

32512
No. 041406

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HEETER CONSTRUCTION, INC.

Appellant,

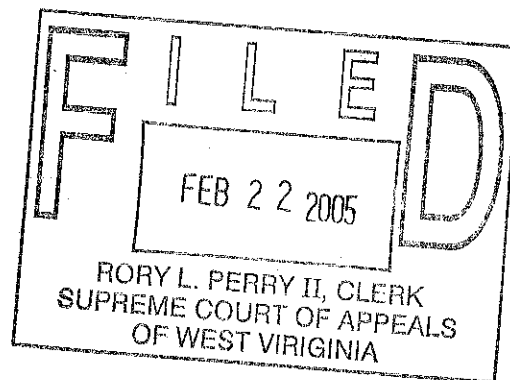
v.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

and

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

Appellees.



BRIEF OF APPELLANT

Submitted By:

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I. Kind of Proceeding

Heeter Construction, Inc. appeals a final judgment order of the West Virginia Human Rights Commission. This is a direct appeal made under the terms of West Virginia Code, Chapter 5, Article 11, Section 11(a). The individual Appellees alleged below that Heeter Construction, Inc. was guilty of discriminatory hiring practices based upon improper considerations of race, age and sex. By a vote of 4 to 3 the Appellee Commission affirmed the Administrative Law Judge's decision as to liability and damages.

II. Ruling Below

The final judgment order of the West Virginia Human Rights Commission states the following:

On June 24, 2004, this matter came before the West Virginia Human Rights Commission on appeal from the Final Decision of Administrative Law Judge Robert B. Wilson. After due consideration of the aforementioned Decision, and after a thorough review of the transcript and exhibits, the arguments and briefs of counsel, and the Petition for Appeal and Answer and Cross-Appeal filed in response thereto, the Commission does hereby find, by a vote of 4-3, that the record supports the ALJ's findings of fact and conclusions of law as to liability. The Commission hereby **AFFIRMS** the Final Decision as to liability.

The Commission further **AFFIRMS** the ALJ's Final Decision as to damages, with the exception set forth below, finding by a vote off 4-3 that the record supports the ALJ's award of incidental damages to all claimants, back pay and interest to claimants Kelly, Binder and Boykins, and payment of costs by the respondent, all in the amounts specified by the ALJ.

By a vote of 7-0, the Commission **REVERSES** the ALJ's Final Decision insofar as it imposes injunctive relief and future duties on 'any other entities owned and/or controlled by the Heeter family,' that were not parties to this litigation."

The Administrative Law Judge's decision as affirmed by the Commission included the following conclusions:

- Based upon a preponderance of the evidence, the undersigned finds, as a matter of fact, that race and, in the case of **Octavia Binder**, race and age, and in the cases of **Kerry L. Walker** and **Timothy Boykins**, race and sex, played a significant part in the Respondent's decision not to hire the Complainants for positions as rock truck drivers and/or flaggers on the Route 10 construction project.
- **Peter Kelly, III** was disappointed by the failure to get the job, felt like they didn't want him around, felt like he was wasting gas driving to the site, and gave up hope. **Mr. Kelly** has suffered humiliation, embarrassment, emotional distress, and loss of personal dignity as a result of the Respondent's unlawful consideration of race in failing to hire him as a rock truck driver.
- After **Octavia Binder's** interview with Mr. Heeter, and the fact that he didn't encourage her to come back, nor ask her to call and did not have her fill out an application, she didn't bother going back. She drove past the job site everyday and never saw any African American women working there. It was very disturbing and very hurtful to Ms. Binder. **Ms. Binder** has suffered humiliation, embarrassment, emotional distress and loss of personal dignity as a result of the Respondent's unlawful consideration of race and age in failing to hire Ms. Binder as a flagger.
- **Kerry L. Walker** would walk past the site everyday and see people teamed up flagging, obviously training someone without experience, all white females and it upset him. He was angered and upset by the failure to be hired. **Kerry Lee Walker** has suffered humiliation, embarrassment, emotional distress and loss of personal dignity, as a result of the Respondent's unlawful consideration of race and sex in failing to hire him as a flagger.
- **Timothy Boykins** testified that it hurt him really bad not getting the job as a flagger with the Respondent and that he

was getting upset because he'd go back and forth and got the runaround. **Mr. Boykins** has suffered humiliation, embarrassment, emotional distress and loss of personal dignity as a result of Respondent's unlawful consideration of race and sex in failing to hire him as a flagger.

- **Sherri Thomas** was told by Glenda Cresong that Respondent was training her to flag. Ms. Thomas went to Respondent's office and asked the secretary if they were hiring flaggers and training them. She was told no. She felt that if they could train white females with no experience to be flaggers, then Respondent could do the same for her. **Ms. Sherri Thomas** has suffered humiliation, embarrassment, emotional distress and loss of personal dignity as a result of Respondent's unlawful consideration of her race, in failing to hire her as a flagger.
- **Andrea Thomas-Pauley** was told by Mr. Heeter that she wasn't qualified to be a rock truck driver. Ms. Thomas-Pauley didn't feel good trying to take care of two children while she was between jobs, and she not getting a job because she didn't know anyone wasn't right. **Ms. Thomas-Pauley** has suffered humiliation, embarrassment, emotional distress and loss of personal dignity as a result of the Respondent's unlawful consideration of her race in failing to hire her as a rock truck driver.
- The **complainants**, are individuals **aggrieved** by an **unlawful discriminatory practice**, and are proper complainants under the West Virginia Human Rights Act, W. Va. Code §5-11-10.
- The Respondent, **Heeter Construction Company**, [sic] is a "person" and an "employer" as those terms are defined under W. Va. Code §5-11-1 et seq., and is **subject to the provisions of the West Virginia Human Rights Act**.



- The **Complainants** have established a **prima face case of race and/or sex or age discrimination**, regarding the failure of Respondent to hire them for positions of rock truck drivers and flaggers, as the case may be. **Respondent**

has articulated legitimate non discriminatory reasons for the failure to hire Complainants, that Respondent hires family, friends and those recommended by family, friends and other trusted business associates in the community. Complainants have proven by a preponderance of the evidence that although a legitimate non discriminatory reason was involved in the decisions not to hire the Complainants, that the impermissible factor of race was a significant factor in the failure to hire the Complainants as well.

Respondent has demonstrated by a preponderance of the evidence that it would not have hired Complainants, Kerry Walker, Sherri Thomas and Andrea Thomas-Pauley, even were the impermissible factor of race not considered; while Respondent has failed to show by a preponderance of the evidence that it would not have hired Complainants, Peter Kelly, Octavia Binder, and Timothy Boykins, in the absence of the unlawful consideration of their race.

- As a result of the Respondent's unlawful discriminatory conduct, **all six Complainants are entitled to an award of \$3,277.45 each**, for humiliation, embarrassment, emotional distress and loss of personal dignity.

- As a result of the Respondent's unlawful discriminatory conduct:

Mr. Kelly is entitled to a back pay award net of mitigation in the amount of **\$62,331.98** through October, 2001, as set forth more fully in Commission's Proposed Damage Calculations. Mr. Kelly is entitled to prejudgement simple interest of **10%** per annum from October, 2001, in the amount of **\$14,024.67 through January 31, 2004.**

Ms. Binder is entitled to a back pay award net of mitigation of **\$12,369.11** through October, 2002, as set forth more fully in Commissions' Proposed Damage Calculations. Ms. Binder is entitled to prejudgement simple interest of **10%** per annum in the amount of **\$1,546.14 through January 31, 2004.**

Mr. Boykins is entitled to a back pay award net of mitigation in the amount of **\$70,463.41** through October, 2002, as set forth more fully in Commission's Proposed Damage Calculations. Mr. Boykins is entitled to prejudgement simple interest of **10%** per annum from October, 2002 in the amount of **\$8,808.21 through January 31, 2004.**

Respondent is liable to the West Virginia Office of the Attorney General, Civil Rights Division, for reasonable costs in the amount of **\$120.28** as reimbursement of travel expenses incurred by the Commission's Counsel in prosecuting these claims, and to the West Virginia Human Rights Commission for reasonable costs in the amount of **\$6,408.60** as reimbursement of its witness fees and the deposition and hearing transcript costs, as more fully set forth in the West Virginia Human Rights Commission's Itemization Of Expenses attached to the Commission's Memorandum of Law as Exhibit C."

