

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

NABIL RAGI AKL,

Complainant,

v.

Docket No. ENO-484-06

EEOC No. 17J-2006-02142C

FORD MOTOR CREDIT COMPANY,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on February 20th, 21st and 22nd, 2008 and reconvened on June 30th, July 1st and July 2nd, 2008, in Kanawha County, at the West Virginia Human Rights Commission's Office Hearing Room, at Room 108A, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge. The record was reopened and further testimony taken from Owen Kirk Staggs on February 6th, 2009.

The Complainant, Nabil Ragi Akl, appeared in person and by Counsel, Andrew J. Katz, Esq., of Working Families Law Firm, L.C. The Respondent, Ford Motor Credit Company, appeared in person by its representative, Jeff Godlewski, Regional Human Resource Manager, and by Counsel, Charlie J. Harris, Jr., Esq., and Erica D. McCaskill, Esq., of Berkowitz, Oliver, Williams, Shaw & Eisenbrandt, LLP for the first three days of Public Hearing; by Charlie J. Harris, Jr., Esq., and Julia D. Kitsmiller, Esq., of Seyferth,

Blumenthal & Harris, LLC for the final three days of Public Hearing admitted pro hac vice; and, by local Counsel, Richard D. Fisher, Esq. with Adams, Fisher & Boggs, PLLC. The parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof, and response briefs through October 31, 2008. Michael L. Blumenthal, Esq., appeared pro hac vice at the February 6th, 2009 proceedings. Respondent Ford Motor Credit Company Supplemental Findings of Fact were filed February 11, 2009 by Robert D. Fisher, 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 necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

I.

STATEMENT OF THE CASE

The Complainant, Mr. Akl, is a person of Lebanese birth. He began working for the Respondent, Ford Motor Credit Company, in November 1998 as a Customer Service Representative-a at the North Atlanta Branch office. He later moved to the Nashville Regional Service Center and was promoted to Customer Service Representative-b at salary grade 4. Later, Mr. Akl became a Dealer Service Analyst at salary grade 5 in the Kansas City Regional Office and cross trained as a Dealer Credit Analyst, as preparation to become a Credit Supervisor. Complainant was promoted to a Dealer Service Supervisor at a salary grade 6 and worked at the Ford Motor Credit Huntington, West Virginia Office in February 2005.

Sometime later in 2005 an on-line employee survey from the Respondent's Personnel Department indicated an unusually high rate of employee dissatisfaction in the Respondent's Huntington Office. This triggered an on-site personnel audit by the Personnel Department officials from corporate headquarters. During the course of the on-site audit, interviews of employees disclosed numerous complaints about the behavior of the Complainant, Mr. Akl. One of the two persons conducting the personnel audit began investigating the Complainant at that time and taking statements from employees in the Huntington Office regarding allegations that Mr. Akl repeatedly used obscene and lewd language and gestures in the office, was abusive in his language toward one individual, made a remark suggesting gender

bias on his part, and that he had disparaged his co-workers. As a result of this investigation, Mr. Akl was demoted from his supervisory duties and reassigned as a salary grade 5 Dealership Services Analyst on September 27, 2005, at the same salary and benefits.

During the investigation, the woman investigating Mr. Akl, took a statement from an individual who worked for Mr. Akl, which indicated that he too engaged in the foul language and that it was all part of maintaining good relations with the dealerships. That statement also indicated that part of the kidding that took place involved Mr. Akl being subjected to insulting derogatory references to his Middle Eastern descent, such as calling him Al-Qaeda, camel jockey and other similarly inappropriate types of comments, both from co-workers, his supervisor and the dealership finance people. Although Mr. Akl complained to the investigators after being demoted, he refused to name names when Respondent's agents indicated it would make no difference in the demotion that he had received. Despite Respondent's knowledge of these types of remarks in the workplace, no investigation was done regarding the ethnic slurs that Complainant had been subjected to in the workplace. On September 29, 2008, Complainant faxed in his resignation from his employment.

II.

PARTIES' CONTENTIONS

The Complainant contends that he was subjected to harassment based upon comments disparaging his national origin by co-workers, supervisor and the dealership customers of the

Respondent which created a hostile work environment. Mr. Akl contends that he was demoted from a supervisory position by Respondent for using offensive inappropriate language in the workplace, while another individual who was not of Lebanese descent was not disciplined for using similar language; and constructively discharged when he subsequently resigned thereafter. Mr. Akl was promoted three times in a seven year period and received consistently high evaluations prior to an on-line survey and subsequent on-site personnel audit, which revealed problems with his supervisory performance leading to an investigation of Mr. Akl. During the course of the investigation of Mr. Akl, Mr. Staggs was identified as using similar language in the workplace and statements taken from Mr. Staggs also identified language disparaging Mr. Akl as a terrorist and offensively referring to his Middle Eastern descent. Despite this knowledge by Respondent, no actions were taken to investigate or eliminate that offensive work place language and conduct.

The Respondent contends that although Mr. Akl was alleged to have been called such things as camel jockey, al Qaeda, and towel head in the office, the Complainant cannot establish a hostile workplace claim because such comments were admitted to be harmless office teasing banter to lessen the tension in a stressful work environment, while the Complainant never utilized the Respondent's numerous methods for complaining about discrimination and in fact did not complain about such comments until two hours after having been notified of his demotion from supervisory duties. Respondent contends that Complainant's disparate treatment claim fails because he is not similarly situated to his

comparator in that no-one complained about the language of another supervisor, but rather only a non-supervisory employee with different responsibilities. Mr. Akl had numerous people complaining about his foul language and sexual innuendo; but also his abusive comments, comments offensive regarding gender and persons with disabilities, and further slanders of co-workers. Finally, Respondent argues that Complainant is unable to meet the objective reasonable person standard for constructive discharge, because he did not lose salary or benefits and voluntarily quit within twenty-four hours of his demotion from supervisory duties because of his abhorrent behavior.

