



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Herman H. Jones
Executive Director

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RETURN RECEIPT REQUESTED

December 27, 1996

Barbara S. Smith
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The Greenbrier Hotel
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ATTN: Craig Phillips
Personnel Manager

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Re: Smith v. The Greenbrier Hotel
ESA-169-92

Dear Parties:

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

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with

the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

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

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

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

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

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before 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 judge on remand.

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

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

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

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

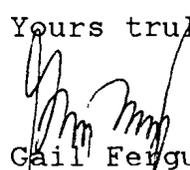
10.8.4. Supported by substantial evidence on the whole record; or

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

10.9. In the event that a notice of appeal from 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 the executive director of the commission at the above address.

Yours truly,



Gail Ferguson
Administrative Law Judge

GF/mst

Enclosure

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BARBARA S. SMITH,

Complainant,

v.

DOCKET NUMBER: ESA-169-92

CSX, THE GREENBRIER HOTEL,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on May 3-7, 1994 and June 14-18, 1994, in Greenbrier County, West Virginia, before Gail Ferguson, Administrative Law Judge. Briefs were received through October 14, 1994.

The complainant, Barbara S. Smith, appeared in person and by counsel, Carol Scotti, Esq. The respondent, The Greenbrier Hotel, was represented by its Personnel Director Craig Phillips and by counsel, Arch Stokes, Esq., Maggie Stokes, Esq., Cassandra Kirk, Esq., admitted pro hac vice and by James Rowe, Esq.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and

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

A.

FINDINGS OF FACT

1. The complainant, Barbara Sweetwood Smith, filed amended complaints in this matter alleging that she was discharged from employment on May 15, 1991 as a accounts receivable clerk for the respondent based upon discrimination due to age and sex, in that her job functions were undertaken by persons under age forty and in that comparably situated males in whose performance respondent was dissatisfied were given lateral transfers rather than being terminated.

2. The respondent was dilatory in providing responses to complainant's discovery request, particularly as the information sought related to respondent's records for other of its employees.

3. Based upon the ambiguity in defining accounts receivable personnel, the respondent was ordered to provide personnel records for the accounting department as a whole.

4. Respondent was ordered to provide private payroll information for certain persons who had been demoted, had their positions eliminated or were terminated as a result of the respondent's downsizing.

5. Respondent had no organizational structure and the distinction between lead persons, supervisors and managers was therefore vague to anyone trying to ascertain equivalency of positions with respect to the complainant's position with respondent.

6. Respondent was found to have inadequately provided the ordered discovery and sanctions were imposed consisting of an order that the information had it been provided, would support the designated claim of complainant insofar as the issues of salary are concerned and that respondent would not be permitted to put on any evidence as it relates to sex discrimination, insofar as salaries and lateral transfers are concerned.

7. Complainant attempted to demonstrate that similarly situated males with whose performance respondent was dissatisfied, or whose positions were eliminated, would be transferred laterally rather than terminated.

8. As the complainant has been impeded in discovering the information as to who these similarly situated males might be or the

nature of what respondent characterized as lateral transfers, it is taken as fact that other males with similar length of service and positions as complainant were given the opportunity to laterally transfer to other positions with respondent whenever there was a problem with performance or downsizing in those positions the males held prior to the lateral transfers.

9. The complainant, Barbara Sweetwood Smith, is a female.

10. The complainant was born October 5, 1934, and was over the age of forty at the time of the alleged discriminatory actions forming the basis of the complaint.

11. Respondent, CSX, The Greenbrier Hotel, is a resort facility located in White Sulphur Springs, West Virginia which provides lodging and other accommodations and services to its guests, patrons and other clientele. Ted Kleisner is its president and Craig Phillips its personnel director. Respondent is a major employer in the Greenbrier County area. The Greenbrier Hotel enjoys an excellent reputation as a five star facility.

12. The complainant began work with the respondent as a clerk-typist in its auditing department in February of 1957, and was promoted to the position of typist and assistant in the accounts receivable department in May of 1960.

13. The complainant resigned her employment with the respondent in August of 1961, when she left the state with her family. She returned to work with the respondent again in March of 1972 and became accounts receivable bookkeeper in June of that year in the accounting department.

14. During her tenure with the respondent, complainant performed at one time or another all accounts receivable functions with the exception of city ledger. Complainant's specific areas of responsibility included: guest inquiries; delinquent accounts and collections; executive discounts; and special billing. The complainant's duties involved the processing of hundreds of thousands of dollars in checks daily.

15. Management decision making authority in the accounting department rested with Chuck Coughlin, the department head and respondent's comptroller.

16. Prior to 1984, respondent relied on the complainant's skill and expertise in performing its accounts receivable functions. During this period, the complainant was given carte blanche authority by Mr. Coughlin and other supervisors to perform her duties. Any attitudinal problems, real or perceived, were overlooked by respondent.

17. Prior to 1984, the complainant was never counseled or otherwise advised that her work performance was below standard.

18. Two of complainant's coworkers, Rita Kincaid and Michelle Lightner, both of whom had worked with complainant for more than five years, testified that the complainant was uncooperative, rude and arrogant, which for them created a tense and stressful work environment.

19. Ms. Lightner further testified that it was common knowledge that management knew the complainant was difficult to work with as both she and Rita Kincaid had complained about complainant to management.

20. In August of 1984, respondent hired Larry Mazey as assistant comptroller to update its accounting functions, including all accounts receivable tasks performed by the complainant. Mr. Mazey who had a college degree in accounting and 18 years' experience became the complainant's supervisor.

21. At the time Mr. Mazey arrived in the department, complainant was the lead person in accounts receivable. The complainant's immediate past supervisor, Ron Applegate, had been killed in an automobile accident.

22. The first time Larry Mazey met complainant, he asked to see how she balanced her receivables, complainant told him, "Chief, that's your job, not mine. They have never been in balance and they never will."

23. Throughout the early years of complainant's employment, the accounting functions she performed were carried out manually, without computers, resulting in accounts receivable being consistently out of balance.

24. Following the arrival of Mr. Mazey in 1984, computers were introduced which could accurately track payables, receivables and cash flow. Respondent also began to upgrade and modernize its operations.