III. Statement of Facts of the Case

This statement of facts is organized by categories and subcategories which are intended to coincide with the arguments presented.

The Evidentiary Hearing and Administrative Law Judge's Decision

Evidence relating to the allegations of discrimination as well as Heeter's defenses thereto was received over a period of eight (8) days of hearings. The Attorney General's representative acted as counsel for the Complainants, see West Virginia Code, §5-11-7. A Charleston attorney, Robert Wilson, acted as the Administrative Law Judge in this case. Mr. Wilson is one of three Administrative Law Judges who are identified as being employed by the Commission to conduct public hearings, West Virginia Code, §5-11-6; Allen v. State, Human Rights Commission, 342 SE.2d 99 (1984) syl. pt. 6.

Extremely unprofessional behavior by Robert Goldberg, the Attorney General's representative who was acting as Complainants' counsel punctuated the proceedings. This misbehavior included name calling, personal insults and even the use of expletives. No evidentiary hearing was conducted on the issue of economic damages. Instead, that issue was addressed by way of opposing written submissions mailed in after the hearings concluded. Heeter's counsel requested a hearing on the subject of damages in that stipulations proved impossible to reach.

The Administrative Law Judge was asked to recuse himself on day three of the hearing. Allegations of misconduct, vituperation, vitriol, and long colloquies of personal accusations pervaded the hearing. Extensive quotations reflecting the same are set forth more fully in the Petition for Appeal pp. 12-33, however for purposes of brevity only the most extreme exchanges will be identified hereinafter.

Day One

When the parties argued over the introduction of a certain business record on the first day of hearings, Transcript Vol. 1, pp. 104-105, the Assistant Attorney General accused Heeter's counsel Karen Miller of trying "to ambush me," p. 108, and concluded that he was "offended" by any implication that he had submitted a fraudulent document and that "[t]his is just preposterous. And it's been going on since this firm [Miller, Snyder, Weiler & Walters] took this case," p. 109.

Day Two

The "trial by ambush" accusation was repeated on day two, Transcript Vol. 2, p. 84. The Assistant Attorney General stated at one point that he's "not going to sit and listen to that" after Ms. Miller stated that he was "trying to hide the truth," *Id.* Afterwards, the Assistant Attorney

General stated that "I'm not afraid of the truth. You are," p. 85. The Administrative Law Judge stated that he didn't "appreciate the – basically bad feeling that is being generated between counsel here by making accusations about what people have done and what their motivations are for that," p. 86, but took no action to address the plainly emerging problem.

Day Three

On the third day of hearings the Assistant Attorney General accused Ms. Miller of wrongdoing as having secured various personnel information about a complainant without first having a signed release from the affected employee, Transcript Vol. 3, pp. 135-127. The proceedings disintegrated quickly from that point. The Administrative Law Judge noted that:

"I'm hearing accusatory remarks from both sides . . ." Id.

The transcript reflects this exchange:

Mr. Goldberg: Jeez.

Ms. Miller: Judge, I'm going to ask him not to use curse words during the hearing.

Mr. Goldberg: I said Jesus. Is that a curse word?

Ms. Miller: Judge, if you don't put some order in this Court, I am leaving, p. 138."

Heeter's attorney and the Administrative Law Judge then argued over the Administrative Law Judge's contempt powers and what name had been used by the Attorney General, if any, pp. 139-143. The Assistant Attorney General then accused Mr. Weiler (Heeter's co-counsel) of calling him "a dick under his breath" which Mr. Weiler of course stated was "absolutely false," p. 144. The Attorney General said he responded by calling Mr. Weiler a "jerkoff," Id.

Ms. Miller verbally moved to recuse the Administrative Law Judge for "protecting Mr. Goldberg," p. 147, to which the Administrative Law Judge stated:

Ms. Miller, your motion is denied. And I resent the accusations that I am not trying my best to maintain order. And I resent the fact that you think I am protecting one side or the other, p. 148.

Day Four

Ms. Miller stated that the Attorney General's representative was "making faces" at her and the Administrative Law Judge was "allowing it," Transcript Vol. 4, p. 67. To that the Administrative Law Judge responded:

"I've had it with you, Ms. Miller. I've had it . . .", p. 68.

Day Five

On the fifth hearing date barbs and accusations were made in response to an effort by Ms. Miller to introduce the Workers Compensation records of Complainant Kerry L. Walker – and to dismiss his claim due to fraud, Transcript Vol. 5, pp. 5-9. The Attorney General stated:

" . . . Respondent's counsel has crossed the Rubicon.¹ She has made allegations of criminal conduct . . .", p. 14.

Day Six

Arguably the comments by the Assistant Attorney General on day six represent the low point in the proceedings insofar as inappropriate comments are concerned. Reference was made in the record to a Mr. Sam Browning, who was identified as a recently-deceased friend of Mr. Heeter. Mr. Browning was known to have provided references for persons from the Man area

¹While history records that Julius Ceasar crossed this Italian river in 49 B.C. on his way to seizing power in Rome it is defined as meaning starting an action from which one cannot turn back. Counsel cites this rather over-dramatic statement as being indicative of the unprofessional "fighting" atmosphere which prevailed at the hearing due to the Attorney General's inflammatory actions and "over the top" statements which the Administrative Law Judge failed to control.

who were seeking jobs with Heeter Construction, Inc. The Assistant Attorney General stated to the witness in referring to Mr. Browning that "you haven't spoken to him recently, have you" which he then defended as a "joke," Transcript Vol. 6, p. 105. Mr. Weiler asked whether Mr. Goldberg wanted to "make fun of any more dead people" to which Mr. Goldberg replied:

"Only when you die." Id.

The atmosphere on day six continued to be difficult. At one point Ms. Miller thought that the Administrative Law Judge was threatening her about a course of cross-examination, pp. 245-246.

Day Seven

When Mr. Weiler proffered an argument to the effect that the Department of Highways EEO Compliance Officer, William Hambleton, should have been contacted by the Human Rights Commission representatives during the investigation stages; the Assistant Attorney-General rejoined:

"Thank God Mr. Weiler doesn't work for the West Virginia Human Rights Commission, and his opinion ...is irrelevant...and I would ask that these ridiculous allegations about fraud, scam, set-up, that have been used from day one by this firm be stricken from the record, particularly the last one, " T. Vol. 7, p. 240.

Day Eight

This is how the hearings ended on the eighth and final day:

MS. MILLER: Judge, I'd like to put on the record this morning that after I gave that to Mr. Goldberg, that he came in the hall, threatened me, pointed his finger in my face, and called me a s-h-i-t head, and I would also like on the record what he said to my client.

