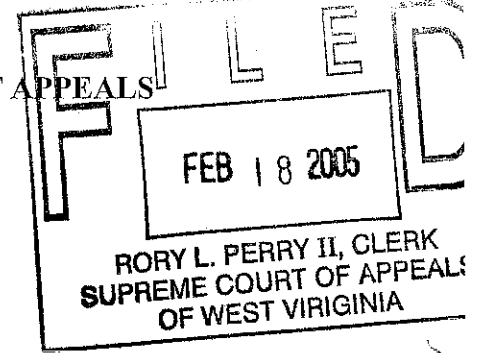


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



**PETER KELLY, III, OCTAVIA E. BINDER,
KERRY L. WALKER, TIMOTHY E. BOYKINS,
SHERRI THOMAS, and ANDREA THOMAS-
PAULEY,**

Complainants,

v.

DOCKET NO.: 32512

HEETER CONSTRUCTION, INC.,

Respondent.

AMICUS CURIAE BRIEF

I am filing this brief in sympathy with the position of the Respondent in the above styled case. My personal experience and the experience of the Respondent in this case, has been that the presumptions applied by the Human Rights Commission and their hearing examiners, are incorrect. This has created a situation where if an investigator for the Human Rights Commission finds probable cause to have a hearing on the merits of a claim, it is virtually impossible for the Respondent to prevail.

The investigator for the Human Rights Commission generally makes a finding of probable cause based on disparate treatment between an employee (who is a member of a protected class) and other employees within a similar job classification. The investigator's finding of probable cause is then presumed by the Human Rights Commission to create a prima facie case of discrimination. I do not disagree that the investigator's findings of probable cause will generally mean that there is a prima facie case of discrimination. The Court has held that disparate treatment between a member

of a protected class and other similarly situated employees is enough to show discrimination by inference and thus establishes a prima facie case of discrimination without any direct testimony. West Virginia Institute of Technology v. West Virginia Human Rights Commission and Hassan Zavareei, Ph.D., 181 W. Va. 525; 383 S.E.2d 490, at page 529. The rationale is that it is often difficult for a Complainant to show overt discrimination other than his or her disparate treatment because discrimination is a state of mind. I believe the law on this point is appropriate.

However, if a prima facie case is created based on disparate treatment, the Court has stated that "...the Complainant's prima facie case of disparate-treatment employment discrimination can be rebutted by the employer's presentation of evidence showing a legitimate and nondiscriminatory reason for the employment-related decision in question which is sufficient to overcome the inference of discriminatory intent." *Id* at page 530-531. The Court has indicated that if some legitimate reason is introduced by the Defendant tending to justify disparate treatment, "...then the Complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the Respondent were merely a pretext for the unlawful discrimination." *Id* at page 531, citing Shepherdstown Volunteer Fire Dept. v. State ex rel. State Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983). What is occurring in the hearing process before the Human Rights Commission is that, if a nondiscriminatory reason is introduced explaining the disparity of treatment, the threshold or level of evidence to rebut this inference is quite low and, certainly not by a preponderance of the evidence. Once the nondiscriminatory explanation is rebutted, the original inference of discrimination from disparate treatment is sufficient to find for the Complainant.

For instance, in this case, the hearing examiner found that the Complainant had established a prima facie case of discrimination by inference from disparity in treatment. The hearing examiner

went on to note that Respondent had offered explanations for the disparate treatment, but found that these were a pretext to cover up discrimination. The hearing examiner states, "pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and, where pretext is shown, discrimination may be inferred. Kelly v. Heeter Construction Company, Docket Numbers ERS: 185-01, EAR:189-01, ERS: 190-01, ERS: 191-01, ERS: 252-01 and ER: 253-01, Final Decision of the Administrative Law Judge at page 33, citing Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995)." What the hearing examiner does not state, is that once the Respondent has set forth a legitimate nondiscriminatory reason for the disparate treatment, the burden then shifts to the Complainant to prove its case by a preponderance of the evidence. The hearing examiner seems to have concluded from Barefoot v. Sundale Nursing Home, that the Respondent's nondiscriminatory justification for its decision, can be rebutted by inference which does not reach the level of proof by a preponderance of the evidence. Once the nondiscriminatory justification is rebutted, the original inference is then held to be sufficient to find for the Complainant.

This is at odds with West Virginia Institute of Technology v. West Virginia Human Rights Commission where the Court stated that, the Complainant can prevail by showing by a preponderance of the evidence, that the facially legitimate reason given by the employer for the employee related decision is merely a pretext for discrimination.

"...if the complainant shows by the preponderance of the evidence that the facially legitimate reason given by the employer for the employment-related decision is merely a pretext for a discriminatory motive." *Id* at 531.

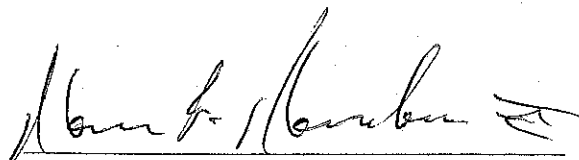
I respectfully suggest that the Court should emphasize with some specificity that the level of evidence required to switch the burden to the Complainant is low. For instance, the Court could state that any factually accurate, generally accepted reason for disparate treatment will be sufficient

to switch the burden to the Complaint, and that this does not have to be established by a preponderance of the evidence. On the other hand, once the burden is switched to the Complainant, it must prove its case by a preponderance of the evidence.

If the Complainant does not have to prove that the Respondent's explanation for disparate treatment is a pretext by a preponderance of the evidence, a Respondent is in the position of being guilty unless he or she proves their innocence by a preponderance of the evidence. Although the decision of the Administrative Law Judge has a number of disjointed statements which might be construed to support his decision, he seems to adopt this later thinking when he states,

“...Respondent has failed to show by a preponderance of the evidence that it would not have hired Complainants,..., in the absence of the unlawful consideration of their race.” Kelly v. Heeter Construction Company, at page 40.

This reasoning does not give the Defendant/Respondent due process and has made the hearing process of the Human Rights Commission blatantly bias.



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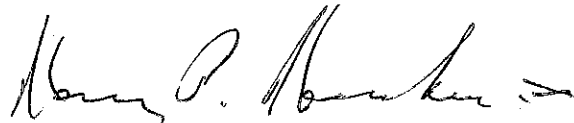
CERTIFICATE OF SERVICE

I, Harry P. Henshaw, III, certify that a copy of the foregoing "*AMICUS CURIAE* BRIEF" was served upon the foregoing on this 16th day of February, 2005, by U.S. Mail, postage pre-paid and addressed as follows:

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Dated this 16th day of February, 2005.



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