25. Shortly after his arrival, Mr. Mazey began to take away the complainant's authority to make independent decisions and began to limit complainant's access to management and others in position of authority.

26. Prior to August of 1984, there were no written complaints or adverse entries of any kind in complainant's personnel file.

27. Prior to December of 1990, complainant had never been laid off during the off-season since returning to work for the respondents in 1972.

28. From the time Mr. Mazey arrived at The Greenbrier he had repeated discussions with complainant about her work performance and attitude.

29. Between 1986 and 1987 there were two customer complaints lodged with respondent about the complainant's negative attitude while discussing billing accounts.

30. In the mid 80's, respondent discovered that thousands of dollars of revenue were lost because of inadequate auditing and collection practices. These losses were attributed to the complainant's failure to perform her duties.

31. In September, 1986, Mr. Mazey considered complainant to be a negative morale factor in the "team work atmosphere" in the accounting department.

32. By September, 1986, Mr. Mazey had concluded that complainant, because of her work performance and attitude, was inappropriately placed in the accounting department.

33. In September, 1986, Mr. Mazey believed that accounts receivable, because it handled and processed approximately 50 million dollars annually, was a critical area which was misstaffed because of complainant.

34. In April of 1987, respondent transferred Vickie Quick into accounts receivable. Ms. Quick then worked with the complainant as her supervisor.

35. According to respondent, Ms. Quick was brought into accounts receivable to monitor adjustments, to make sure that write-offs were properly done and not excessive and to perform end of month tasks.

36. Respondent has a policy of locating alternate jobs within its operation for employees who need to be reassigned because of ill-suitedness for incumbent positions.

37. In 1988, Larry Mazey located a possible opening for the complainant in its head waiter's office as a secretary.

38. The complainant interviewed for the position in the head waiter's office, but turned it down because "she would not have enjoyed working with the people that I would have had to associate with."

39. Larry Mazey nor any of the respondent's management personnel had indicated to complainant that she should take the position in the head waiter's office because she would not have a position any longer in accounts receivable. Mr. Coughlin assured her that her job was secure.

40. According to respondent, complainant made frequent mistakes in accounting both before 1989 and after 1989, when the Flagler interface software was installed in the computer system.

41. Six months before the Flagler system was installed in 1989, Ms. Quick began monitoring everything that went through receivables. She found numerous times where cash was misapplied and adjustments were made the wrong way by complainant.

42. Ms. Quick scheduled the accounts receivable employees for training on the new Flagler system in January, 1989. The complainant

did not receive the same degree of initial training as the other employees. The complainant was the last person to receive a computer terminal.

43. Complainant admitted she did not understand the new Flagler software system.

44. In March 1989, two months after installation of the new Flagler system, complainant had so confused the input that Ms. Quick concluded there were major problems.

45. Shortly after the computer problem in March, 1989, Ms. Quick sat for three-and-a-half hours in complainant's office and went over with her every procedure, every transaction code, every adjustment that could be made, maintenance, and all other features of the system. Ms. Quick had not had to do this with any other employee.

46. Complainant continued to make mistakes and Ms. Quick, on several days, had to stop what she was doing, go into the system, and fix the failure to balance before rolling the date.

47. Ms. Kincaid went to Ms. Quick's office almost on a daily basis upset about complainant's attitude and inability to perform.

48. Ms. Lightner went to Ms. Quick's office approximately once per week upset about complainant's attitude and inability to perform her job duties.

49. Ms. Quick expressed to Mr. Mazey frequently that complainant should not be in the accounting area because Ms. Quick was having to spend hours every day trying to get accounts receivable in balance.

50. Respondent maintains that it was not able to transfer the complainant to another department because the complainant's negative attitude was well known and therefore no other department wanted her.

51. According to respondent, many of complainant's duties were taken away by respondent due to problems with her performance and with her difficulty grasping the new Flagler computer system necessary to balance accounts receivable. These duties were assumed by Ms. Quick or delegated to Ms. Lighter and Ms. Kincaid.

52. According to respondent, by Spring of 1990, because of her inability to perform efficiently and up to standards, complainant's responsibilities had shrunk to include only answering guest inquiries and some applications of cash which required supervision.

53. Because of the complainant's limited duties and with seasonal slowdown in December, 1990, Ms. Smith was laid off. At the time of her layoff, the complainant was 52 years old. In December of 1990, the complainant was earning \$8.91 per hour with respondent.

54. Respondent has a policy and practice of first promoting and transferring from within before going outside to hire.

55. On May 14, 1991, respondent notified complainant that she was terminated because it was downsizing and restructuring accounts receivable and therefore had abolished her position.

56. At the time of her termination the complainant's annual earnings were \$19,281.60. The approximate annual value of benefits provided by respondent to complainant was \$5,784.48.

57. Complainant had unreimbursable medical bills after her termination by respondent which would have been covered by health

insurance provided by respondent in the approximate amount of \$5,389.00

58. Neither at the time of complainant's layoff or at any time subsequent did the respondent inform complainant of any job openings or offer her an alternative position in any of its departments.

59. The complainant suffered embarrassment, humiliation, loss of dignity and loss of personhood because of respondent's actions.

60. When respondent was dissatisfied with the performance of similarly situated male employees, it kept them on the payroll rather than terminating them.

61. After complainant's layoff and later termination, Mr. Mazey was responsible for the hiring of several younger employees to perform various accounting functions, some of which had at one time or another been performed by the complainant.

62. In December of 1990, Scott Gilbert, a male relative of respondent's president, came to work in the accounting department. Mr. Gilbert was a management trainee who was scheduled, after learning the various functions of the accounting department, to work toward a management position at two other seasonal properties owned by respondent. Mr. Gilbert was 23 years old.

63. In the summer of 1991, Laura Beth Dodson, a college intern worked in accounting learning all aspects of the accounting department, included but not limited to, receivables, payables, city ledger, collections, quest inquiries and general accounts. Ms. Dodson was approximately 21 years old.

64. Cindi Knight, a 26 year old female, was transferred into the credit card classification in June of 1991. Ms. Knight was computer proficient.

65. Employees in the credit card classification were required to manage between 28 and 30 million dollars annually through a highly computerized case management function.