MR. GOLDBERG: Judge, she's being dishonest flat out, undeniably dishonest. I didn't threaten her. I didn't call her what she says I called her. I called her a chicken. I said, "You're filing a motion to hold me in contempt?" Thinking about the absurdity of asking someone to be held in contempt for something that took place after the hearing, off the record. I don't know whether the Court would have authority to hold me in contempt. I don't – first off, I don't know whether this tribunal has the authority to hold me in contempt. Second off, this – what this incident that they're talking about, took place about a half an hour after the hearing was done, when we were leaving the building. So, this is just another attempt – first off, they've tried to assassinate the Respondent's [sic] character. Second off, they've tried to ask you to recuse yourself, and they've assassinated your character on the record. No, they're assassinating my character on the record. The fact of the matter is that things did happen yesterday, words were exchanged after the hearing. I overreacted to some deliberately provocative conduct by Mr. Weiler, and for that reason, I am responsible, because I have yet to learn that when individuals like Mr. Weiler and like Ms. Miller, who deliberately try and push your buttons in order to get you angry, in order to get you to react, are doing it not because of any other reason than to get you to – to make you vulnerable to these kind of ridiculous charges. As a matter of fact, yesterday, after Mr. Weiler called me pathetic and miserable, Ms. Miller said, "Mr. Goldberg, why is it so easy for us to get to you?" and then she said she was going to teach me a lesson about professionalism today.

MR. WEILER: Judge –

MR. GOLDBERG: So, that's why this motion is being filed. The Court knows, the Court has seen the behavior that has transpired in this courtroom. The Court has seen opposing counsel repeatedly engage in outrageous and deliberately provocative conduct, the sole purpose being to distract the Court's attention from the one thing that we all should be focusing on here, which is the merits of the case. Now, I will take responsibility, Judge, and I'm going to apologize to the Court, and I particularly, most importantly, want to apologize to my clients for every time that I have allowed these two individuals to dupe me into falling for their tricks. Like I said before, this kind of conduct just gets my Irish up, and I have a very difficult time, given where I was raised, and the way I was raised, when individuals confront me with certain words, that, where I was

raised, have consequences, and then instead of facing those consequences, the individual runs behind my back, runs away, and then files motions like this. That's what's going on here, Judge. This is deliberate conduct. Ms. Miller stated as much yesterday that she was deliberately trying to provoke me, and it worked. And to that point, I am pathetic, and I am miserable. I've been in this hearing for nine days, listening and observing what I – you know, I have never in my life observed members of the bar behaving in the way that these two individuals have behaved. I have been in battles with other members of the bar, both here and in Beckley when I was a public defender. I have gone to war with these individuals, and there has always been, underneath it, a mutual respect and lines what were agreed upon, based upon honor and based upon respect for the profession, and respect for the results of the profession that have not been crossed. These are the first two attorneys that I have ever confronted who just don't recognize those lines.

MS. MILLER: Judge, if I may –

MR. GOLDBERG: And I don't know how to deal with it, Judge, and I have not dealt with it always in an appropriate manner, but I think that the record speaks for itself. These are two individuals who got up, threatened to leave. These are two individuals who have done nothing but deliberately act in a manner to provoke both the Court, my witnesses, and me, and they have gotten what they asked for, and to the effect – again, I'll say it again, to the point that I fell into their trap, I want to apologize to the Court. I want to make it clear to this Court that this was not directed at you, and it was not meant as any sort of disrespect to you, and it clearly was not directed at my clients, and if there has been any sort of interference in my ability to represent my clients, I've been putting in 12, 13 hour days for the last three weeks. They've had two attorneys on the other side. They've had their assistants working for them. I've had me, and I've been working 13 hour days to represent seven Complainants in an extremely complex suit, which started a week after I had had two previous hearings, where I had to represent two other Complainants. I am tired. I've been working hard. I've been doing – I've been trying to keep my word that I do – my word that I try and keep to all of my Complainants, that I will do the best I possibly can to help these people, and to the extent that I get angry and frustrated when I see counsel treading over the lines of dignity and honor and making this into a circus, I do lose

my temper, and I am very sorry to this Court, as I would be to any Judge, but I have given my word to these Complainants, and I try as hard as I can to adequately represent them, and when I have counsel, like these two, who are deliberately trying to provoke me, on top of the long days and the long hearings and the lack of sleep and the coming in at 6:00, 5:00 in the morning, and not leaving until 10:00 at night, seven days a week, sometimes my temper does get frayed, but I can tell you that last night, both of these individuals gave as well as they got, and if there were disagreements, they were on both sides, and I'm sure -- I haven't read this pleading, but I'm sure that they haven't mentioned the fact what they called me, what was done, in effect, to tell me. And, I'm sure that Ms. Miller has not specifically mentioned the fact in this pleading, that she said to me, "Why do you keep falling for what -- why are you such an easy target?"

MS. MILLER: That's not true, Judge, at all.

MR. WEILER: Well, Judge, I want to say one thing. First of all, he is putting the blame on his unprofessional conduct, tortious conduct, and saying that I provoked him. I have never provoked him. He has always been the instigator. All I did was packing up and leaving and he called me an a -- hole. I didn't even respond. Ms. Miller addressed i, and then he started using f-bombs and everything else. I told him he was not worth my time, and he wanted to provoke a fight. He called me a chicken shit, got up into my face, was yelling. He's not worth my time, and I thought it was pathetic. So, for him to state that he was provoked in any way, we're sitting here in the hearing yesterday, and I'm listening to him make his long argument, and then when he's finished, he calls me a jerk again under his breath. This lady right here heard it, and you'd already told him to stop that. He -- I have never experienced this guy, especially a civil rights attorney to use the f-word, asshole, chicken shit. He accosted Mrs. Miller and us in the hallway, stuck out his chest, blocked our walkway. If that's not a threat, I don't know what is, after he received this motion. What else can we do? Since the very first time of this hearing, I said, "Listen, I'm not going to worry about him. He's not worth my time for his antics," and I haven't said anything to provoke him. He got mad at me yesterday when I said, "Was that sufficient?" And then, he calls me an a-hole, while I'm trying to get packed up and we pass each other in this doorway, and if he thinks I did anything to provoke him --

JUDGE WILSON: It was my understanding that was turned off.

MR. WEILER: I thought I switched it off. Sorry. Switched off. And, for whatever reason, he called me that, at that particular time. If he's going to sit there and tell you that I said something to him or did something to him, he's a boldface liar, like he's lied all along, regarding – saying I've said things. I don't want to deal with it. It's not worth my time. Mrs. Miller takes offense to it. He's pathetic. He's not a factor in my life. I'm not going to worry about it. But, if I can't walk down the street in Charleston without him calling me names and everything like that, I mean, I guess eventually, I'll have to do something about it, but I think, you know, you warned him once, and for him to say, "Oh, I'm working hard, and I lost my temper, and we provoked him," that is an absolute joke, an absolute joke, you know.

MR. GOLDBERG: I'll let his statements speak for themselves.

MS. MILLER: Judge, I would like her to put on the record, also, what happened to her, Mr. Goldberg.

JUDGE WILSON: Could you identify yourself for the record?

TERRI PINSON: Yes, my name is Terri Pinson, and I work for Mr. Heeter, and all – I've observed several different things that were offensive to me, yesterday, and it may have been the day before, in the closing – I'm sorry. I mean, every time somebody tries to talk, everybody's, you know, "uh, uh" getting all made and everything. You just said something when he referred to me awhile ago, about, "she heard her say it," and you said, "If she heard it," and you got up and walked out. I mean, I don't understand everybody going back and forth, but that's beside the point. He was upset, we were off the record. He was clearly mad. He was throwing his papers around and looking – I'm sorry, Judge. Will you tell him to please quit remarking over my comments.

MR. GOLDBERG: Did you hear me say anything?

JUDGE WILSON: Please be quiet.

MS. PINSON: I'm sorry, Judge. I think I deserve to have something to say without having to listen to him make his comments.

JUDGE WILSON: Yes ma'am.

