified that in June or July 1988 he went to respondent's office to inquire as to why Roe was no longer on his account. He stated that during a meeting with Cook, Cook "wanted to know who I wanted to take care of my policies if her contract was not renewed at the end of the year. I told him that I would make that decision when the time came." Butler said that he understood Cook's comment to mean, ". . . she wasn't going to be there after December. He led me to believe that her contract would not be renewed and that I should get somebody else to take care of it."

61. Butler did not know Roe prior to her servicing his policy in 1985. He has since become friends with Roe and her husband. Though their friendship may be a ground for bias, Butler appeared at ease and truthful on the stand and his testimony, therefore, is credited.

62. In November 1987, when Roe was still a manager, WSL introduced minimum performance standards for agents, to become effective on 4 January 1988. The standard required the placing of \$87.78 worth of commissions per agent per week.

63. The minimum performance standards were developed on an average of first-year commissions based on production levels from various geographical divisions. In establishing the minimum performance standards, the company took into account any possible adverse impact they might have on the basis of either the age, sex or race of its many agents. They found the standards to be free of unintended prejudicial impact.

64. To meet the minimum performance standards, an employee had to earn first-year commissions in the neighborhood of only \$5,000. The commissions had to be generated by new business and not renewals.

65. In January 1989 when the minimum performance standards were first enforced against respondent's agents, only two and one-half percent of the sales agents were terminated, or approximately 80 out of 3,100 sales agents. Out of the 80 people terminated, 23 were females and 42 of the 80 were age 40 or over. The company later abandoned the discharge of agents for failure to meet the minimum performance standards. Instead, WSL charged for a portion of their medical benefits.

66. Performance standards were measured on the basis of calendar quarters. The first and second calendar quarters of a year constituted a performance measurement period, and then the third and fourth calendar quarters of the year were a performance measurement period. If the standards were not met after the first measurement period, the agent was placed on probation. If the agent again failed to meet the standards in the second measurement period, he or she was discharged.

67. Cook testified that an agent had to have been employed by WSL for at least 20 out of the 26 weeks in the measurement period in order for the standard to be applied against him or her.

68. Cook also testified that when Roe resumed work as an agent on 8 February 1988 he never mentioned to her that the first measurement period (January through June) would apply to her.

69. Despite the fact that Roe would be working 20 or more weeks in the first measurement period, on 5 April 1988 Cook wrote the following letter to his supervisor, Helms:

"Since Ms. Roe has been in service less than six months, the first six-month period should not be used in calculation for her Minimum Performance Standard. Please advise."
(Complainant's Exhibit 9).

70. Roe testified that in April 1988 Cook showed her his letter to Helms and then made a copy for her. Cook's testimony regarding this incident was extremely evasive and he exhibited a great degree of nervousness. He at first denied showing her the letter, but then stated, "I may have given her a copy of that letter. I would not deny that." The testimony of Roe on this point is credited.

71. Cook testified that he later learned from the home office that the January through June period would be applied against Roe. When asked if he informed Roe about the home office's decision, Cook again became evasive, nervous and rambling: "Only if she had asked me if that period applied. If I wrote that letter on my own without her knowledge, I would not have informed her of my phone call from the home office, but if she had asked me to write that letter, I would have then as soon as I received the answer told her." In short, he said that did not remember. Roe testified that Cook never informed her of the home office phone call or that the first six-month period would be enforced against her. Based on an assessment of credibility, the testimony of Roe is credited.

72. The minimum performance standard was next raised with Roe in July 1988. On 20 July, Cook and Byrd met with Roe and asked her

to sign a document (Respondent's Exhibit 4) acknowledging that she was being placed on probation for failing to meet the minimum performance standards from January through June. According to Roe, Cook stated that, "I need you to sign this. It doesn't mean anything, but I need your signature on it for to continue employment." Roe skimmed the document and signed it.