66. Beginning in August of 1991, Mr. Mazey hired four more employees to work in the accounting department, all considerably younger than the complainant.

67. Deidre Dixon was hired into the accounting department by Mr. Mazey in August of 1991. Ms. Dixon, who had a four year degree in accounting, floated the department learning all aspects of accounting, including accounts receivable, accounts payable, city ledger, credit cards and revenue control. Ms. Dixon was 23 years old.

68. In March of 1992, Mr. Mazey hired Kathy Sealey who also had a four year degree in accounting to work in the credit card classification. Ms. Sealey was 23 years old.

69. Also in March of 1992, Sandra Brinley was hired to work in the area of general accounts, a system Mr. Mazey initiated to insure that the needs of convention guests were met and to handle guest inquiries regarding billing. Ms. Brinley was 20 years old.

70. Finally in May of 1993, Angie Deskin, a 21 year old transfer from the shop area was hired to work in general accounts by Mr. Mazey. Ms. Deskin did not meet the performance standards assigned for the task and was not recalled from a layoff. At the time of her layoff, Ms. Deskin was a probationary employee in the accounting department.

71. The complainant, Barbara Smith, is not equipped by virtue of her improficiency in computer skills to return to the accounts receivable department at the Greenbrier Hotel.

72. The complainant is qualified for lateral placement in a comparable position in one of the other departments respondent operates.

73. The complainant's attorney expended 399.50 hours in the preparation and litigation of this matter, as set forth in Appendix A.

74. The normal hourly rate of complainant's attorney is \$125.00 per hour.

75. The complainant's attorney fees in this matter are \$49,937.50, as supported by counsels fee affidavit, hereto attached as Appendix A. (399.50 hours multiplied by the hourly rate of \$125.00).

76. Close scrutiny of the record in this matter compels a finding that the lodestar computation not be augmented.

77. The complainant's costs in this matter are \$299.76 as supported by her cost statement hereto attached as Appendix A.

B.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. WV Code §§5-11-1 to -19. Section 5-11-9(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect

to compensation, hire, tenure, terms, conditions or privileges of employment...."

The term "discriminate" or "discrimination" as defined in WV Code §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of...sex... or age.... WV Code §5-11-9. This includes equal opportunity with regard to hiring. WV Code §5-11-9.

Given this statutory framework, to recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful sex or age discrimination, must ultimately show by a preponderance of the evidence that:

(1) the employer excluded her from, or failed or refused to extend to her, an equal opportunity;

(2) sex or age was a motivating or substantial factor causing the employer to exclude the complaint from, or fail or refuse to extend to him, an equal opportunity, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); and

(3) the equal opportunity denied a complaint is related to any one of the following employment factors: compensation, hire, promotion, tenure, terms, conditions or privileges of employment.

A discrimination case may be proved on a disparate treatment theory or by a disparate impact theory. Guyan Valley Hospital, Inc. v. WV Human Rights Commission, 382 S.E.2d 88 (1989). A disparate treatment case requires proof that the decision maker acted upon an illegal motive. Disparate impact has no "intent" requirement, but rather a showing that a facially neutral employment practice has a disproportionate adverse impact on a protected class.

There are three different analyses which may be applied in evaluating the evidence in a disparate treatment discrimination case. The first, and most common, uses circumstantial evidence to prove discriminatory motive. A complainant may show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and adopted by our Supreme Court in Shepherdstown V.E.D. v. WV Human Rights Commission, 309 S.E.2d 342 (1983). The McDonnell Douglas method requires that the complainant first establish a prima facie case of discrimination. The burden of production then shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the complainant may show that the reason proffered by the respondent was not the true reason for the employment decision, but rather a pretext for discrimination.

Cases analyzed under the McDonnell Douglas test often turn on the credibility of the explanation offered by the respondent for its decision. The term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." WV Institute of Technology v. WV Human Rights Commission, 383 S.E.2d 490, 496 (1989). Where pretext is shown, discrimination may be inferred, though discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks.

In Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (1987), the West Virginia Supreme Court of Appeals proposed a general test in establishing a prima facie case of employment discrimination

in situations where McDonnell Douglas is unadaptable. In order to make a prima facie case, there must be an offer of proof:

- (1) that the plaintiff is a member of a protected class;
- (2) that the employer made an adverse decision concerning the plaintiff; and
- (3) that, but for the plaintiff's protected status, the adverse decision would not have been made. Conaway 358 S.E.2d 423 at 429.

More recently in Barefoot v. Sundale Nursing Home, (1995), the Court resolved any uncertainty as to the meaning of "but for" in the context of a Conaway prima facie showing. Justice Cleckley writing for the Court reaffirmed that Conaway and its progeny disavows any intent which requires more than a threshold but for showing. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. Barefoot, slip op. at 12, citing Conaway. As pointed out by the Court, a complainant may establish the necessary nexus by evidence of disparate treatment between a member of the protected class and others; or by other indicia of discriminatory animus.

Second, there is the mixed motive analysis established by the United States Supreme Court in Price Waterhouse v. Hopkins, supra, and recognized by the West Virginia Supreme Court of Appeals in WV Institute of Technology, supra. The difference here is that the pretext aspects of the McDonnell Douglas analysis are not applicable. Where an articulated legitimate, nondiscriminatory

reason is shown by the respondent to be nonpretextual, but is in fact a true motivating factor for its adverse action, a complainant may still prevail under the "mixed motive" analysis by presenting evidence that an illegal motive was at least a factor for respondent's action. The respondent can only avoid liability if it carries the burden of proving that it would have taken the same adverse action, absent consideration of the proscribed criteria.

Finally, a complainant may prove disparate treatment by direct evidence of discriminatory intent. Proof of this type shifts the burden to the respondent to prove by a preponderance of the evidence that it would have rejected the complainant even if it had not considered the illicit reason. Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

The facts presented in the instant action lend themselves easily to an analysis under Conaway.