Finally, the company representative was allowed to speak:

MS. PINSON: Thank you. Anyway, he was upset. He was throwing his papers around. He threw a big notebook down over there, and he said, "God damn," and he went to walk out of here, and he said, "These two --" That's all I heard him say, but he was definitely mad, and he said, "God damn," and he looked me straight in the eye when he said that. He knows that I heard him say it, and I find that very offensive, and for us to be in here, I find that even more offensive for him to say that. And then this morning, Ms. Miller came in and said, "Here's your motion, Mr. Goldberg." He said, "What motion?" real hateful, and she said, "The one I told you I was going to file yesterday." She walked over the room, and he said, "Do you work for her?" and I said, "No, I don't. I work for Mr. Heeter," and he opened the envelope and he said, "She's --" and he didn't finish what he was going to say, and he said "This is bullshit," and he threw the papers down and he walked out. And Mr. Walker was standing in here when all this went on. And I'd also like to say that I observed, yesterday, when he called Mark a jerk, I definitely seen him, and I heard it, also. Now, the first incident that was in question, I did not hear, the first day or whatever. I didn't hear him say that to him, but yesterday -- I mean, he was giving Mark dirty looks, and I definitely seen him call him a jerk yesterday.

JUDGE WILSON: Is there further representations you want me to hear?

(No response)

JUDGE WILSON: All right. I am going to take the motion to hold Commission's counsel in contempt under advisement, and I am going to request, Ms. Miller, that you direct a brief to me, if you can establish my statutory and regulatory authority to act on this motion. I would request you to have that by Monday. At this point, we're off the record."

Transcript Vol. 8, pp. 17-28.

**Incidental Damages Awarded for
Humiliation, Embarrassment, Emotional
Distress and Loss of Personal Dignity**

All Complainants were awarded the sum of \$3,277.45 as damages for humiliation, embarrassment, emotional distress, and loss of dignity. This award was made both to prevailing and to non-prevailing complainants alike. What follows is the testimony given by each of the Complainants cited by the Administrative Law Judge to support such an award.

Kerry Walker, A Non-Prevailing Party²

“Q: How did it make you feel when you didn’t get the position at Heeter’s?”

A: I was very upset because, what angers me is when big business comes into these little small towns, they think they can just manipulate anybody and hire who they want, and I’m the type of person, it’s the principle thing. You know? And that’s what upsets me about people, big business coming in and not giving the little man the opportunity to hire. Its’s extremely upsetting. Extremely.” T. Vol. 2, pp. 230-231.

Sherri Thomas, A Non-Prevailing Party

“Q: Let me just ask you this one last question. How did it make you feel when you didn’t get at job with Mr. Heeter?”

A: Well, I felt that if he could train these other women and give them a chance he could do the same also for me.”
T. Vol. 3, pp. 201-202.

²As is developed further in this brief, the Final Order perhaps by mistake identifies Walker as the victim of race and sex discrimination along with Boykins and Binder, paragraph 77, p. 26. In paragraph 88, p. 29 the Respondent is found to have prevailed against Mr. Walker’s claim.

Andrea Thomas-Pauley, A Non-Prevailing Party

“Q: I want to ask you – well, strike that. I want to ask you, how did it feel when you didn’t get this job at Heeter Construction?

A: It didn’t feel too good, because I was in-between jobs and I was trying to take care of my kids. Their dad is no where around. I’m the only one taking care of my kids. I was the one that had to take care of them. And me not getting a job because I didn’t know nobody, I just didn’t think that was right.” T. Vol. 3, p. 59.

The three Complainants who were awarded economic damages as victims of discrimination testified in the following manner.

Timothy Boykins

“Q: Let me ask you this, Mr. Boykins. How did it make you feel that you didn’t get this job at Heeter Construction?

A: Well, it hurt me real bad because of, like I said earlier, my wife had that bad car accident and unemployment was running out. My other job was running out, and it hurt me pretty - it hurt me real bad.” T. Vol. 2, p. 178.

Octavia Binder

“Q: Let me ask you this one last question. How did it make you feel when you applied for this position and didn’t get it?

A: Well, I kept looking - like I said, I go out of the home every day with the clients that I work with. And so I traveled that area every day. And I kept looking see at least one African American woman. And I never did see one.” P., p. 43.

"So that to me was very disturbing and very hurtful. I couldn't see a reason why - to me I couldn't see a reason why he didn't hire me. If he would have asked me for references I could have gotten him some." T. Vol. 4, p.32.

Peter Kelly, III

"Q: Mr. Kelly, let me ask you, how did it make you feel that you applied and didn't receive these positions?" P., pp. 43-44.

"A: Well, I feel like I applied in good faith and I still like I would have been a good worker for Mr. Heeter. I didn't get the job, and normally I'd be disappointed. I do have four kids to try to feed, so it was disappointing to me. Like I wasted gas that I didn't have to waste." T. Vol. 2, p. 74.

**The Evidence of Alleged
Discrimination**

As earlier noted, three of the Complainants were found to have been the victims of some form of discrimination.

Octavia Binder

Octavia Binder is an African-American female who was age 68 at the time of the hearing, T. Vol. 4, p.13. Paragraph 77, p.26 of the Final Order:

"Based upon a preponderance of the evidence, the undersigned finds, as a matter of fact, that race, and in the case of Octavia Binder, race and age... played a significant part in the Respondent's decision not to hire..."

Ms. Binder applied for the position of flagger at Heeter's highway construction site. She was awarded back pay of \$12,369.11 through October, 2002, 10% interest per annum, and \$3,277.45 as incidental damages as previously mentioned herein.

Other than the finding of fact of race and age discrimination made by the Administrative Law Judge in paragraph 77, the incidental damage award of \$3,277.45 in paragraph 79, and the economic damages awarded in paragraph 87, the Final Order mentions Ms. Binder a mere three times in any meaningful way. Those follow:

Paragraph 8: "Complainant, Octavia Binder, is an African-American female who was born January 4, 1935. She lives in Kistler, Logan County, West Virginia. She has been continuously employed with Voca-Res-Care in Logan County since April, 2000. Transcript Vol. IV, pages 13 and 14.

Paragraph 9: "Ms. Binder visited Respondent's office in Man and spoke with the secretary regarding potential employment as a flagger. She was informed that Respondent was not presently there, but had just gotten a new job and would be hiring soon. She called the next day and was told to apply through the Logan County Job Service. She completed her 101 Form requesting a flagger position. She called the Respondent who acknowledged receipt of the application and was told she did not need prior flagging experience for the position. The next day she visited Respondent's Man office, waited 30 minutes, and spoke to Mr. Heeter regarding the flagging position. Ms. Binder was repeatedly asked if she would stand on pavement for 8 to 12 hours. She responded that at her previous employment, the Nassau County Medical Center, she regularly stood for 12 to 27 hours on concrete. He didn't tell her to check back, and she never went back, assuming that he was not going to hire her."
T.Vol. IV, pp. 15-30.

Paragraph 86: "Respondent has not demonstrated by a preponderance of the evidence that it would not have hired Octavia Binder as a flagger in the absence of the impermissible consideration of race and age.

In specific response to Ms. Binder's assertion of discrimination, Heeter's counsel offered testimony from the office secretary who in fact remembered Ms. Binder as "real pushy," demanding and making her feel "really uncomfortable," T.Vol. 6, p. 179. Ms. Binder's application did not indicate her age, Commission Exhibit 10. Further, Ms. Binder's nephew LeRoy Sharp worked for Heeter and was not listed by her as a reference and he did not put in a word of support for her. T.Vol. 4, p.46. Moreover, three of the ten flaggers who were already hired at the time of Ms. Binder's application were between the ages of 40 and 60, Respondent's Exhibit 27.