III.

SUMMARY OF DECISION

The Complainant admits that he used vulgar language in the workplace. The evidence established that an abnormally high dissatisfied rating from Respondent's employees in the Huntington Office on an on-line survey of employee satisfaction resulted in an on-site personnel audit, which turned up repeated and strong complaints from employees regarding the conduct of one of the Respondent's supervisors, namely the Complainant. The Complainant has established that his demotion from supervisory duties was in part related to his national origin, being Lebanese. Complainant's disparate treatment claim does not necessarily fail because no other supervisors who engaged in such conduct to such a degree

as to cause serious trouble with office morale were treated differently. Complainant's supervisor, Mr. MacDonald, who is not of Middle-Eastern descent, and permitted Complainant's foul language without addressing the concern in his evaluations or expressing it as being a basis of disciplinary action, was not demoted as Complainant was but rather given a written letter of reprimand. Other supervisory personnel at the Huntington Office had used profanity with no discipline ever being imposed upon them. The influence of ethnically offensive slurs against Complainant were not investigated in relation to their impact on Complainant's alleged conduct or the motives of those giving damaging statements against Complainant in regard to Respondent's investigation and demotion of the Complainant.

Complainant is able to meet the objective reasonable person standard for constructive discharge, (despite his not losing salary or benefits and voluntarily quitting within twenty-four hours of his demotion from supervisory duties); because of the circumstances surrounding the investigation conducted by Ms. Loy without any meaningful opportunity of Complainant to respond to the allegations and voice his concerns in that process. When Complainant was informed of the discipline, his demotion from supervision, he immediately informed Ms. Loy that he was being subjected to ethnic harassment himself and that he was responding to that harassment. The placing of him under the supervision of those who had conspired to have him demoted for their own gain placed the Complainant in an untenable position. The failure of Respondent to address his problems with the ethnic slurs in connection with the failure to give him any meaningful opportunity to defend himself from

the charges leading to his demotion, while demanding he make specific allegations against his co-workers, with the knowledge that he would be placed under their supervision, placed the Complainant in a position in which no reasonable person could be expected to remain on the job.

The Complainant has established a hostile workplace claim. His testimony is credible that he was subjected to severe ethnic slurs because of his Lebanese background, by many co-workers, his supervisor, Mr. MacDonald, and dealers. These included such slurs as “camel jockey” and worse, including repeated references to Complainant being “Al Qaeda” or terrorist. That this was done in a teasing manner, in no way ameliorates the severity of such harassment. Complainant would fire back with obscenities and other insulting references as his defense mechanism for this type of comment. Complainant’s testimony is corroborated by Mr. Stagg’s testimony and his statements to Ms. Loy in her investigation of Complainant’s behavior. The numerous witnesses of Respondent’s who denied hearing such language is simply not credible.

The actions of Complainant’s co-workers and customers in making these offensive derogatory slurs and references to his being a terrorist, may be imputed to the Respondent because of Respondent’s refusal to conduct an investigation into the allegations by Complainant of ethnic harassment, when they were aware of such comments during the investigation, from an independent witness’s statement to Ms. Loy. Such refusal to address the concerns raised by Complainant and investigate such offensive slurs and behavior is

inexcusable. Where Respondent's supervisory employee, Mr. MacDonald, repeated these comments and permitted them in his presence, the harassment is as a matter of law imputable to Respondent.

IV.

FINDINGS OF FACT

1. Complainant, Nabil Ragi Akl, is a U.S. citizen, who was born in Lebanon. Born in 1967, the Complainant emigrated to the United States in 1976 with his parents who were fleeing the civil war in Beirut, Lebanon. Tr. Vol. III, pages 4 and 5.

2. Respondent, Ford Motor Credit Company, (FMC hereinafter), is in the business of acquiring credit, approving credit and providing credit packages to the Ford dealerships. FMC gets the contracts from the dealerships, and collects and maintains accounts for the dealerships. Tr. Vol. III, pages 14 and 15.

3. The Respondent's customer is the Ford dealer. The object is to get a certain percentage of the dealer's loans with FMC. FMC has to reject loan offerings from the dealer when they can't approve the individual seeking the loan without offending the dealer whose loan offering is being rejected. Since FMC's rates for its credit packages were typically 2% higher than that available through the banks, FMC had to be able to sell its dealers on the quality of the services it was providing and rely upon interpersonal relationships with the

dealers. Tr. Vol. III, pages 22-25 and 33.

4. Complainant began working for the Respondent, Ford Motor Credit Company, in November 1998 as a Customer Service Representative-a at the North Atlanta Branch office. Tr. Vol. III, page 14.

5. Complainant later moved to the Nashville Regional Service Center and was promoted to Customer Service Representative-b at salary grade 4. Tr. Vol. III, pages 15 and 16.

6. Early in 2002 Complainant became a Dealer Service Analyst at salary grade 5 in the Kansas City Regional Office and cross trained as a Dealer Credit Analyst, as preparation to become a Credit Supervisor. A Dealer Service Analyst primarily makes decisions as to whether or not to accept a credit offering from the dealership. A Dealer Credit Analyst crunches numbers from the dealerships reviewing their financials and puts together credit packages to offer the dealerships. Tr. Vol. III, pages 18, 19, 21, 64 and 65.

7. Complainant was promoted to a Dealer Service Supervisor at a salary grade 6 and worked at the Ford Motor Credit Huntington, West Virginia Office in February 2005. Tr. Vol. III, page 72.