Applying the Conaway standard, the complainant has established a prima facie case of age and sex discrimination. It is undisputed that the complainant, a female over the age of forty, is a member of two separate protected classes. The complainant is also a member of a distinct class of older women. To be sure, courts have recognized combined classes. Jeffries v. Harris County Community Action Assn., 615 F.2d 1025 (5th Cir. 1980), (a combined class of black females). It is further undisputed that respondent made an adverse employment decision concerning complainant's employment when it laid her off and then terminated her in 1991. What is now needed is some evidence from the complainant, direct or circumstantial, which links her status as a class member and respondent's decision so as to give

rise to an inference of discrimination. The complainant has convincingly hurdled the "but for" threshold showing, by offering proof that after she was laid off and terminated, that respondent continued to hire much younger individuals who performed many of the duties which she had formerly performed. See Findings of Fact 62-70. Moreover, the complainant has presented evidence that similarly situated males, whose performance respondent was dissatisfied with, were laterally transferred rather than being laid off or terminated.

The prima facie showing by complainant creates a presumption of age and gender discrimination, thereby shifting the burden to respondent to articulate a legitimate and nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Although the burden on respondent is only one of production, to accomplish it, a respondent must clearly set forth through the introduction of admissible evidence the reason for its actions. The explanation provided "must be clearly and reasonably specific," and "must be legally sufficient to justify a judgment for the defendant." Id. at 254, 258.

In the case at bar, respondent's reasons for its actions take more than one form. Respondent argues that complainant's job performance was substantially and consistently below standard. Moreover, that the complainant's negative attitude which generated ill-will among co-workers and guests alike, bode badly for her when respondent made efforts to relocate her elsewhere in its operations, as is its policy, because no one would have her, save one prospect, which complainant rejected. Consequently, when respondent was faced

with an economic decision as to who should be laid off during a downsizing effort and a seasonal slowdown in 1990, the complainant was chosen due to her unproductivity. In addition, respondent maintains that the complainant was terminated while on layoff when her job was eliminated due to restructuring of the accounting department; and that complainant job duties were not performed by new hires after she was let go.

These explanations for respondent's actions, although varied, satisfy respondent's burden of production, thereby moving the analysis to the final stage of the proof formula.

The complainant at this time has the opportunity to prove by a preponderance of the evidence that respondent's reasons were merely pretexts for discrimination. The complainant "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. 248 at 256.

The complainant has convincingly established that the reasons proffered by respondent are not the true reasons for its action, but rather pretext for age and gender discrimination.

In instances such as this, it is the duty of the factfinder to make the ultimate determination whether there was intentional discrimination on the part of the respondent. Shepherdstown, supra. To that end, the factfinder must decide which party's explanation of the employer's motivation it believes. United States Postal Service Board of Governor's v. Aikens, 460 U.S. 711 (1983).

In determining which side to believe, it is up to the factfinder to assess the credibility of witnesses and the persuasiveness of the evidence. Westmoreland Coal Co. v. WV Human Rights Commission, supra.

In a circumstantial case such as this, motive turns largely upon an assessment of the credibility of the party's explanations. To be sure, the testimony of complainant, was, for the most part, consistent and believable. On the other hand, when the explanations offered by respondent are examined, they do not warrant a similar assessment.

For the period prior to 1984, there was extensive evidence offered by respondent about specific instances of alleged misconduct and incompetence on the part of the complainant which was not persuasive as the documentation either failed to establish that the complainant was responsible for the problem or that she was operating outside the authority vested in her by respondent's comptroller, Charles Coughlin. Other instances cited for this period involved situations in which complainant's many supervisors would have been reasonably expected to have monitored or corrected. Moreover, the evidence reveals, and it is uncontroverted, that prior to 1984, the complainant was not counseled or disciplined orally or in writing by any of her supervisors. Co-worker Rita Kincaid's testimony as to complainant's attitude during the complainant's tenure is similarly unpersuasive. It is apparent that the complainant and Ms. Kincaid did not get along, therefore the evident bias of Ms. Kincaid underscores her credibility. Missy Lightner, who had worked for a shorter period of time on the other hand, was a credible witness.

There are other inconsistencies in the explanations offered by respondent regarding several of the incidences which it maintains were central to its decision.

Respondent maintains that complainant's attitude was repugnant and insulting to guests, thereby promoting ill-will at the core of respondent's raison d'etre-hospitality. Inexplicably, however, after respondent began taking duties away from the complainant, the complainant was kept in guest inquiries which requires maximum contact with guests and the public. The clear implication of this is that complainant's attitude was not a factor considered by respondent in its subsequent decisions.

On the other hand, respondent's argument that complainant job performance diminished following modernization of its accounting department has some merit. The evidence reveals that after respondent's Flagler software system was installed in 1989, that the complainant was unable to grasp the necessary computer skills which would have enabled her to perform her job. It is therefore apparent on this issue alone that complainant's performance was not up to standard at the time she was laid off and then terminated.

It is similarly apparent that at least two of the individuals hired after the complainant's layoff and termination, namely: Cindi Knight and Kathy Sealey, brought in by Mr. Mazey to perform highly computerized functions, possessed superior qualifications to that of the complainant; and that the summer intern Ms. Dodson was not similarly situated. However, the hiring of Scott Gilbert in December 1990 and Deidre Dixon in August of 1991, belies Respondent's articulated defense that downsizing in 1990 and 1991 was a major

factor in complainant's layoff and termination. Moreover, the evidence reveals that Mr. Gilbert, Ms. Dixon, and two individuals hired in 1992, Sandra Brinley and Angie Deskin performed accounting duties which encompassed those formerly performed by the complainant.

The question as to whether the respondent provided the complainant with the opportunity to laterally transfer is an entirely different matter. According to respondent, it has a policy of laterally transferring its employees to other departments when either respondent or the employee is dissatisfied with the current placement. Under this instant facts, with the exception of one possible alternate position for which complainant interviewed in 1988 and later rejected, respondent maintains that it was not able to find a transfer slot for the complainant. According to respondent, this was because the complainant's negative attitude was well known throughout its operations and therefore no one wanted her.

Restated, respondent's reliance on the complainant's attitude and demeanor as a basis for its actions has previously been determined to be pretextual. Moreover, Mr. Mazey's testimony establishes that it is he who would decide whether certain positions in other department were suitable for the complainant, therefore respondent's statement that no one would have her is inaccurate and not credible.