Timothy Boykins

Timothy Boykins is an African-American, age 41, and a lifelong resident of Man, T.Vol.2 pp. 155-156. No physical evidence exists that Mr. Boykins ever applied for a job with Heeter, although Mr. Boykins testified that he did submit an application, p. 169. No application was found or produced. He had previously worked as a flagger on another job on Route 10 in the vicinity of Heeter's job site. At his old job, there had been an argument with Heeter about a traffic tie-up, pp. 163, 203-204. The Final Order, paragraph 77, p. 26, finds as a fact that the decision not to hire Mr. Boykins as a flagger constituted race and sex discrimination. He was awarded back pay of \$70,463.41, through October 2002, interest at 10%, and incidental damages of \$3,277.45.

Mr. Boykins claimed, and the Administrative Law Judge concluded, that Heeter somehow "sabotaged" his later employment with another company. In paragraph 20, p. 10 of the Final Order, the Administrative Law Judge found:

"Mr. Boykins was constructively discharged from subsequent employment with Evergreen Reclamation after Mr. Heeter told his boss at Evergreen that Mr. Boykins had a lawsuit against him. Later, his boss came in cussing and was abusive toward Mr. Boykins, and Mr. Boykins quit. Evergreen Reclamation did work for Mr. Heeter's companies. Mr. Cochran's testimony that he discharged Mr. Boykins for being late for work is not credited." Transcript Vol. II, pages 192 and 193.

And, in paragraph 89, p.29, the Administrative Law Judge found in part that:

...Mr. Boykins' efforts to mitigate his damages are spotty until April, May, June and July of 2001, when he worked for Evergreen Reclamation. That employment appears to have been sabotaged by Mr. Heeter..."

The foregoing was accompanied by another finding that the "Respondent appeared willing to hire Mr. Boykins if he would apologize.

Peter Kelly, III

Peter Kelly, III is African American, age 39 at the time of hearing, T. Vol. 2, p. 47. He applied for the position of rock truck driver. In the Final Order Mr. Kelly was awarded back pay of \$62,331.98 through October, 2001, 10% interest, and the same incidental damages as all others, \$3,277.45. *While the Order finds that Heeter failed to demonstrate "by a preponderance of the evidence that it would not have hired Peter Kelly as a rock truck driver," paragraph 84, p. 28, at no place in the Order does the Order affirmatively conclude that Heeter discriminated against Kelly.* In fact, the Final Order in paragraph 84 also concludes that:

“... Race almost worked to the advantage of Mr. Kelly until Mr. Heeter hired another African American, Greg Jackson, in September, 2000. That brought the total African American work force over the 3.7% non-white population of Logan County, which Mr. Hambleton [the Highways Department EEO officer] states was the goal in the project.”

Economic Damages

No evidence was presented at the eight (8) days of hearings in support of the damages which were arrived at and awarded. On the third day of the hearings the Administrative Law Judge informed counsel as follows:

“JUDGE WILSON: Okay. At the conclusion of this round of hearings on Wednesday I’m going to direct that releases be signed regarding any necessary tax documents that update damage calculations.

I’m further going to direct that the Respondent provide the earnings information from persons that were hired after any of the hire dates at issue in this case, on that project, simply for that project at issue, not everything under the sun.

And I’m also going to ask that the parties attempt to stipulate as to what the backpay and mitigation are and if they cannot that they submit their differences in writing as well.

And during that process, Mr. Goldberg, I expect you not to use any curse words of any kind.” Vol. 3, p. 175.

The above followed this exchange earlier that day:

“MS. MILLER: Concerning the damages, are we litigating the damages along with this?

JUDGE WILSON: Yes, ma’am.

MS. MILLER: Okay.

MR. GOLDBERG: Judge, can I be heard on that?

JUDGE WILSON: Yes.

MR. GOLDBERG: I know you made your decision. You know, as far as the issue of mitigation, I guess, the Respondent and the Complainant will have two different positions regarding all seven of these individuals as to whether they adequately mitigated their damages or didn't.

As far as the amount of money that they earned while they were off or after they applied at Mr. Heeter's office, I think there would probably be an opportunity to stipulate to some dollar figures for each of these individuals. And I wouldn't have an objection to leaving the record open after the hearing for the purposes of doing that.

JUDGE WILSON: Okay. Then let me backtrack and correct myself, Ms. Miller. Evidently we're not necessarily including that testimony in the record on damages at this point with each witness. And I will hold the record open for documentary stipulation evidence and what have you, as necessary on the mitigation on damages.

MS. MILLER: If I may address that point, Judge. From our figures, what we have done, there's not a lot of damage in the case. But the figure, for example, that we're getting from these documents are certainly different than – like for example on Pauley. Pride said from August 14th to December 31st she made \$2,832. And those documents aren't here.” Vol. 3, pp. 133-134.

No stipulation was reached on this subject. The respective counsel instead presented written submissions to the Administrative Law Judge. Karen Miller who was one of Heeter's attorneys wrote in her submission that:

“Heeter Construction requests a separate hearing on damages so that these issues may properly be determined,” p. 56, Respondent's Brief of 3/31/03.

The principle amount of damages awarded totaled almost \$165,000 and with interest now exceed \$200,000. Further, costs were awarded in excess of \$6,500.

IV. Assignment of Errors

The Commission erred in the following particulars:

- 1. In allowing a hearing to be conducted in a manner which contravenes the procedural requirements of due process of law and the Administrative Procedures Act.**

The Appellant's counsel moved unsuccessfully to recuse the Administrative Law Judge during the proceedings. In the presentation to the Commission, Appellant's counsel submitted statistics which indicate that the Administrative Law Judge's record of decisions is virtually always for complainants and against the employer. Moreover, the transcript demonstrating the antics at, and lack of control of, the hearings was available for the Commission's review. The Commission affirmed the Administrative Law Judge's decision by a vote of 4 to 3.

- 2. In upholding incidental damages for humiliation, embarrassment, emotional distress and loss of personal dignity.**

The record is devoid of any legal or factual basis to support this award. Moreover, the award of incidental damages to non-prevailing parties is without precedent.

- 3. In upholding any award of damages whatsoever in the absence of supporting testimony. This decision violates the requirements of the West Virginia Human Rights Act, the Administrative Procedures Act, the applicable regulations and the prevailing rules of evidence.**

As with the other rulings, the Commission affirmed the Administrative Law Judge's decision on damages by a vote of 4 to 3. The transcript of hearings was available for their review. The Commission is statutorily charged with the responsibility of adhering to the requirements of the Act under which the Commission originated and from which it derives its authority. The Administrative Law Judge is a selected employee of the Commission under West Virginia Code, §5-11-6.

4. Neither the evidence nor the findings and conclusions support the decision that Heeter Construction, Inc. violated the West Virginia Human Rights Act.
5. The decision employs an improper burden of proof and entirely neglects the issue of pretext.

V. Points and Authorities

A. THE WEST VIRGINIA HUMAN RIGHTS ACT IS DESIGNED TO ACHIEVE NOBLE PURPOSES WHICH INCLUDE FAIRNESS AND EQUALITY TO ALL PERSONS WHO COME UNDER ITS JURISDICTION.

Gilbert v. Penn-Wheeling Closure Corp., 917 F. Supp. 1119 (N.D.W.Va. 1996)

Henegar v. Sears, 965 F.Supp. 833 (S.D.W.Va. 1997)

West Virginia Code, §5-11-1

West Virginia Code, §5-11-2

B. THE HEARING STRUCTURE UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT COMMANDS THE UTMOST CARE AND ADHERENCE TO PROPER PROCEDURE.