8. When the Complainant started at Huntington he was one of two Dealer Service Supervisors. The work was split between himself and Carmine Spada, with Mr. Spada directly supervising the Dealer Service Analysts and Complainant directly supervising the Dealer Credit Analysts for much of the period during which the events giving rise to the case

transpired. The Dealer Service Supervisor who was in the office when a question arose however would make the call and Complainant would frequently get calls from dealers wanting to change the decisions of the Dealer Service Analyst making a denial of a particular loan offering when Mr. Spada was not in the office or when Mr. Spada's phone was busy and would roll over to Complainant. Tr. Vol. III, pages 68-71, 75 and 76.

9. Complainant was the only person of Middle-Eastern descent as far as he is aware at the Huntington Office of Respondent. People were aware of his national origin because of his name and the fact that people would ask him from where he came. In fact his co-worker, Mr. Staggs told complainant's supervisor, Mr. MacDonald, that Complainant was Lebanese right after he was hired. Tr. Vol. III, pages 85 and 91; and Tr. Vol. II page 77.

10. References to Complainant's national origin would be made on a regular basis as part of "cutting up" in the office. This would occur in a number of ways, such as relaying what a dealer was saying, such as "give off your camel or put your camel humper on the phone". Other times it could be initiated in the office by anything such as a news flash or terror alert. People would say things like, "We're bombing your cousins" and "You weren't on vacation you were in an Al Qaeda training camp weren't you, because there was a terror alert when you were gone." Complainant had been called camel jockey, towel head, Al Qaeda, terrorist, camel humper or camel f***er, sand jockey and others. When something would happen like a terror alert, or as when a terrorist was caught who was named Nabil, he would get these type of comments all day. Tr. Vol. III pages 85, 88 and 89.

11. Dave MacDonald was the Branch Operations Manager at Huntington for the Respondent. He was aware of these comments when he would occasionally overhear them and would in fact sometimes repeat them or laugh at them. Mr. MacDonald did not attempt to stop anyone from saying these things. Tr. Vol. III, pages 89-92.

12. Complainant thought these comments violated the Respondent's anti-harassment policy because they were degrading comments about a person of a different racial or ethnic group. Complainant did not report the incidents because it was not in his nature to complain. He learned to be thick skinned about it. For example if a dealer would say something, he could not go to Ford and complain that a dealer had said something to him because it would not help his situation and ability to advance; particularly where it was Complainant's ability to get along with the dealers and have good relations with them that was one of his greatest strengths. Instead Complainant would "fire back" at the person as a self-defense mechanism. Some of this firing back might involve inappropriate comments or language. Tr. Vol. III, pages 95-100.

13. Complainant was offended by these comments. Sometimes Complainant would laugh instead of scream. Some comments were more offensive than others. Tr. Vol. III, pages 98 and 99.

14. Sometime during 2005 the Respondent's Personnel Relations Department received back from the Huntington Branch Office results of an anonymous electronic personnel audit conducted by the Respondent by e-mail survey of the Respondent's

employees on site. The purpose of these surveys is to assess whether company policies are being applied consistently and fairly. The audits cover management practices and the company's policies and procedures. If the results of the survey do not meet a specific threshold of employee satisfaction in either of these areas it triggers an on-site Personnel Audit by members of the Respondent's Personnel Relations Department. The results from the Huntington Office were unacceptable and required a rare on-site follow-up with in person interviews of the Respondent's employees in Huntington. Tr. Vol. IV, pages 157-161, 282 and 283.

15. The on-site personnel audit was conducted by Emma Loy, a Human Resources Business Partner for the Executive Vice President Team of Global Operations and Technology, who was conducting her first personnel audit to be certified in conducting such audits; and, Deanne Griffore, the Human Resource Manager for the Irving, Texas Business Center, who took the lead in conducting the audit. Tr. Vol. IV, pages 157, 162, 281 and 283.

16. Ms. Loy and Ms. Griffore split up the employees and began to interview them concerning the personnel audit responses from a list of standard questions. Ms. Griffore testified credibly that after the morning interviews, three or four people had raised concerns about inappropriate behavior by one of the supervisors, that being Complainant. These concerns centered upon inappropriate language and conduct by the Complainant that was creating a negative work environment. These allegations were very egregious and of a nature that Ms. Griffore had never heard before in the approximately twelve previous personnel

audits in which she had participated. After the morning interviews, Ms. Griffore talked to Ms. Loy and suggested that they needed to get in touch with Personnel Relations to discuss the things they were hearing. Personnel Relations directed Ms. Loy to begin an investigation into the allegations about the conduct of the Complainant, while Ms. Griffore continued with the personnel audit. Tr. Vol. IV, pages 164-166 and 283-289.

17. Those individuals that had made negative comments about the Complainant were called back in to be interviewed by Ms. Loy in regard to her investigation of Complainant and encouraged to provide statements of their personal experiences with Complainant. Only those that had indicated problems with Complainant were called back in as part of the investigation. Tr. Vol. IV, pages 168 and 169.

18. Tracy Davidson was a Discounter who worked for Complainant. She indicated that she overheard Complainant tell a dealer to "Kiss his balls." Ms. Davidson was displeased because she overheard Complainant regularly using the "F" word in constant vulgar back and forth with Kirk Staggs, a DSA. Additionally she overheard him speak disparagingly of his co- DSS, Carmine Spada, calling him a "lazy b***ard". Ms. Davidson complained that Complainant and Mr. Staggs would frequently get off the phone with one of the dealers and mimic them as if the dealer was mentally challenged. Ms. Davidson testified that she heard Complainant call people "p***y" and that these things made the work environment very uncomfortable to the point of not wanting to come to work in the morning. Ms. Davidson was not happy about her situation as she had to uproot her teenage daughter from Colorado

to transfer to Huntington. Ms. Davidson was a disgruntled employee. Tr. Vol. III, page 275; Tr. Vol. V, pages 51-53; Respondent's Exhibit No. 13.