73. Cook testified that when he showed Roe the probation document, she "hesitated for a few minutes and I said, I informed her that if she did not sign the form, she could be subject to termination. I would return the form back to the home office unsigned. It would then be a corporate decision. She signed the form." Cook added that Roe "skimmed across" the form and gave no indication that she understood its contents.

74. The hearing examiner finds it more likely than not that the 20 July incident did not disabuse Roe of the belief, formed as a result of being shown the 5 April letter, that the first six-month measurement period did not apply to her. Her testimony of the event is credited.

75. In October or November 1988 Cook had a meeting with all agents who were still not meeting the performance standards. At the meeting were Cook and agents Hughes, Williams and Anthony. Cook apprised each agent of how much business he or she would have to write by December in order to remain in respondent's employ. He also offered to assist them in meeting the standards. Roe knew of the meeting and its purpose, but had not been asked or directed to attend. Since she had not been required to attend the meeting, Roe's beliefs that the first measurement period did not apply to

her and that she was not in jeopardy of being fired were reinforced. Cook's testimony that such a meeting did not take place is unworthy of belief.

G. Roe Is Terminated

76. On or about 20 January 1989, Cook summoned Roe, Hughes (a male under 40), Anthony (a female under 40) and Williams (a male under 40) to his office. He informed them, as a group, that since they had not met the minimum performance standards for a second measurement period their services were being terminated.

77. Roe's response to Cook's statement was, "Mark, does this mean me?" Hughes testified that Roe asked this question in a very shocked and surprised tone of voice. Cook answered, "Yes, it does."

78. Roe testified credibly that this January 1989 meeting was the first time she realized that her job was in jeopardy and that the January through June measurement period was being applied against her.

79. It is undisputed that Roe did not meet the minimum performance standards from either January through July or August through December 1988.

80. Roe testified that even though she was an experienced and successful agent, she was not able to meet the minimum performance standards because of a hostile work environment in that she was humiliated at every opportunity by Cook, accounts were taken away from her and given to other agents, and, she alleged, she was

discouraged, not knowing how many other accounts would be taken away from her.

81. Even if the six accounts which Roe claimed were taken away from her and given to another agent had not been taken away, she still would not have met the minimum performance standards.

82. During all times relevant herein, WSL had a written policy against sexual discrimination or sexual harassment, which included a procedure for having any such complaint addressed. The policy also included harassment or discrimination on the basis of age.

83. After Roe resigned as a sales manager, Sandra Byrd, a 42 year old female, was promoted to her position. At the time of hearing, however, Ms. Byrd had resumed her previous status as sales agent and George White, a male over age 40, was promoted to sales manager. As of the December 1990 hearing, the entire sales management team was male.

H. Credibility

84. On the whole, weighing the manner of testifying of all of the witnesses, their apparent candor and fairness, apparent prejudice or bias, and the extent to which one's testimony was either supported or contradicted by other witnesses, the testimony in support of the complainant is found to be more worthy of belief than that proffered by respondent. The testimonies of Cook, Byrd and Helms, in particular, are found to be unworthy of belief.

I. Damages

85. Based on the credible evidence of record, from 1985 through 1987 the complainant earned the following income as a sales manager:

Annual Income 1985:	\$46,383.00
Annual Income 1986:	\$54,656.42
Annual Income 1987:	\$39,608.60

86. In 1988, after her resignation as sales manager, Roe's annual income as a sales agent was \$17,869.30. Under normal circumstances, an agent of Ms. Roe's experience and talent would earn as much income, if not more, as a sales manager.

87. In 1989, the year she was discharged, Roe earned \$535.19 from WSL and \$284 profit from self-employment.

88. In 1990, Roe earned \$3,650.00 in wages from her current employer and \$500 profit from self-employment.

89. Using her 1987 income as a sales manager as a benchmark, and deducting her earned income for each respective year, the following calculations indicate the back pay due complainant as a result of respondent's unlawful discriminatory acts:

(a) For 1988:	\$39,608.60
	<u>-17,869.30</u>
	\$21,739.30
(b) For 1989:	\$39,608.60
	<u>- 819.19</u>
	\$38,789.41

(c) For 1990:	\$39,608.60
	<u>- 4,150.00</u>
	\$35,458.60
TOTAL BACK PAY DUE: (THROUGH 1990)	<u>\$95,987.31</u>

90. Complainant is currently employed and earns a salary of \$625 per week. In 1987, her average weekly salary (\$39,608.60 ÷ 52) was \$761.70. Complainant, therefore, continues to suffer a loss of earnings in the amount of \$136.70 per week.