Allen v. State Human Rights Commission, 342 SE.2d 99 (1984)

West Virginia Code, §5-11-6

West Virginia Code, §5-11-8(d)(3)

C. THE REQUIREMENTS OF PROCEDURAL DUE PROCESS

North v. W.Va. Bd. Of Regents, 233 S.E.2d 411 (1977)

State ex rel. Rogers v. Board of Education of Lewis County, 25 S.E.2d 537, 542 (1943)

Tennant v. Marion Health Care Foundation, Inc., 459 SE.2d 374 (1995)

D. THE HEARING WAS CONDUCTED IN VIOLATION OF THE WEST VIRGINIA ADMINISTRATIVE PROCEDURES ACT AND GOVERNING REGULATIONS.

West Virginia Code, §5-11-10

West Virginia Code, §29A-5-1(d)

West Virginia Code, §29A-5-2

77 C.S.R. 2-7.4a

77 C.S.R. 2-7.13

77 C.S.R. 2-7.27e.4

77 C.S.R. 2-7.30

E. THE AWARD OF INCIDENTAL DAMAGES WAS ENTIRELY UNJUSTIFIED.

Bishop Coal Co. v. Salyers, 380 S.E.2d 238 (1989)
Courtney v. Courtney, 487 S.E.2d 436, 440 (1993)
Frye v. Future Inns of America-Huntington, Inc., 566 S.E.2d 237 (2002)
Hardman Trucking Co. v. Poling Trucking Co., 346 S.E.2d 551 (1986)
Human Rights Commission v. Perlman Realty Agency, 239 S.E.2d 145 (1977)
Ripley v. Whitten Transfer Co., 63 S.E.2d 626 (1950)
Spencer v. Steinbrecker, 164 S.E.2d 710 (1968)

F. THE DECISION WHICH FINDS HEETER LIABLE TO COMPLAINANTS KELLY, BOYKINS AND BINDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Chapman v. Al Transport, 180 F.3d 1244 (11th Cir. 2000)
Shepherdstown V.F.D. v. W. Va. Human Rights Commission, 309 S.E.2d 342 (1983)
West Virginia Code, §29A-5-2
West Virginia Rules of Evidence 602
Black's Law Dictionary (5th Ed. 1979)

VI. Discussion of Law

A. THE WEST VIRGINIA HUMAN RIGHTS ACT IS DESIGNED TO ACHIEVE NOBLE PURPOSES WHICH INCLUDE FAIRNESS AND EQUALITY TO ALL PERSONS WHO COME UNDER ITS JURISDICTION.

The West Virginia Human Rights Act, West Virginia Code, §5-11-1 *et seq.*, was first enacted in 1967. While the Act has added provisions over the years its purpose is as clear as it is noble. The Act is West Virginia's response to the Civil Rights Act of 1964 and should be interpreted together with that legislation, Henegar v. Sears, 965 F.Supp. 833 (S.D.W.Va. 1997); Gilbert v. Penn-Wheeling Closure Corp., 917 F. Supp. 1119 (N.D.W.Va. 1996). The policy is thus stated:

"It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas

of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status.

The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society," West Virginia Code, §5-11-2.

It is of utmost importance that any hearing which is conducted to vindicate the rights which are protected by the Human Rights Act should be conducted with dignity, professionalism and in the spirit of fairness. At a minimum, all parties to such proceedings should expect proper decorum from the officers who participate and that a spirit of fairness will attend all such proceedings. Parties should anticipate that the judge who presides over hearings under the Act will follow the applicable statutes and regulations which govern the proceedings.

When proceedings under the Human Rights Act fall short in the application of the governing statutes and regulations, when the proceedings lack proper decorum, dignity and professionalism, all parties lose whether they realize it or not. Indeed, the very noble purposes of the Act itself are undermined when the proceedings are fatally flawed. Justice is seldom served when a party has good reason to believe that he/she/it has been treated unfairly. That can never be more so than when the outcome of a proceeding costs a party hundreds of thousands of dollars and subjects the party to personal ignominy. Under the West Virginia Human Rights Act an employer who is found liable loses both money and reputation. Accordingly, those who possess the authority to render decisions must endeavor to be careful, prudent and even-handed. The outcome demands it.

B. THE HEARING STRUCTURE UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT COMMANDS THE UTMOST CARE AND ADHERENCE TO PROPER PROCEDURE.

West Virginia law requires that the Human Rights Commission “. . . shall employ an administrative law judge who shall be an attorney, duly licensed . . . for the conduct of the public hearings . . .” West Virginia Code, §5-11-6; Allen v. State Human Rights Commission, supra. West Virginia Code, §5-11-8Id)(3) authorizes the Commission to delegate to the Administrative Law Judge “. . . to determine all questions of fact and law presented” which is reviewed for whether it conforms to laws and Constitutions, is within the Commission’s jurisdiction, rendered in accord with procedures and applicable rules, supported by substantial evidence and not arbitrary, capricious or an abuse of discretion. In summary, the Administrative Law Judge acts as both judge and jury with the awesome authority to return a verdict of damages whether economic or incidental damages. After the Administrative Law Judge acts, the Commission which chose the Administrative Law Judge in the first place is provided a somewhat narrowed window of review since the Administrative Law Judge has been the fact finder. Because the Commission merely enters an order which affirms, reverses or modifies the Administrative Law Judge’s decision the parties and public cannot know anything of the thought process and reasoning of the Commission.

It follows from the structure of the Act that 1) persons selected to act as Administrative Law Judge should be above suspicion for bias, 2) persons who are selected should always be careful to strictly follow the law and procedure which govern these proceedings, and 3) such persons should be diligent to assure that the proceedings are conducted in an atmosphere of fairness and dignity consistent with the high purposes of the Act.

C. THE REQUIREMENTS OF PROCEDURAL DUE PROCESS

The standards needed to satisfy procedural due process depend upon the particular circumstances of the case, North v. W.Va. Bd. Of Regents, 233 S.E.2d 411 (1977). The more valuable the right sought to be deprived, the more safeguards will be interposed. Due process always requires an unbiased hearing tribunal and the opportunity to present evidence on one's behalf. More than 60 years have now passed since this Court concluded that *the failure to produce sworn testimony nullifies a judicial or quasi-judicial proceeding*, State ex rel. Rogers v. Board of Education of Lewis County, 25 S.E.2d 537, 542 (1943).

In the appeal to the Human Rights Commission Heeter's trial counsel urged the Commission to reverse the Administrative Law Judge's decision citing among the several grounds presented that the Administrative Law Judge had misstated, manipulated and manufactured evidence, Notice of Appeal dated 1/29/04. Counsel submitted a copy of a prior recusal motion filed in another case which recited Administrative Law Judge Wilson's record of decisions, showing that of his decisions over 84% favored Complainants in a period of 7 1/2 years and 100% were decisions favorable to Complainants during the four years before that particular motion was filed. The Commission also had the hearing transcript to review. Most assuredly, a thoughtful and objective observer considering these materials would pause in view of such a record, Tennant v. Marion Health Care Foundation, Inc., 459 SE.2d 374 (1995).

In this case, it is impossible to ignore the poor quality of the proceedings in that the absence of proper decorum and procedure is painfully obvious. Coupled with that fact, the money judgment rendered against Heeter was quite large. Most striking however is the Administrative Law Judge's decision which awards money judgments to non-prevailing parties as incidental damages and other gratuitous findings e.g. that Heeter "sabotaged" Boykins' later

employment. It is submitted that an objective observer would not view this as a proceeding which was conducted before an unbiased tribunal. There is simply nothing about these proceedings which inspires confidence in the integrity of the judgment reached below.

As noted *supra*, in West Virginia procedural due process requires the presence of sworn testimony. The damages found against Heeter which now exceed \$200,000 with accrued interest is predicated upon written submissions, not sworn testimony. On that further basis the proceedings violate the requirements of due process of law.