19. Kitty Herrington worked for Complainant as a DCA. She stated to Ms. Loy that Complainant had told her she should not bitch because it was not taken positively by management, when she had complained to the Branch Manager about having to make copies for someone. She also claimed he said something along the lines of "that's what you get for having women working for you." She also complained about Complainant's use of the "F" word. Ms. Herrington was miserable working for Complainant because she did not feel valued and because of Complainant's unprofessional language and inappropriate actions. She began to see a therapist. Kitty Herrington currently supervises ten data entry clerks for Respondent. At the time she was in Huntington, Complainant had to repeatedly counsel Ms. Herrington for poor work performance. Ms. Herrington was moved from DSA to DCA because of poor performance and the Branch Manager had told Complainant to shape her up or move her out. Tr. Vol. III, pages 279 and 280; Tr. Vol. V, pages 85, 86, 89, 90, 94 and 95-97; Respondent's Exhibit No. 16.

20. When Ms. Loy interviewed Katherine Baisden, Ms. Baisden stated that Complainant told her, "You'll do it because it's your f***ing job" when Ms. Baisden was insubordinate because he did not approve of the way she had rounded the numbers on the credit package and told Complainant maybe he should have done it himself. When Ms. Baisden related the incident she had tears in her eyes and told Ms. Loy that she felt

humiliated. According to the statement taken by Ms. Loy, Ms. Baisden made other allegations as well. On another occasion Complainant was doing a deal review and asked that it include an additional comment, Ms. Baisden asked why and was told, "Because I said so!" At another sales review meeting when he got back the auditors recommendations, Ms. Baisden stated Complainant said, "All I need is another damned woman telling me what to do!" Ms. Baisden complained that Complainant used the "F" word on a daily basis. Ms. Baisden's statement says she never heard Complainant make homosexual references or mimic mentally challenged people. Tr. Vol. IV, page 187; Respondent's Exhibit No. 15.

21. Two individuals provided statements that they heard Complainant use inappropriate language in the office on a daily basis. Dianne Bowman gave a statement that Complainant used cuss language on a daily basis both in general conversation and after talking to dealers. Ms. Bowman specifically related Complainant calling the dealers "S.O.B." and "a**hole" after getting off the phone. Ms. Bowman indicated that she heard the "F" word in the office but wasn't sure if it was from the Complainant and did indicate that a person named Heather used the "F" word when she didn't get her way. Ms. Bowman did not ever hear anything regarding homosexuality or imitating mentally challenged people. Lorita Carman gave a statement which indicated Complainant used "locker room talk" and that he used the "F" word on a daily basis but that Complainant did not direct the language to her and that it did not bother her. Her complaint was simply that the Complainant needed to tone down his behavior and kidding because his music and voice were too loud. Ms.

Carman did not ever hear anything regarding homosexuality or imitating mentally challenged people. Respondent's Exhibits No. 17, No. 18 and No. 21.

22. Dianne Griffore did interview Brad Kusic as part of Ms. Loy's investigation of Complainant because she had just interviewed him the previous afternoon as part of the personnel audit. Mr. Kusic told Ms. Griffore that he heard Complainant use phrases such as, "who's sucking your dick today?" and "did so and so hit their head on their [sic] desk coming out from underneath your desk?"; as well as the regular use of the "F" word. Mr. Kusic worked as a DSA and would be supervised by Complainant when Mr. Spada was not present. Mr. Kusic heard daily if not hourly use of profanity by Complainant, while the other comments were heard two or three times. Mr. Kusic also testified that Complainant told sexual jokes. Mr. Kusic didn't like it, felt the comments were inappropriate and that they offended other people. Tr. Vol. IV pages 298 and 299; and Tr. Vol. V pages 18-20, and 24-26.

23. Mr. Kusic testified credibly that he heard other supervisors use profanity, but not nearly as frequent. Mr. Kusic testified credibly that dealers cursed over the phone on a regular basis. Mr. Kusic's testimony that he denied ever hearing any negative references to Complainant's ethnicity or race is not credible. Prior to coming to Huntington, Mr. Kusic had been demoted from supervisory position in 2002. He came to Huntington as a DSA and later moved to a DCA position. Mr. Kusic was promoted to DSS at the Huntington Office in May 2006. Tr. Vol. V pages 8-12, 19, 24 and 36.

24. Carmine Spada, the other DSS, told Ms. Loy that he heard Complainant use the “F” word and the “S” word on several occasions and that Kitty Herrington and Kirk Staggs had come to him with statements that Complainant swears. These statements were not complaining about the swearing but simply stating that he swore. Mr. Spada went to Dave MacDonald once when he heard the Complainant use the “F” word, but was told they needed to work things out. Mr. Spada never reported the language to Dave Nicosia but had discussed Complainant’s tone and way that he talks to his employees, specifically that he talked down to the employees. Mr. Spada never heard any references to male genitalia, homosexual references or mimicking of mentally retarded people. Mr. Spada admitted he had a difficult relationship with Complainant and had meetings with Mr. MacDonald, Complainant and Mr. Staggs to discuss their disagreements. Complainant had gone to Mr. MacDonald to complain that Mr. Spada was not doing his work. Complainant was astounded that Mr. Spada could not do a credit package and could not spread a financial after all the time he had been with Respondent as a DSS. Tr. Vol. III, pages 276 and 277; Tr. Vol. V, pages 124, 127, and 131; Respondent’s Exhibit No. 14.