91. Complainant made no request to be compensated for such lost benefits as health insurance, dental insurance, life insurance, vacation or retirement benefits, and for that reason, none are calculated or awarded.

92. Respondent offered no evidence that complainant had unreasonably failed to mitigate her damages.

93. As a result of respondent's discriminatory conduct, complainant suffered considerable emotional distress, humiliation and loss of personal dignity.

J. Summary of Facts

94. Complainant Emogene Roe, a female over the age of 40, is a member of a protected class under the West Virginia Human Rights Act.

95. Complainant was subject to harassment and a hostile working environment consisting of threatening, demeaning, humiliating and manipulative conduct by her supervisor, Mark Cook.

96. The harassment complained of was based upon Roe's sex.

97. The harassment complained of affected a term, condition or privilege of employment.

98. The supervisor, Mark Cook, acted within the scope of his employment.

99. Complainant's gender played a motivating and substantial part in the decision to discharge Roe in January 1989.

100. Respondent's defenses that such harassment did not occur, or was minor or unintentional, or did not play a motivating or substantial part in the decision to discharge Roe, are rejected as not supported by the evidence.

101. The respondent intentionally discriminated against Emogene Roe because of her sex, and not because of her age, in violation of W. Va. Code § 5-11-9(a)(1), and is liable to her for back pay, incidental damages and such other relief as allowed by law.

II. DISCUSSION OF LAW

A. THE HRA PROHIBITS HARASSMENT IN THE WORKPLACE ON THE BASIS OF SEX.

The seminal purpose of federal and state civil rights laws is "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

In Westmoreland Coal Co. v. Human Rights Commission, 382 S.E.2d 562 (1989), the West Virginia Supreme Court of Appeals recognized that sexual harassment in the workplace is the type of artificial and unnecessary barrier which the Human Rights Act (HRA) was specifically designed to prohibit. Though Westmoreland dealt with physical contact of a lewd and lascivious nature that was forced upon a female employee as a condition of continued employment, various federal courts of appeals have recognized that harassment that is non-sexual, but still clearly based on gender, may also be actionable. Given our Court's instruction to seek guidance from federal court interpretations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., when analyzing new issues arising under the HRA, it is acceptable to apply the federal court decisions as an aid in determining whether respondent violated the HRA.

In the leading case on point, McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985), the circuit court held that in cases involving sexual harassment:

The relevant legal question is whether such harassment comprised a "condition of employment." If it does -- that is, if it is sufficiently patterned or pervasive to comprise a condition [citation omitted] . . . and if it is apparently caused by the sex of the harassed employee -- that is, if "but for her womanhood" [citation omitted] the harassment would not have occurred, then such harassment violates Title VII.

765 F.2d at 1138.

In order for the harassment or unequal treatment to be illegal, said the McKinney court, it need not "take the form of sexual

advances or of other incidents with clearly sexual overtones. . . Rather, we hold that any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII." Ibid.

The McKinney definition of sexual harassment as including "any disparate treatment" based on sex, whether sexual or not, 765 F.2d 1139, has been adopted by the Eight Circuit (Hall v. Gus Construction Co., 842 F.2d 1010 (1988)), the Tenth Circuit (Hicks v. Gates Rubber Co., 833 F.2d 1406 (1987)), and the Eleventh Circuit (Bell v. Crackin Good Bakers, Inc., 777 F.2d 1497 (1985)).