D. THE HEARING WAS CONDUCTED IN VIOLATION OF THE WEST VIRGINIA ADMINISTRATIVE PROCEDURES ACT AND GOVERNING REGULATIONS.

In addition to the above requirements of procedural due process all proceedings before the Human Rights Commission must be conducted in conformity with the West Virginia Administrative Procedures Act, see West Virginia Code, §5-11-10. Two provisions of the Administrative Procedures Act have been violated based on this record.

West Virginia Code, §29A-5-1(d) provides:

“All hearings shall be conducted in an impartial manner. The agency, any member of the body which comprises the agency, or any hearing examiner or other person permitted by statute to hold any such hearing for such agency, and duly authorized by such agency so to do, shall have the power to: (1) Administer oaths and affirmations, (2) rule upon offers of proof and receive relevant evidence, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) dispose of procedural requests or similar matters, and (6) take any other action authorized by a rule adopted by the agency in accordance with the provisions of article three of this chapter.” (Emphasis added).

And

West Virginia Code, §29A-5-2:

“(a) In contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded. **The rules of evidence as applied in civil cases in the circuit courts of this state shall be followed.** When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record. Any party to any such hearing may vouch the record as to any excluded testimony or other evidence.

(b) All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

(c) **Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.”**

Multiple violations of the applicable Code of State Regulations also appear. In these proceedings the Rules of Professional Conduct must be adhered to, 77 C.S.R. 2-7.4a. The Administrative Law Judge must regulate the course of the hearing and to this end the regulations afford the Administrative Law Judge considerable discretion, 77 C.S.R. 2-7.13 and 77 C.S.R. 2-7.27e.4. The Administrative Law Judge should also follow and properly apply the rules of evidence, 77 C.S.R. 2-7.30. The proceedings fail on this basis, too.

E. THE AWARD OF INCIDENTAL DAMAGES WAS ENTIRELY UNJUSTIFIED.

Due to their very nature, incidental damages awarded for embarrassment, humiliation, emotional distress and loss of personal dignity should be viewed with caution. While this Court has approved awards of incidental damages in Human Rights Act cases the Court has never allowed such an award to *parties who lost*, see Human Rights Commission v. Perlman Realty Agency, 239 S.E.2d 145 (1977); Bishop Coal Co. v. Salyers, 380 S.E.2d 238 (1989); Frye v. Future Inns of America-Huntington, Inc., 566 S.E.2d 237 (2002). In fact, this Court has held that in cases where the claim presented is limited to emotional distress that:

“ . . . such emotional distress must not only be severe, but must manifest distinct psychological or mental patterns that are commonly recognized by experts,” Courtney v. Courtney, 487 S.E.2d 436, 440 (1993).

Parties who seek damages must always prove those damages by a preponderance of the evidence, see e.g. Ripley v. Whitten Transfer Co., 63 S.E.2d 626 (1950). Damages should never be awarded based upon conjecture or speculation, Hardman Trucking Co. v. Poling Trucking Co., 346 S.E.2d 551 (1986), Spencer v. Steinbrecker, 164 S.E.2d 710 (1968). These axioms apply equally to the claims made in this case. There is or should be no exception simply because the case involves the Human Rights Act. In fact, it can be forcefully argued that when one person alone possess the full authority to determine such damages the record should certainly be scrutinized as carefully as when a judge and jury pass upon such claims.

Contrary to the requirements for proving incidental damages the Complainants herein merely said they were “upset” or “hurt” or “didn’t think it was right” or found it “very disturbing” or were “disappointed.” Such conclusory statements do not constitute proof by a

preponderance of evidence. Indeed, such self-serving statements can be viewed as *de minimus* proof.

**F. THE DECISION WHICH FINDS HEETER LIABLE TO
COMPLAINANTS KELLY, BOYKINS AND BINDER IS NOT
SUPPORTED BY SUBSTANTIAL EVIDENCE.**

There exist threshold flaws and deficiencies in the finding of liability as well as more nuanced, arcane errors in the decision that Heeter discriminated against Mssrs. Kelly and Boykins and Ms. Binder. West Virginia law requires that a complainant under our Human Rights Act must establish a *prima facie* case by a preponderance of the evidence. That burden can be met by proving that the complainant belongs to a protected group, that he or she applied and was qualified for the position, that he or she was rejected in spite of his or her qualifications and after the rejection the respondent continued to accept applications from similarly qualified applicants, Shepherdstown V.F.D. v. W. Va. Human Rights Commission, 309 S.E.2d 342 (1983), syl. pt. 3.

If the complainant meets the initial burden of proof then the respondent has the burden of offering some legitimate and nondiscriminatory reason for the rejection. When the respondent succeeds in rebutting the presumption of discrimination, then the complainant is provided with the opportunity to prove by a preponderance of the evidence that the respondent's reason for rejection is a mere pretext for unlawful discrimination, Id. The burden of persuasion never shifts and always remains upon the complainant.

Threshold Flaws and Deficiencies

Very basic errors exist in the decision below. Peter Kelly is awarded more than \$76,000 (including interest through January, 2004), paragraph 85, p. 28 and p. 43, but he is not found to

have proved a *prima facie* case of discrimination in paragraph 77, p. 26. On the other hand, the converse is true for Kerry L. Walker, see paragraph 77, and paragraph 5, p. 40. However, in paragraph 5, p. 40 the Final Order concludes that the Respondent has *failed to show by a preponderance that it would not have hired Peter Kelly, Octavia Binder and Timothy Boykins*. In this regard, not only does a glaring internal discrepancy exist within the Final Order, but also the burden of proof appears to have been improperly shifted to Heeter.

In connection with Mr. Boykins' claim there is no proof that he actually submitted an employment application to Heeter Construction, Inc. as required by law, Sheperdstown V.F.D. supra. Moreover, the finding that Mr. Boykins was constructively discharged from his subsequent employment at Evergreen Reclamation because of some act of "sabotage" by Mr. David Heeter is absurd. Mr. Boykins' testimony about quitting his job at Evergreen Reclamation follows:

"A. No, ma'am, I got terminated because my boss had – he called me in, Dave Cochran, called me in from work one day, I got off work, we hydroseed, and he called me in and asked me did I know Mr. Heeters. I told him, yes. He said that, I heard you got a lawsuit against him. I said, I told Dave, I set down, I said, David, I went an applied for a job, I was qualified for a flagger and I thought I should have got a job over it. He said, I understand. I told Dave, I said, any time that you go over there and hydroseed on this hill over there, I will stay at the shop and clean equipment if it comes down to that. I went to work one morning, Dave come in there cussing, throwing pages and stuff, put his hand in my face cussing and stuff, I left.

Q. So you quit that employment after six months, correct?

A. Yes, ma'am." T. Vol. 2, pp. 192-193.

The same can be said of the finding about "apologizing." Boykins attributed that to a conversation with the now deceased Mr. Sam Browning, which constitutes the entirety of the evidence on the subject.

In relation to Ms. Binder there are virtually no findings in the record which support the "fact" finding or legal conclusion that she was the victim of discrimination. The record of findings and the evidence goes no further than to show that Ms. Binder was a member of a protected class of persons. There was no evidence anywhere in the record to show that Heeter knew what her age was as it was not listed on her application and there was no testimony that her age was discussed.

Beyond the aforementioned deficiencies, the Administrative Law Judge directed a "mail in" of the damage evidence, see T Vol. 3, pp. 133-134, 175. Such a procedure is not considered evidence as there was no supporting stipulation, Rule 602, West Virginia Rules of Evidence; West Virginia Code, §29A-5-2; Black's Law Dictionary (5th Ed. 1979). In spite of these most fundamental of errors, and arguably because of them, large damages for allegedly lost wages were awarded by the Administrative Law Judge.