25. Ms. Loy also took the statement of Michael Holder. He reported that he frequently heard Complainant use profanity in excess and that Complainant and Mr. Staggs would make homosexual jokes and sexual innuendo. Complainant was reported to have told Mr. Staggs, “I’m going to come over there and kick you in the nuts!”, “Who’s sucking your dick now?” and “You can kiss my balls.” Complainant told Mr. Holder he must have the

balls the size of raisins. Mr. Holder reported to Ms. Loy that Mr. Staggs used phrases like, "You get under the desk well" and called Complainant "Puntang" like it was a nickname. Mr. Holder also reported that Complainant said Mr. Spada was worthless and couldn't do his job. Complainant's Exhibit No. 13.

26. Both Ms. Griffore and Ms. Loy interviewed Dave MacDonald, the Branch Operation Manager, who was the Complainant's supervisor. Mr. MacDonald told them that he noticed Complainant used profanity and spoke with him about it around April, and then again sometime around June or July. In August he came up with the "cuss jar" for Complainant to put a quarter in each time he swore because it had helped him when he had a problem with swearing. Mr. MacDonald did not hear Complainant use vulgar comments or act unprofessionally or disrespectfully, and denied that any employees had complained or mentioned to him about the Complainant's language or behavior. Mr. MacDonald never told Complainant that his language could result in discipline, he did not think the language merited discipline and made no written record of the times he recalled talking to Complainant about his language. Tr. Vol. IV page 298, Complainant's Exhibit No. 14 and Respondent's Exhibit No. 50.

27. At 4:30 on September 13, 2006, Complainant was called into the meeting with Ms. Loy and Ms. Griffore. Complainant entered the meeting expecting to be briefed about the audit and office morale but was instead ambushed with a number of allegations. Complainant was never given an opportunity to explain himself or give any of his concerns.

When Complainant denied anything they would say, “are you sure you didn’t?” or “your lying.” Ms. Loy and Ms. Griffore had their allegations and had their minds made up. The meeting was fairly quick and Complainant was suspended immediately and did not return to work for approximately two weeks, at which time he was called in to discuss the discipline he would be given. Tr. Vol. III pages 124-126 and 314-316.

28. Ms. Loy provided Complainant with contact information and told him he could provide a written statement within the next week. The Complainant could not have complied however, because he was never given a summary of the allegations against him or any indication of what Respondent was planning in the way of discipline. Complainant only learned of the allegations in general terms at the time he was called into Dave Nicosia’s office on his return and given his demotion and letter of reprimand. That letter contained what the Complainant considered to be blatantly untrue statements and he never was given an opportunity to respond to all of the specific allegations leading to his demotion until the Public Hearing in the present action. Tr. Vol. IV page 164.

29. Ms. Loy interviewed Kirk Staggs by telephone a few days later, because he had been out of the office when she was conducting her investigation. Mr. Staggs denied using the “F” word. He stated that Complainant did not use the “F” word in the office-at the business level. He denied that Complainant used any inappropriate language that’s repetitive or habitual and that we all slip on occasion. He denied that they used that language on a regular basis but that one of them might hang up the phone and say something like that guy

was a real ass. Mr. Staggs indicated that they joke around with one another and the dealers like to tease them. Mr. Staggs denied that Complainant made any homosexual references other than to pass on a comment such as “take his knee pads off” or “quit kissing up to the boss”. He denied specific references to body parts such as “you can kiss my balls” or “who is sucking your dick now?” In his statement Mr. Staggs did mention that people would tease Complainant calling him a towel head or to get back on his camel because Complainant had come from Lebanon. Mr. Staggs told Ms. Loy that both Mr. Spada and Complainant had made comments that they felt each other had not been pulling their weight. Tr. Vol. IV pages 175 and 176; and Complainant’s Exhibit No. 5.

30. Ms. Loy discussed her investigation conclusions with Personnel Relations and HR and recommended that Complainant be discharged. Ms. Loy believed all of the worse allegations against Complainant, including that he used profanity several times per week. It did not bother her that there were big discrepancies in the descriptions of the purported language and the number of occurrences. Her testimony that it was not surprising given the differences in locations was not credible given the evidence of the proximity of all the people to Complainant in the office. Her matrix for presenting the investigation for instance listed the comment to Kathy Baisden about it being her “F***ing” job three times on the chart. She did not note that Ms. Baisden had been insubordinate or that Complainant had immediately apologized and had never directed any abusive language to any other subordinates. At no time had any other inappropriate language been direct to those who were purportedly

offended by it, nor had they voiced their complaint to the Complainant or any one else at the time. Personnel Relations indicated that termination was not equivalent to other instances where these allegations had been found and therefore it was decided that Complainant would be demoted from DSS to DSA and put back to Salary Grade 5, without decrease in his pay. Tr. Vol. IV pages 196-198, 222-224 and 227; Respondent's Exhibit No. 37.

31. Complainant was called into Branch Manager, Dave Nicosia's office when he returned to work from his suspension, and told that he was being demoted from supervisor as a result of the investigation. The Regional Director of Human Resources, Jeff Godlewski listened in on speaker phone as Mr. Nicosia delivered the letter of reprimand to Complainant and informed him of his removal from supervisory duties and demotion to salary grade 5. The Complainant declined to sign the letter of reprimand as it indicated that he had regularly used profanity and made vulgar comments on the floor and used this type of language in a threatening manner to employees. It further stated that Complainant admitted that he had been counseled on the inappropriate behavior on three separate occasions. Tr. Vol. VI pages 104-106; Complainant's Exhibit No. 11 and Respondent's Exhibit No. 24.