As succinctly stated in Hall, under the McKinney definition, "predicate acts underlying a sexual harassment claim need not be clearly sexual in nature." 842 F.2d at 1014. "Intimidation and hostility toward women because they are women," said the court "can obviously result from conduct other than explicit sexual advances." Ibid. Since Title VII "evinces a congressional intention to define discrimination in the broadest possible terms" [citations omitted]; non-sexual conduct which is "sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment" gives an employee a cause of action for unlawful sex discrimination. 842 F.2d 1014-1015.

In Bell v. Crackin Good, the Eleventh Circuit outlined the five elements needed to establish a Title VII violation based upon a hostile working environment: (1) the employee belongs to a protected group; (2) she was subject to unwelcome sexual

harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

An employee is "under no obligation," said the Bell court, "to adduce proof of sexual advances, requests for sexual favors [or] other verbal or physical conduct of a sexual nature." 777 F.2d at 1503. Harassment is actionable if the objectionable conduct consists of "threatening, bellicose, demeaning, hostile or offensive conduct by a supervisor in the workplace because of the sex of the victim of such conduct." Ibid.

Applying the McKinney-developed analysis of sexual harassment to the facts at bar, it is clear that complainant has established a violation of the HRA. There was ample evidence adduced at hearing that Cook harassed Roe by treating her measurably differently than he did the male managers. Cook would not go to her office to pick up the daily sales reports, would not keep her abreast of changes in company policies and directives, allowed her agents to circumvent her authority, yelled and cursed at her, and treated her with such personal coldness and disdain that it was noticed by other agents. None of the male managers were treated in such a manner.

It is similarly clear that Cook's harassment of Roe was because of her sex. There was credible testimony that within a month after he assumed control of the Huntington office, Cook informed Roe that she was too aggressive for a woman and,

additionally, he made the statement to Hughes that he preferred to have an all-male managerial force. Moreover, as supporting evidence complainant offered credible testimony that Cook made crude and offensive comments against women in general and felt threatened by women who were talented and successful. His stereotypical attitude toward women was clearly and convincingly proven.

It was also shown that Cook's harassment of Roe affected her "state of psychological well being at the workplace," Bell, at 1503, a quality which has been generally recognized by the courts as a term, condition or privilege of employment. See, e.g., Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). Indeed, the harassment became so bad, culminating in the Houts incident, that Roe felt it necessary to resign her management position and resume agent status so as to diminish her day-to-day contact with Cook.

Finally, Roe showed that Cook's conduct was "sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment," Hall, 842 F.2d at 1014, beyond which any "reasonable woman" should be required to endure. Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987). Here, as in Bell, there was a plan or scheme by a supervisor to force Roe to resign; Cook yelled at her; he humiliated her and undermined her authority; he screamed that he was "tired of her shit"; Cook told at least one other manager not to associate with her; and Cook reserved only for Roe a contempt and anger so chilling that others

observed and felt it. Cook's conduct was constant, not isolated, and constituted a clear pattern of harassment.¹

Respondent's defenses to complainant's allegations of sexual harassment were that the conduct complained of did not occur or was the result of a "personality conflict." Based on a determination of credibility, the hearing examiner finds that Cook's harassment of Roe did occur as she and her witnesses described it. The evidence of Cook's attitudes toward women, in general, and Roe in particular, leads ineluctably to the conclusion that the roots of the conflict were gender based and did not stem from a simple clash of personalities.

¹The Bell court summarized the totality of the harassment in that case as follows:

We have a situation where a female employee holding the position of captain in a packing department of a plant was the only female with several males in similar positions who were treated entirely differently than she was, the difference being exhibited by harassing conduct by her supervisor, the plant not having had a female captain before the plaintiff and statements by the supervisor that he would try to run her off if he could. This was then combined with the fact that the plant manager had previously found her qualified to become a supervisor and had promised her the next supervisory job but had then placed a male supervisor in the slot instead.