The Final Order Employs an Erroneous Burden of Proof

A careful review of the Final Order demonstrates that it misstates the burdens on the parties. Under Conclusions of Law, paragraph 5, pp. 40-41 the Order states:

"5. The Complainants have established a prima facie case of race and/or sex or age discrimination, regarding the failure of Respondent to hire them for positions of rock truck drivers and flaggers, as the case may be. Respondent has articulated legitimate non discriminatory reasons for the failure to hire Complainants, that Respondent hires family, friends and those recommended by

family, friends and other trusted business associates in the community. Complainants have proven by a preponderance of the evidence that although a legitimate non discriminatory reason was involved in the decisions not to hire the Complainants, that the impermissible factor of race was a significant factor in the failure to hire the Complainants as well. Respondent has demonstrated by a preponderance of the evidence that it would not have hired Complainants, Kerry Walker, Sherri Thomas and Andrea Thomas-Pauley, even were the impermissible factor of race not considered; while Respondent has failed to show by a preponderance of the evidence that it would not have hired Complainants, Peter Kelly, Octavia Binder, and Timothy Boykins, in the absence of the unlawful consideration of their race.”

Contrary to the foregoing conclusion, the burden which should be placed on the complainants after the respondent offers evidence of legitimate and nondiscriminatory reasons for not hiring the complainant is to prove by a preponderance of evidence that the Respondent’s reasons are merely pretext for unlawful discrimination. Simply stated, there is no finding or conclusion which addresses the subject of pretext, notwithstanding that the record is replete with testimony and documentary evidence showing legitimate non-discriminatory reasons for not hiring Kelly, Boykins and Binder. In fact the Administrative Law Judge found non-discriminatory reasons, but failed to follow through with the law’s requirements for analyzing this issue.

The non-discriminatory reasons for not hiring these three persons is indeed in the record and includes the reasons found by the Administrative Law Judge. The record also reflects a sound basis to conclude that there was no *prima facie* case of discrimination shown in the first place and any evidence of discrimination was entirely rebutted by Heeter’s proof. As for Peter Kelly, III, the position he sought was *actually filled by Greg Jackson*, an African-American, see Final Order paragraph 84, p. 28. It is nonsensical to find racial discrimination when the person hired is of the same race as the unsuccessful applicant. Under this decision Heeter can never win

– if he had hired Kelly, Jackson could successfully complain. Surely, that cannot be the law. As for Mr. Boykins, who is under the law a non-applicant, Heeter knew of his previous flagging work and was not impressed by it. As for Ms. Binder, she was found to be unpleasant and demanding. The Human Rights Act does not require that an employer hire someone whose work they don't like or whose personality is found to be unpleasant. The business judgment of the prospective employer should not be overruled by the Commission. When it does, the Commission becomes a "super employer," Chapman v. Al Transport, 180 F.3d 1244 (11th Cir. 2000). That is not the Act's function or purpose.

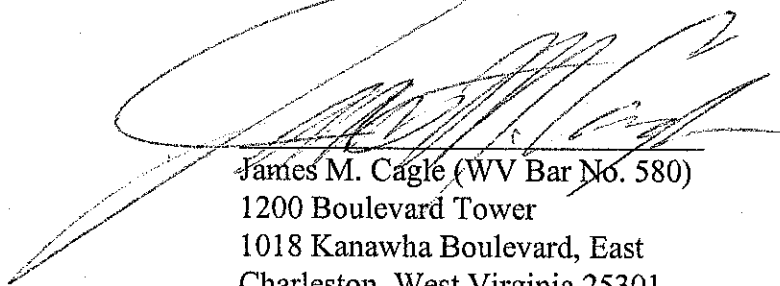
An overarching feature of the evidence which should have been dispositive of the allegations against Heeter was the testimony of Rebecca G. Haley, EEO Labor Compliance Supervisor, T. Vol 4, pp. 98-187, Mike King of Heeter Construction, Inc. whose job included making sure that minority hiring goals were met, T. Vol. 7, pp. 252-289, and William Hambleton, West Virginia Highways Department EEO Compliance Officer, T. Vol. 7, pp. 199-248. *Each of these witnesses testified without any impeachment or rebuttal that Heeter had not only met but had exceeded all requirements of minority hiring.* For example, Ms. Haley confirmed that Heeter's labor force reflected a 14% minority representation and 22% female representation, T. Vol. 4, pp. 141-142, see Exhibit 33 (compliance status letter dated 5/1/01). Mr. King's evidence confirmed the 14% minority hires and 22% female hires, exceeding the government's goals, the required contract requirements and well above the minority population figures for Logan County, T. Vol. 7, p. 272. Mr. Hambleton also testified that Heeter had met and exceeded West Virginia Department of Highways minority and female hiring requirements, T. Vol. 7, pp. 201-210. The investigators had checked and re-checked the Heeter job as part of

their responsibilities. While one can still discriminate even if he meets the goals for hiring minorities, when this evidence is considered along with the other non-discriminatory reasons it is clear that the reasons given are not a pretext for discrimination.

VII. Conclusion and Prayer

Appeals from the Human Rights Commission are considered by applying a *de novo* review of the legal conclusions and reviewing the findings of fact under a clearly erroneous standard. This Court shall reverse, vacate or modify the decision or order if and when substantial rights have been prejudiced because the findings, inferences, conclusions, decisions or order violate constitutional or statutory provisions, exceed statutory authority or jurisdiction, are made upon unlawful procedures or are affected by other error of law, are clearly wrong, arbitrary or capricious, Gino's Pizza of West Hamlin, Inc. v. W.Va. Human Rights Commission, 418 S.E.2d 758 (1992). In this case all of the above infirmities apply. The law does not support the decision against Heeter, the procedure followed was unlawful, the constitution was violated, the findings of fact are clearly wrong, are arbitrary, capricious and contradicted by the evidence which was presented. Remarkably, the decision even exceeds the Commission's jurisdiction when damages are awarded to persons who are not found to be the victims of discrimination. Consequently, the decision below should be reversed and judgment should be entered in favor of the Appellant Heeter Construction, Inc.

Respectfully submitted,



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No. 041406

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HEETER CONSTRUCTION, INC.

Appellant,

v.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

and

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

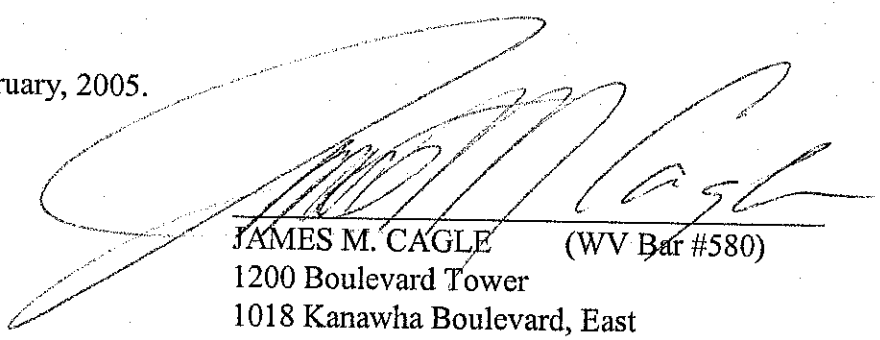
Appellees.

CERTIFICATE OF SERVICE

I, James M. Cagle, hereby certify that I have served a true and exact copy of the foregoing **BRIEF OF APPELLANT** via first-class mail, postage prepaid to the following:

Paul R. Sheridan, Esquire
Deputy Attorney General
Civil Rights Division
P. O. Box 1789
Charleston, West Virginia 25326

on this the 22nd day of February, 2005.



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