32. Complainant called Ms. Loy and confronted her about what he considered to be a witch hunt and kangaroo court and at which time Complainant stated to her how can you do this to me when I've been the victim of all this mistreatment, i.e. ethnic slurs, on the basis of Complainant's Lebanese origin. Ms. Loy immediately put Complainant's allegations into an e-mail and sent it to the Personnel Relations Manager and the Regional Human Resources

people. Ms. Loy did not inform Mr. Godlewski or others in relaying these allegations of ethnic slurs against Complainant, that the allegations had been raised by Mr. Staggs in the course of Ms. Loy's investigation of Complainant, nor were Mr. Stagg's interview transmitted or referenced in Ms. Loy's e-mail. Tr. Vol. IV pages 199-202; Respondent's Exhibit No. 48.

33. The next day after receiving the Loy e-mail, Regional Human Resources Manager, Jeff Godlewski and a Human Resources Associate called the Complainant from the Greenville South Carolina office to discuss his allegations of a hostile work environment. When asked for specifics, Complainant said that just about everyone in the credit department made such comments. Complainant refused to give names and dates for the comments when they made it clear to him that they would not reconsider the reprimand and demotion he had been given. Mr. Godlewski did not ever ask Ms. Loy if the allegations of ethnic slurs against Complainant had been confirmed by any of Complainant's co-workers in the credit department. They did not follow up on the investigations of the ethnic slur allegations because of his desire to link the two investigations and his refusal to name names of those responsible when they refused to negotiate his discipline. Complainant told them he would resign and seek legal representation because he did not want to work at salary grade 5 for former peers. Tr. Vol. IV pages 31-36, 84, 92 and 93; Respondent's Exhibit No. 27.

34. Complainant was told he would have to put the resignation in writing which he did on September 29, 2005 and hand delivered on that day. Tr. Vol. III pages 259 and 260; Respondent's Exhibit No. 28.

35. Complainant felt compelled to resign because of the refusal of the Human Resource people to reopen the investigation of his demotion when there were total obvious lies as far as Complainant was concerned. Things such as the letter of reprimand stating Complainant was counseled three times on his language, when no written warnings were given to him, never told that anyone was complaining and it was never brought up as a potential problem area in his reviews; when the letter of reprimand said he was threatening people; and, where the investigator had information before her that Complainant was being called terrible things like towel head and camel humper, but took no steps to follow up on those prior to announcing their decision to demote just the Complainant. Complainant had no trust at that point and felt that he would not have those problems of racially hostile language directed toward him addressed, but rather be precluded from responding in kind when such comments were directed toward him. Tr Vol. III pages 132, 133, 191, 235-237 and 241.

36. Complainant's total compensation varied from \$40,000 to \$87,300 from 2001-2004 with Respondent. Tr. Vol. I page 56.

37. That total include both his base salary which was \$44,000 at the time he left his employment with Respondent, plus various bonuses and incentives for moving. Those moving incentives include lump sum payments which were in addition to actual moving expenses. Tr. Vol. III, pages 16-18 and 294.

38. Complainant's expert Vocational Analyst, Errol Sandlon, determined that based

upon the generally good vocational factors Complainant possessed and the fact that he had been promoted three times while employed by Respondent in a little over seven year span, it would be likely that he would have continued to progress had he stayed with Respondent. The Vocational Expert examined the likely promotional paths for Complainant with the Respondent and looked at the corresponding national career figures which corresponded with those positions at Respondent and concluded that taking the median between the two next steps it would be expected that Complainant would earn on average over his career \$66,000 per year had he continued with Respondent. Tr. Vol. I page 44-52, 54-56, 66 and 93.

39. Mr. Sandlon next looked at Complainant's vocational history and determined that his best fits after his leaving employment with Respondent were in the vocational fields of credit analyst and restaurant management. The expected annual earnings potential in those fields over his working life, would be around \$50,000 per year as a restaurant manger, while as a credit analyst Complainant would be expected to earn around \$60,000. Complainant's Exhibit No. 1.

40. Complainant did not work from October 2005 until May 2006 when he was hired as a management associate/loan officer with United Bank in Griffin GA. Complainant was encouraged to leave because the Bank did not have enough business to justify keeping his position. Complainant earned \$42,000 in a year working there. Complainant looked into becoming a loan officer at other banks but was told he would need to take a lower paying loan associate position while he learned the FDIC rules etc. that apply to the banking industry

loan officer positions. Complainant did not pursue that line of work and instead took a job working for his brother as a manager at his brother's restaurant earning \$25,000. Tr. Vol. III pages 1586-163.

41. Mr. Sadlon calculated the loss of income and expected loss of income, through May 2009 to be around \$72,000; while the difference in income thereafter based upon his expected earning potential in the restaurant management field through the remainder of his career would be in the area of \$16,000 less per year than he could have earned potentially with the Respondent. Tr. Vol. I pages 64 and 65.

42. Complainant presented the testimony of an Economic Damages expert, Roger Griffith, who based upon these opinions of Mr. Sadlon, concluded that the present value of expected wages and benefits would result in a net loss of earnings through the age 72 expected working life of \$624,654.00, based upon the expected earnings of a restaurant manager career for Complainant. Complainant's Exhibit No. 4.

43. Complainant does not want to be reinstated by the Respondent because he is afraid that the Respondent's higher ups would be aware that he had gone to court against the company and would hold him back on promotions. Tr. Vol. III, pages 136 and 137.

44. This matter was reopened for the testimony of one of the witnesses, Owen Kirk Staggs because his earlier testimony had been constrained by intimidation of Respondent's Human Resource employee Jeff Godlewski, who indicated that Mr. Staggs could not be promoted when his "integrity" was in doubt. Mr. Staggs had sent an e-mail to himself on

February 25, 2008 setting forth his experience regarding his initial testimony on February 21, 2008. Mr. Staggs contacted the Administrative Law Judge's office to inform them of this fact after Respondent terminated his employment. Commission's Joint Exhibits No. 1 and No. 2.