777 F.2d at 1502.

B. SEX WAS A MOTIVATING FACTOR IN
RESPONDENT'S DISCHARGE OF ROE.

Respondent argues that even if Roe was subjected to a sexually hostile work environment as a manager, she was discharged for a legitimate and nondiscriminatory reason, i.e., failure to meet WSL's minimum performance standards, and, therefore, her termination did not violate the HRA.

Using the "mixed motive" formula set out in Price Waterhouse v. Hopkins, 490 U.S. ___, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), and cited approvingly in West Virginia Institute of Technology v. Human Rights Commission, 383 S.E.2d 490 (1989), this defense must be rejected.

In Price Waterhouse, the U.S. Supreme Court held that ". . . once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." 104 L. Ed. 2d at 284.

Here, complainant convincingly showed that gender was a motivating factor in the employment decisions leading up to her resignation as a sales manager, and beyond that to her period of work as a sales agent and her discharge.

After Roe resumed work as a sales agent, it is clear that Cook continued in his efforts to drive her out of the office. He removed accounts from her control and assigned them to other agents; he intentionally misled Roe through use of the April letter to believe that the first measurement period (January

through June 1988) would not be applied to her; he did not tell her that the home office had supposedly ordered him to apply the first six-month period; he excluded her from the November 1989 meeting that would have necessarily tipped her off that her job was in jeopardy; and, finally, he broadly hinted to a customer, Bailey, that Roe would be gone by the time his policy came up for renewal. The totality of Cook's conduct leads to no conclusion other than that he continued to harass Roe because of her sex up to and including the date of her discharge.

Once complainant showed that sex was a motivating factor in the decision to fire her, the burden shifted to the employer to prove that it would have made the same decision even if it had not allowed gender to play such a role. This, WSL could not do.

WSL's argument that both men and women were discharged for failure to meet minimum performance standards cannot stand as a viable defense in this case. None of the other fired employees (Hughes, Anthony and Williams) were treated comparably to Roe. None of them were perceived by Cook to be a threat to his position. None were subjected to consistent and severe harassment. None were fed misinformation as to whether the first measurement period applied to him or her. None had accounts removed from their control. In fact, Hughes and Williams benefitted from the transfer of accounts since Cook, after he removed them from Roe, assigned at least one each to Hughes and Williams in order to help them meet the minimum standards. Similarly, Hughes, Williams and Anthony, but not Roe, were counseled and warned in November 1988.

In summary, WSL has produced no evidence by which the hearing examiner could conclude that it would have discharged Roe even if it had not allowed gender to play a role in its decision. On the contrary, the evidence showed that from one month after he assumed control of the Huntington office, Cook went on an unabated mission, motivated by Roe's sex, to drive her from the office.²

C. COMPLAINANT IS ENTITLED TO A MAKE WHOLE REMEDY.

The complainant having shown unlawful discrimination, and the respondent being liable for Cook's action since he acted within the scope of his employment, Paxton v. Crabtree, et al., No. 19615 (W. Va. S. Ct. Dec. 6, 1990), the hearing examiner is empowered to award such relief as will effectuate the purposes of the Human Rights Act and "make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). The injured party is to be placed, as near as possible, in the situation which she would have occupied had she not been discriminated against.

Here, Ms. Roe, under the "make whole" rule, is entitled to the following relief:

1. Back pay in the amount of \$95,987.31, with prejudgment interest on back pay, Frank's Shoe Store v. West Virginia Human

²The fact that Roe was replaced by Byrd, another older female, is not, in and of itself, a defense to a charge of discrimination. Such evidence is probative but not conclusive of nondiscrimination. 2 Larson, Employment Discrimination, § 50.32(e). Here, this evidence was overwhelmingly outweighed by evidence showing discrimination.

Rights Commission, 365 S.E.2d 251 (1986), at the rate of ten percent per annum; Bell v. Inland Mutual Ins. Co., 332 S.E.2d 127 (1985).

2. Incidental damages in the amount of \$2,500.00. Pearlman Realty Agency v. West Virginia Human Rights Commission, 239 S.E.2d 145 (1977); Bishop Coal Company v. Salyers, 380 S.E.2d 238 (1989).