Mr. Mazey's motivation for his refusal to communicate the nature of complainant's transfer to the Head Waters office in 1988 and his subsequent inability to locate another position in another department, may be inferred from his actions in hiring the individuals for the accounting department who in some respects, but

on a more sophisticated level, took over many of the functions previously performed by the complainant. Of those individuals hired, all were invariably much younger than the complainant. This indicates Mr. Mazey's personal preference for younger employees in deciding personnel matters within his discretion. Thus, the complainant has met her burden of proving pretext as to the failure of respondent to offer her a lateral transfer.

In addition, as previously indicated in the findings of fact, the complainant's ability to ascertain the nature of lateral transfers of other similarly situated individuals had been made virtually impossible given the respondent's obstruction of the complainant's attempts to garner the necessary information in the course of discovery. The offer of respondent to make the information available after imposition of sanctions during the course of public hearing is not reasonable given the fact that discovery is the proper time for provision of this type of information and given the respondent's repeated failure to cooperate in a meaningful fashion in each of the previous cases of being ordered to provide information to the complainant. Thus, it is found as a matter of fact that the respondent would routinely offer alternative lateral transfers to employees with whose performance they were dissatisfied and did not do so based upon the complainant's sex.

In conclusion, the record as a whole establishes that the complainant was terminated because of her age and sex. The complainant, Barbara Sweetwood Smith, has sustained her burden of establishing age and gender discrimination by a preponderance of the evidence.

C.

CONCLUSIONS OF LAW

1. The complainant, Barbara Sweetwood Smith, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, CSX, The Greenbrier Hotel, is an employer as defined by WV 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 WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. Complainant has established a prima facie case of age and gender discrimination.

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

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to make whole remedy as follows: (1) Reinstatement in a comparable position with respondent at a rate of pay equal to what she earned at the time of her termination; and (2) backpay in an amount equal to what complainant would have earned had she not been unlawfully terminated. The record

evidence indicates that at the time of her termination, complainant earned \$19,281.60 per year and that she would have received an increase each year of approximately 5 per cent.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$2,950.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. As a result of the unlawful discriminatory action of the respondent, complainant is entitled to an award of reasonable attorneys fees and cost in the aggregate amount of \$49,937.50.

10. Complainant's request that the lodestar calculation be augmented is denied upon application of the factors considered by the Court in Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

D.

RELIEF AND ORDER

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

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

2. (A) The complainant's attorney shall within twenty days of receipt of this decision submit to the Commission and the respondent the following:

(B) Recalculations of complainant's backwages, benefits and interest for the period and amount set forth in conclusion of law number 7.

3. Respondent shall be provided with a like period of twenty days upon receipt of complainant's calculations within which to respond to complainant's calculations on damages.

4. These respective calculations shall be reviewed by the undersigned, deemed supplements to this decision and incorporated by reference herein.

5. Within 31 days of receipt of this decision, the respondent shall pay to the complainant attorney fees and costs in the aggregate amount of \$50,237.26.

6. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

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

8. Within 60 days of receipt of this decision, respondent shall make a written offer of reinstatement to complainant in an a lateral position in another of its departments, comparable in pay and responsibility to the position complainant held at the time of her termination in 1991.

9. Within 15 days of receipt of respondent's offer of reinstatement, complainant shall notify respondent of her acceptance or rejection of the offer. If complainant rejects respondent's offer

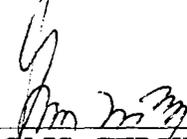
without good cause or fails to respond, respondent's obligation to complainant shall end.

10. In the event of failure of respondent to perform any of the obligations set forth above, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 27 day of December, 1996.

WV HUMAN RIGHTS COMMISSION

BY: 

GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BARBARA SWEETWOOD SMITH,

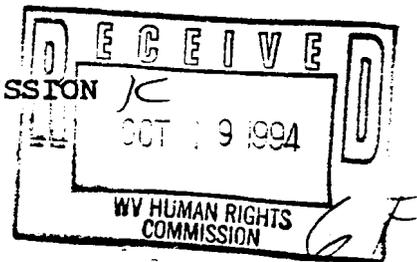
Complainant,

vs.

DOCKET NO. ESA-169-92

GREENBRIER MOTEL,

Respondent.



AFFADAVIT OF CAROLE L. SCOTTI IN SUPPORT OF
COMPLAINANT'S PETITION FOR ATTORNEY'S FEES

STATE OF WEST VIRGINIA,

COUNTY OF GREENBRIER, to wit:

Carole L. Scotti, being first duly sworn, deposes
and says as follows:

1. I represented the complainant Barbara Sweetwood
Smith in the above-captioned case.

2. I was admitted to practice law in 1979, and
have been engaged in the practice of law since 1979.

3. I am licensed to practice law before the West
Virginia Supreme Court of Appeals, the Supreme Court of
Illinois, and four federal district courts and courts of
appeal.

4. I have special expertise in employment
discrimination cases. I represented the complainant in
Westmoreland Coal Company v. Boone, 382 S.E.2d 562
(W.Va.1989), the seminal case which established sexual
harrassment as a cause of action under the West Virginia
Human Rights Act.

APPENDIX A

5. In 1992, I was awarded the statewide Womens Award for the Professions by the West Virginia Women's Commission for barrier-breaking achievement in my work in representing women in such cases.

6. I currently represent a number of complainants with cases pending before the Human Rights Commission. I also represent numerous plaintiffs in various federal courts on civil rights causes of action. I have counseled and advised hundreds of employees with employment-related problems. I am a member of the Employment Law Committee of the West Virginia State Bar. I have presented numerous lectures and speeches on the topics of sex discrimination and sexual harassment. In numerous requests to continue and delay this matter, junior counsel for respondent has made comment to the Administrative Law Judge upon my superior experience and qualifications.

5. Complainant and her attorney reasonably expended \$299.76 in costs herein. See the attached statement of costs.

6. My normal hourly rate for employment discrimination cases is \$125.00 per hour.

7. I expended 399.50 attorney hours on the preparation and litigation of this case. See the attached detailed itemized statement of my time on the Barbara

Sweetwood Smith account which was prepared from my contemporaneous time records.