45. Respondent promoted Mr. Staggs some time after his initial testimony in February 2008 to a supervisory position as DSS first in Atlanta and later in Nashville. This occurred after a meeting with Dave MacDonald and Dave Nicosia wherein he expressed his discomfort working around Kitty Herrington and others; as well as, his feeling that they as managers didn't stand up and do the right thing. In an earlier meeting with Mr. MacDonald he had been warned not to talk around Davidson, B[a]j[s]den, and Herrington. Tr. Vol. VIII, pages 38, 58 and 77.

46. Mr. Staggs was terminated from employment with Respondent on November 3, 2008, with reason for termination listed simply as "best interest of the company." Tr. Vol. VII, pages 17 and 18.

47. Complainant's Petition for Attorney's Fees, Exhibit 1, at page 7, contained an entry for 7/22/2008, TC re: fraudulent testimony. That document was served on Respondent's lawyer by facsimile transmission on October 23, 2008.

48. Mr. Staggs testified credibly that the DSA job was all about putting business on the books for Respondent. Although Respondent's employees did not tell DSAs to use sexist language or racist comments when interacting with the dealers to build dealer

relations, such conduct was observed by Mr. Staggs during his training as a DSA. Tr. Vol. VIII, pages 9 and 64.

49. Mr. Staggs testified credibly that both Branch Manager Mr. Giffin and later Mr. Nicosia used profanity and swore at the Huntington Branch office. Tr. Vol. VIII, pages 10 and 11.

50. Mr. Staggs testified credibly that Mr. Spada, Mr. MacDonald, Mr. Holder and Mr. Kucik all used jokes like towel head, where's the camel f**ker, and he's just upset because he can't form his turban today, etc., mostly centering on comments regarding sex with camels. Mr. Staggs testified credibly regarding a specific instance of a General Manger at a dealership, who had called him and told him, "tell the camel f**ker to get his head out of Dave MacDonald's lap and come out here and take my call." Tr. Vol. VIII, pages 15 and 25-27.

V.

DISCUSSION

The West Virginia Human Rights Act forbids discrimination against persons on the basis of their national origin. West Virginia Code §5-11-9(1) makes it unlawful; "For any person, employer, . . . to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment . . ." West Virginia Code §5-11-3(h) defines discriminate or discrimination as "to exclude from, or fail or refuse to extend

to, a person equal opportunities because of . . . national origin . . .”

In order to prove a *prima facie* case of discrimination under the Act, the Commission must show:

- (1) That the plaintiff is a member of a protected class.
- (2) That the employer made an adverse decision concerning the plaintiff.
- (3) But for the plaintiff's protected status, the adverse decision would not have been made.

Syllabus Point 3, Conaway v. Eastern Associated Coal Corp., 178 W.Va. 164, 358 S.E.2d 423 (1986). Mayflower Vehicle Systems, Inc. v. Cheeks 218 W.Va. 703, 713-714, 629 S.E.2d 762, 772 - 773 (W.Va.,2006).

The West Virginia Human Rights Act imposes on an employer a duty to ensure, as best it can, that workplaces are free of harassment that creates a hostile or offensive working environment. Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995), Syl. Pt. 8; Conrad v. ARA Szabo, 198 W. Va. 362, 370, 480 S.E.2d 801, 809 (1996). To establish a hostile or abuse work environment claim, it must be established:

1. That the subject conduct was unwelcome;
2. That it was based on the plaintiff's [national origin];
3. That it was sufficiently severe or pervasive as to alter the plaintiff's condition of employment; and

4. That it was imputable on some factual basis to the employer.

Fairmont Specialty Services v. West Virginia Human Rights Comm'n, 206 W. Va. 86, 522 S.E.2d 180 (1999). “The aggravated nature of discriminatory conduct, together with its frequency and severity, are factors to be considered in assessing the efficacy of an employer’s response to such conduct. Instances of aggravated discriminatory conduct in the workplace, where words or actions on their face clearly denigrate another human being on the basis of race, ... and which are clearly unacceptable in a civilized society, are unlawful under the West Virginia Human Rights Act... When such instances of aggravated discriminatory conduct occur, the employer must take swift and decisive action to eliminate such conduct from the workplace.” Id. at Syl. Pt. 3. At FN 8, the Fairmont Specialty Services Court elaborated, “Conduct such as the use of the “N” word to describe an African-American, ... cannot be tolerated in the workplace. They are the type of outrageous discriminatory conduct that may be considered to be of an aggravated nature such that the threshold for it to be actionable is much lower than for more subtle forms of discrimination which cumulatively cause such conduct to be actionable under the Human Rights Act.” Furthermore, “When discriminatory conduct under the West Virginia Human Rights Act, ...is reported to the employer, the report of such conduct places upon that employer a duty to investigate.” Id. at page 189.

In Slack v. Kanawha County Housing And Redevelopment Authority, 188 W. Va. 144, 423 S.E.2d 547 (1992) Syl. Pt. 6; the West Virginia Supreme Court recognized a cause of action for constructive discharge in cases of race discrimination , where the employer has

created a hostile working climate which was so intolerable that the employee was forced to leave his employment. The elements for a constructive discharge in a discrimination case are as follows:

Syl. Pt. 4. A constructive discharge cause of action arises when the employee claims that because of age, race, sexual or other unlawful discrimination, the employer has created a hostile working climate which was so intolerable that the employee was forced to leave his employment.