3. Reinstatement into the next available agent's position, with front pay in the amount of \$136.70 per week until such time as complainant is actually placed in such position. An award of a wage differential pending reinstatement has long been a recognized remedy in civil rights cases. See, e.g., EEOC v. Korn Industries, 662 F.2d 256 (4th Cir. 1981); Taylor v. Teletype Corp., 492 F. Supp. 405 (E.D. Ark. 1980), modified, 648 F.2d 1129 (8th Cir. 1981), cert. denied, 102 S. Ct. 515 (1981); and Mays v. Motorola, Inc., 22 F.E.P. 803 (N.D. Ill. 1979). Complainant is additionally entitled to be considered for promotion to the next available sales manager position and, in the event she is not selected, respondent shall be required to identify each and every reason that someone else was selected over her. Complainant is also entitled to retroactive seniority from her date of discharge.

III. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W. Va. Code § 5-11-3(d).

2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W. Va. Code § 5-11-3(a).

3. On or about 30 June 1989, the complainant filed two verified complaints with the West Virginia Human Rights Commission properly alleging that respondent had engaged in one or more unlawful discriminatory practices within the meaning of W. Va. Code § 5-11-9. Said complaints were timely filed within 180 days after the alleged act of discrimination and the West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to the authority granted it by W. Va. Code § 5-11-8, 9 & 10.

4. The West Virginia Human Rights Act is violated when an employer requires an employee to submit to severe or pervasive harassment because of her sex and which affects a term, condition or privilege of employment.

5. The complainant proved by a preponderance of the evidence each of the following points:

- (a) she belongs to a protected group;
- (b) she was subject to unwelcome sexual harassment;
- (c) the harassment complained of was based upon sex;
- (d) the harassment complained of affected a term, condition or privilege of employment; and
- (e) the employer knew or should have known of the harassment in question and failed to take prompt remedial action, or that the harasser was a supervisor acting within the scope of his employment.

6. The complainant proved that harassment because of her sex continued into the period after she resigned her position as a sales manager and that her sex was a motivating factor in the decision to discharge her.

7. The respondent failed to prove that it would have discharged Roe in January 1989 even if her gender had not been allowed to play such a role.

8. In carrying out his scheme of harassment against Roe, Cook at all times acted within the scope of his employment.

9. WSL was made aware of Cook's harassment of Roe and failed to take prompt remedial action to stem or deter it.

10. The charge that respondent discriminated against Roe because of her sex, Case No. ES-2-90, is sustained.

11. The charge that respondent discriminated against Roe because of her age, Case No. EA-1-90, is dismissed.

IV. REMEDY

The complainant having proven her case by a preponderance of the evidence, she is, therefore, entitled to the following relief:

(1) Back pay in the amount of \$95,987.31, plus interest at the rate of ten percent per annum;

(2) Retroactive seniority to her date of discharge;

(3) Reinstatement to the next available sales agent position in respondent's Huntington office, with front pay to be paid to complainant in the amount of \$136.70 per week until such time as she is reinstated;

(4) Upon reinstatement, complainant shall be given the opportunity to apply for the first available sales manager position and, if she is not selected, the respondent shall advise the Commission in writing as to each and every reason the person actually selected was chosen over her;

(5) Incidental damages in the amount of \$2,500 for the humiliation, embarrassment, and loss of personal dignity suffered by complainant as a result of respondent's unlawful acts;

(6) Respondent is ordered to cease and desist from unlawfully discriminating on the basis of sex in its employment decisions, and shall file an annual report with the West Virginia Human Rights Commission detailing the gender composition of its workforce and of its hires and promotions;

(7) No objection having been filed to complainant's petition for attorney fees and costs, the same are hereby awarded in the amounts requested of \$11,053.25 in attorney fees and \$473.95 in costs.

Respectfully submitted,



MIKE KELLY
HEARING EXAMINER PRO TEMPORE