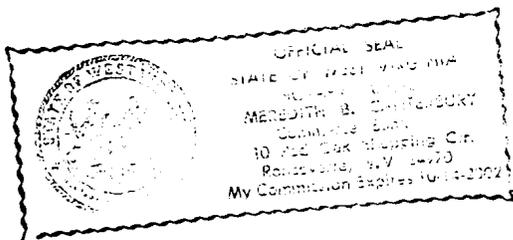
Further affiant sayeth not.

Carole L Scotti

Carole L. Scotti

Signed, sworn to and subscribed before me on this

17 day of October, 1994.



Meredith B. Cantelmo
NOTARY PUBLIC

ACCOUNT NAME: BARBARA SWEETWOOD SMITH

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
10-29-91	2.30	Initial conference
11-2-91	.10	Telephone call client
11-4-91	.90	Draft amended complaint
11-4-91	.70	Conference with client
11-4-91	.30	Draft Letter to Human Rights Commission
11-15-91	.30	Review amended complaint
12-9-91	.40	Review employer response
12-12-91	.30	Telephone call client
12-19-91	.30	Review client response
12-20-91	.30	Draft letter to Human Rights Commission
1-22-92	.50	Review new material
2-17-92	2.60	Review new material, case preparation
2-19-92	.10	Telephone call, HRC investigator
2-25-92	.10	Telephone call from client
2-25-92	.10	Telephone call, HRC investigator
2-26-92	.30	Telephone call, HRC investigator
2-26-92	1.20	Telephone call client
3-2-92	4.90	Draft response to Human Rights Commission investigator
3-5-92	.20	Review investigator response
5-13-92	3.60	Draft response #2 to Human Rights Commission investigator
5-14-92	5.30	Draft response #2 to Human Rights Commission investigator
7-31-92	.10	Review investigator letter
8-3-92	1.80	Review file
8-3-92	.10	Telephone call Human Rights Commission investigator
8-4-92	.40	Telephone call from Human Rights Commission investigator
8-4-92	.40	Telephone call client
8-5-92	.50	Telephone call client
10-21-92	.40	Telephone call from client
1-19-93	.40	Telephone call from Attorney General
3-4-93	.50	Telephone call from client
4-7-93	.40	Review determination paper
4-12-93	.30	Review Human Rights Commission letter to employer

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
4-14-93	.30	Draft letter to client
5-18-93	.40	Review Administrative Law Judge Order
6-8-93	.10	Telephone call from client
6-9-93	.40	Telephone call client
6-15-93	.50	Review Respondent answer and letter to ALJ
7-28-93	1.10	Prepare Interrogatories and Requests to Produce
7-30-93	2.90	Prepare Interrogatories and Requests to Produce
7-30-93	.30	Telephone call from opposing counsel
7-30-93	.20	Telephone call opposing counsel
7-30-93	.40	Telephone call from opposing counsel
8-3-93	2.70	Prepare Interrogatories and Requests to Produce
8-5-93	.40	Review respondent motion deposition
8-6-93	2.60	Respond respondent motion deposition
8-6-93	.50	Telephone call client
8-7-93	.40	Review Administrative Law Judge letter
8-10-93	.70	Review Respondent amended motion, motion admission pro hac vice, Interrogatories and Requests to Produce
8-11-93	.20	Telephone call from ALJ office
8-11-93	.20	Telephone call ALJ office
8-16-93	.30	Review respondent's amended certificate of service
8-16-93	.30	Review Court's orders (2) 8/12
8-17-93	.40	Telephone call ALJ office
8-18-93	.10	Telephone call from ALJ office
8-18-93	.20	Telephone call from ALJ office
8-18-93	.10	Telephone call from ALJ office
8-26-93	.10	Telephone call from ALJ office
8-27-93	.10	Telephone call ALJ office
8-27-93	.30	Telephone call from ALJ office
8-31-93	.10	Telephone call client
9-1-93	.20	Telephone call from client
9-1-93	.40	Draft letter to client
9-3-93	.70	Review motion Protective Order
9-8-93	.10	Telephone call from ALJ office
9-9-93	.10	Telephone call from ALJ office
9-9-93	.40	Telephone call from ALJ office
9-13-93	.30	Telephone call from ALJ office
9-13-93	.30	Telephone call ALJ office

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
9-14-93	.90	Review Respondent's amended answer
9-15-93	1.20	Draft response Respondent's motion to continue
9-24-93	.30	Draft letter to opposing counsel
	.40	Draft letter to opposing counsel
	.30	Telephone call client
	.30	Draft letter to Administrative Law Judge
10-1-93	.40	Review Respondent's fax
	.40	Telephone call from ALJ office
10-5-93	2.40	Prepare response to Interrogatories and Requests to Produce
	.10	Telephone call opposing counsel
10-12-93	.50	Telephone call client
10-13-93	.20	Telephone call opposing counsel
10-15-93	2.00	Telephone conference
10-18-93	1.00	Telephone conference
	.20	Telephone call courthouse
10-19-93	.30	Telephone call KRM Reporting
10-29-93	.40	Review Respondent's orders
	.40	Review Respondent's motions
11-1-93	.30	Telephone call from ALJ office
	.40	Telephone call client
11-2-93	.10	Telephone call opposing counsel
	.20	Telephone call court reporter
	.10	Telephone call from opposing counsel
	.20	Telephone call opposing counsel
	.20	Telephone call from opposing counsel
	.10	Telephone call court reporter
11-8-93	.30	Review court orders (faxed)
	2.10	Conference client
11-9-93	3.70	Prepare deposition, Larry Mazey
11-10-93	3.20	Deposition, Complainant
	1.80	Deposition, Larry Mazey
	.90	Conference client
11-12-93	.10	Telephone call from court reporter
	.30	Telephone call court reporter
11-16-93	2.30	Review deposition transcript, Larry Mazey
	.90	Review deposition transcript, Barbara Sweetwood Smith
11-17-93	1.60	Review deposition transcript, Barbara Sweetwood Smith

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
11-19-93	3.70	Draft response, Respondent's Interrogatories and Requests to Produce
12-2-93	1.10	Review Respondent response, Complainant's Interrogatories and Requests to Produce
12-16-93	1.20	Review Respondent response, Complainant's Interrogatories and Requests to Produce
12-17-93	.90	Review Respondent response, Complainant's Interrogatories and Requests to Produce
12-20-93	1.90	Review Respondent response, Complainant's Interrogatories and Requests to Produce
12-28-93	3.20	Draft motion sanctions
12-31-93	.40	Review Respondent's Motion to Compel
1-3-94	.50	Telephone call from client
1-11-94	2.20	Office conference, client
1-19-94	.40	Telephone call client
1-24-94	.10	Telephone call from ALJ office
	.10	Telephone call from ALJ office
	.10	Telephone call witness
	.50	Telephone call witness
	.30	Telephone call from witness
	.10	Telephone call from witness
1-30-94	1.60	Prepare for telephone conference
1-31-94	.30	Review fax from Respondent
	.30	Telephone call ALJ office
	.30	Telephone call from ALJ office
2-1-94	.60	Review fax Order from ALJ
2-2-94	.40	Draft letter to Administrative Law Judge
	.30	Review fax from Administrative Law Judge
2-7-94	.30	Telephone call from opposing counsel
	.30	Telephone call from ALJ office
	.40	Telephone conference
2-8-94	.10	Telephone call from witness
	.40	Telephone call from witness
	.20	Telephone call from opposing counsel assistant
	.40	Review records, Federal Express
	.30	Telephone call opposing counsel
	.30	Telephone call ALJ office
	.30	Telephone call ALJ office

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
2-9-94	2.10	Review Respondent's discovery responses
2-10-94	3.40	Review Respondent's discovery responses
2-11-94	2.70	Review Respondent's discovery responses
2-12-94	2.40	Review Respondent's discovery responses
2-13-94	4.50	Trial preparation
2-14-94	1.90	Draft motion sanctions
	.10	Telephone call Human Rights Commission
	.10	Telephone call Human Rights Commission (fax)
	.10	Telephone call opposing counsel (fax)
	.10	Telephone call ALJ office
	1.40	Prepare pre-hearing memorandum
	.30	Telephone call witness
	2.60	Prepare trial
2-15-94	1.60	Prepare pre-hearing memorandum
	.30	Telephone call from opposing counsel
	.20	Telephone call from process server
	3.90	Trial preparation
2-16-94	.30	Telephone call from ALJ office
	.30	Telephone call ALJ office
	.30	Telephone call client
	.40	Review Respondent's pre-hearing memorandum
	.20	Telephone call from client
	.40	Review court order
	.50	Conference client
	.20	Telephone call AT&T
	.20	Telephone call ALJ office
	.90	Trial preparation
2-17-94	1.80	Prepare joint stipulations
	4.30	Prepare for settlement conference
2-18-94	4.00	Travel time, Charleston round-trip
	3.50	Settlement conference
	1.10	Review files
2-19-94	4.00	Draft facts for pre-hearing memorandum
	3.90	Conference client
	5.20	Draft pre-hearing memorandum
2-20-94	2.00	Review new files
	1.70	Draft chart trial preparation
	3.60	Draft pre-hearing memorandum

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
2-20-94	.50	Telephone call client
	.10	Telephone call witness
	.30	Telephone call witness
	.40	Telephone call witness
	.40	Telephone call witness
	.20	Telephone call from witness
	.40	Telephone call witness
2-21-94	.30	Telephone call client
	.30	Telephone call from client
	.90	Draft settlement letter
	.10	Telephone call client
	1.40	Draft pre-hearing memorandum
	.20	Telephone call from client
	1.90	Draft settlement letter
	.20	Telephone call client
	.80	Draft revised pre-hearing memorandum
	1.80	Draft supplementary discovery
	.30	Telephone call from opposing counsel
2-22-94	.30	Telephone call client
	.40	Telephone call from client
	.40	Telephone call from ALJ office
	.20	Telephone call from ALJ office
	.10	Telephone call from client
2-23-94	.50	Telephone call client
	.40	Review Respondent's discovery
	.20	Telephone call ALJ office
	.90	Review personnel files
	.30	Telephone call witness
	.50	Review files
	.30	Telephone call witness
	.10	Telephone call witness
2-24-94	1.70	Review files
	.30	Telephone call from witness
	.40	Conference witness
	.40	Review file
	.30	Telephone call from ALJ office
	.10	Telephone call from client
	.30	Telephone call from client
	.10	Telephone call ALJ office
	.40	Telephone call from ALJ office
	.20	Telephone call client
2-25-94	.40	Telephone call from client
	3.70	Settlement negotiations/hearing
2-28-94	.20	Telephone call client
	.20	Telephone call Secretary of State
3-2-94	.40	Review waiver regulation

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
3-2-94	.40	Review waiver regulation
3-3-94	1.40	Review Respondent's response
	.40	Telephone call client
3-4-94	.40	Draft stipulations
3-7-94	.40	Review Respondent's protective order and discovery response
3-14-94	.30	Review opposing counsel letter re joint stipulations
	1.60	Draft response to opposing counsel
3-16-94	5.90	Draft second renewed motion sanctions
3-17-94	.80	Draft settlement letter to Respondent
3-29-94	.40	Telephone call witness
3-31-94	.40	Review Respondent's response motion sanctions
4-4-94	1.90	Draft motion limine
	.70	Draft statement issues
4-8-94	.40	Review statement issues
4-11-94	.90	Draft letter to Administrative Law Judge
4-13-94	.30	Review Respondent's stipulations letter
4-16-94	.40	Draft letter Attorney General
	2.10	Review Respondent's trial exhibits
4-19-94	1.50	Trial preparation
	1.10	Telephone call client
	.20	Telephone call witness
	.30	Telephone call witness
	.30	Telephone call from ALJ office
	.10	Telephone call from ALJ office
	.40	Telephone conference
4-20-94	1.70	Trial preparation
	.50	Draft letter to Administrative Law Judge (faxed)
	.30	Review Administrative Law Judge Order (faxed)
	2.40	Trial preparation
	.10	Telephone call witness
	.10	Telephone call witness
4-21-94	.40	Draft letter to Attorney General
	1.10	Trial preparation
	1.70	Trial preparation
4-22-94	.10	Telephone call from Attorney General

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
	.40	Telephone call Attorney General
	.30	Review fax, Respondent
	.30	Review fax, Administrative Law Judge
	.30	Telephone call from Attorney General
	.30	Telephone call Attorney General
	.70	Telephone call from Attorney General
4-23-94	2.90	Trial preparation
4-24-94	3.00	Trial preparation
4-25-94	.40	Preparation for teleconference
	.30	Telephone conference
	.10	Telephone call witness
	.30	Telephone call ALJ office
	.20	Telephone call HRC
	.20	Telephone call from HRC
	.30	Telephone call from Attorney General
	.50	Telephone call from witness
	.30	Telephone call from Attorney General
	.20	Telephone call Attorney General (fax)
	.40	Review fax from Attorney General
	.50	Telephone call client
	.30	Review fax from Administrative Law Judge
4-26-94	2.60	Trial preparation
	.30	Review fax from opposing counsel
	.10	Telephone call witness
	2.10	Trial preparation
	.10	Telephone call witness
	.50	Telephone call from witness
	.40	Telephone call from witness
	.20	Telephone call from opposing counsel
4-27-94	1.10	Draft response non-compliance statement
	.40	Review Respondent's letter/motion
	.90	Draft response Respondent's letter/motion
	.40	Review Respondent's motion to continue
	.40	Telephone call Attorney General
	.80	Telephone call client
	2.60	Trial preparation

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
	.10	Telephone call witness
	.10	Telephone call witness
	.20	Telephone call process server
4-28-94	1.30	Trial preparation
	.20	Telephone call HRC
	.20	Telephone call from HRC
	.20	Conference process server
	.20	Draft subpoena RRR cert.
	.40	Review faxed letter to ALJ from Respondent witness
	.30	Review Administrative Law Judge order, motion continue
	.50	Telephone call client
	3.90	Trial preparation
4-29-94	4.50	Trial preparation
4-30-94	6.50	Trial preparation
5-1-94	4.70	Trial preparation
5-2-94	5.60	Trial preparation
5-3-94	7.00	Trial
	2.20	Trial work
5-4-94	7.00	Trial
	4.50	Trial work
5-5-94	7.00	Trial
	2.40	Trial work
5-6-94	6.50	Trial
	1.90	Trial work
5-7-94	3.00	Trial
	2.20	Trial work
5-13-94	.40	Telephone conference
	.40	Telephone call client
6-7-94	.30	Telephone call from opposing counsel
6-8-94	.40	Review Respondent's requests to delay
	.40	Draft letter Administrative Law Judge, response
6-9-94	.10	Telephone call from ALJ office
	.30	Review faxed letter from Respondent
6-10-94	.40	Telephone conference
	.40	Telephone call client
	.40	Review fax motion protective order, Respondent
	.30	Telephone call from Respondent witness
	1.30	Trial preparation
6-11-94	3.60	Trial preparation
6-12-94	2.90	Trial preparation
6-13-94	.40	Review fax motion protective order
	1.90	Draft motion sanctions

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
6-13-94	2.20	Conference client
	2.40	Trial preparation
6-14-94	6.50	Trial
	1.90	Trial preparation
6-15-94	7.50	Trial
	.60	Telephone call client
6-16-94	3.20	Trial
	.60	Conference client
6-29-94	.20	Telephone call from opposing counsel
7-5-94	.30	Review motion extension
7-6-94	.50	Draft opposing motion extension
7-13-94	.40	Telephone call client
7-20-94	.10	Telephone call from court reporter
7-21-94	.10	Telephone call court reporter
	.20	Telephone call HRC
	.30	Telephone call Attorney General
	.30	Telephone call from court reporter
7-22-94	.40	Review fax letter from Attorney General
	.30	Telephone call Attorney General
	.10	Telephone call court reporter
	.10	Telephone call HRC
	.50	Draft letter to Attorney General
	.40	Telephone call from ALJ office
7-29-94	.40	Telephone call HRC
7-30-94	.40	Review letter from Attorney General
	.40	Draft letter to Attorney General
8-8-94	.30	Review letter from HRC
	.30	Draft letter to HRC
8-26-94	.20	Telephone call from opposing counsel
	.30	Telephone conference
8-31-94	.50	Telephone call from client
9-2-94	.50	Draft letter to Administrative Law Judge
9-8-94	.50	Draft letter to Administrative Law Judge
9-9-94	3.10	Draft post-hearing brief
9-13-94	4.70	Draft post-hearing brief
9-16-94	4.80	Draft post-hearing brief
9-17-94	6.90	Draft post-hearing brief
9-20-94	.10	Telephone call from Respondent
	.10	Review fax from ALJ office

<u>DATE</u>	<u>TIME EXPENDED</u>	<u>ACTIVITY</u>
9-28-94	.40	Review Respondent motion to "disallow"
10-1-94	.90	Draft Complainant's motion for additional sanctions
10-5-94	.40	Review Respondent's response to motion additional sanctions
10-6-94	.40	Draft Complainant's reply to Respondent's reply motion for additional sanctions
10-7-94	4.30	Review Respondent's post-hearing brief
10-8-94	2.70	Draft Complainant's reply brief
10-10-94	1.10	Draft Complainant's reply brief
10-12-94	.90	Review Respondent's reply brief
	<u>399.50</u>	

COSTS AND EXPENSES

<u>Date</u>	<u>Description</u>	<u>Cost</u>
11/23/93	Certified mail, RRR to HRC	2.75
1-26-94	Telephone Calls to 1/26/94	\$ 16.15
2-6-94	Postage	6.09
2-18-94	Travel round trip Charleston	44.00
2-18-94	Tolls " " "	5.00
2-21-94	UPS overnight - Atlanta	9.00
2-21-94	UPS " -Charleston	2.84
3-16-94	Postage	3.63
4-4-94	Postage	3.67
4-16-94	USPO overnight-Charleston	4.65
4-21-94	USPO " -Charleston	4.65
4-21-94	USPO overnight-Charleston	2.90
4-28-94	Postage	2.29
5-13-94	Service subpoenas	30.00
5-14-94	Service subpoenas	47.75
7-21-94	HRC Regulations	30.20
9/19/94	Postage	4.34
10-14-94	Telephone calls 1-27-94 to 7/6/94	79.85
		<u>\$299.76</u>