Syl. Pt. 5. Where a constructive discharge is claimed by an employee in a retaliatory discharge case, the employee must prove sufficient facts to establish a retaliatory discharge. In addition, the employee must prove that the intolerable conditions that caused the employee to quit were created by the employer and were related to the facts that gave rise to the retaliatory discharge.

Syl. Pt. 6. In order to prove constructive discharge, a plaintiff must establish that the conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary however that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit.

A discrimination case may be proven under a disparate treatment theory which requires that the Complainant prove a discriminatory intent on the part of the Respondent. The Complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Dept. v. West Virginia Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). Under this formula, the Complainant must first establish a prima facie case of discrimination; the Respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the Complainant must show that the reason proffered by the Respondent was not the true reason for the decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance or pretense. West Virginia Institute of Tech. v. West Virginia Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corp., *supra*. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and where pretext is shown, discrimination may be inferred, Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995), although it need not, as a matter of law, be found. St. Mary's Honor Society v. Hicks, 509 U.S. 502 (1993).

There is also the "mixed motive" analysis under which a Complainant may proceed

to show pretext, as established by the United States Supreme Court in PriceWaterhouse v. Hopkins, 490 U.S. 228 (1989), and recognized by the West Virginia Supreme Court in West Virginia Institute of Tech., supra. “Mixed motive” applies where the Respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the Complainant need only show that the Complainant’s protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the Complainant’s protected class had not been considered. Barefoot, supra, 193 W. Va. at 485, 487, 457 S.E.2d at 162 n.16, 164 n.18.

Complainant was demoted following an investigation that resulted from complaints from three disgruntled women employees. The depth of the angst that triggered Ms. Loy’s investigation of Complainant had little to do with Complainant’s foul language but rather much more to do with Ms. Herrington’s sheer incompetence first in her role as DSA then as DCA and Complainant’s need to continually coach her in her duties in the positions of DSA and DCA which are the pathways to career development within Respondent’s organization. Complainant had been told to counsel Ms. Herrington about complaining in front of the Branch Manager about doing tasks which she had been assigned. Complainant told her not to bitch about doing a job assignment in front of the Branch Manager because it does not create a good impression.⁶ A more politically correct term would be gripe perhaps but Complainant did not call Ms. Herrington a bitch nor did he imply that she was one in

counseling her in that instance. Similarly, Ms. Baisden had a singularly bad attitude about her work. Complainant told her that “she would do it because it was her f***ing job” when she suggested he do a report himself since he did not approve of the way she had rounded her numbers on the report. Complainant immediately apologized to her and that was the only instance that he had ever directed foul language at a subordinate, other than as part of the office banter and teasing. The only person who actually appeared to be offended by Complainant’s foul language was Ms. Davidson, who never voiced her offense to anyone until the investigation of Complainant.

Both Huntington Branch Managers, Mr. Griffin and Mr. Nicosia used profanity and swore with no discipline ever being imposed. Branch Operations Manager, Dave MacDonald, who was aware of the foul language, took no steps beyond asking that Complainant watch his language, and used ethnically offensive comments with sexual overtones himself, received a letter of reprimand. None of those individuals is Lebanese. Yet Complainant, who was Lebanese, was demoted. Additionally, the language for which Complainant was ostensibly demoted for using was frequently a direct response to the use of ethnically offensive jokes and comments directed toward the Complainant and was almost exclusively directed to those engaged in the teasing or in exacerbation at the conclusion of a phone conversation with an abusive dealer.

The Complainant was subjected to severely abusive ethnic slurs, which cannot be made “welcome” by Complainant simply because he is unwilling to complain when to do so

would be counterproductive to Complainant's career development with Respondent. Dealership managers would make references to him as a camel or camel humper. Complainant is dependent upon his relationships with these individuals to put business on the books. There is very credible testimony that Dave MacDonald, the Branch Operations Manager, Carmine Spada, a Dealer Service Supervisor, Mr. Holder and Mr. Kusic all used jokes like "towel head", "Where's the camel f***er" and "he's just upset he couldn't form his turban today". Complainant testified credibly that he was subject to barrages of teasing about his being a terrorist, "they're bombing your cousins" and like comments whenever something would occur in the news. These types of comments are so egregious that they created an extremely ethnically hostile work environment for Complainant. Respondent was made aware of these allegations when Ms. Loy talked to Mr. Staggs on the phone during her investigation of Complainant. Yet she did not investigate the allegations of these types of comments. She offered as explanation that no one was offended and that she did not investigate because she was too busy with the investigation of Complainant. Furthermore, when Complainant was made aware that he was being demoted, Complainant did complain to Ms. Loy regarding the offensive and abusive language he was being subjected to while no other people were being subjected to the witch hunt which resulted in Complainant being demoted. Ms. Loy refused to consider the implications of those allegations in regard to her investigation of Complainant.

Ms. Loy passed those concerns on to Mr. Godlewski, Regional Human Resources

Manager, who likewise failed to consider the implications in regard to the allegations against Complainant, refusing to reconsider his demotion. Mr. Holder and Mr. Kusic both used ethnically offensive slurs about and to Complainant. Both these individuals alleged in the investigation that Complainant swore everyday. Both coincidentally had motives to get Complainant out of the way for their own advancement, as evidenced by Mr. Kusic's promotion to DSS in May 2006 at the Huntington Office. Mr. Spada used such ethnically offensive language and did not get along with Complainant because Complainant found Mr. Spada to be lazy and incompetent to put together a credit package after years as a DSS with Respondent. Yet these facts and the allegations of ethnic harassment of Complainant were not relevant to Ms. Loy in regard to her investigation of what Complainant did or did not do. Ms. Loy simply thought Mr. Akl should be fired. Non Lebanese supervisors had never been fired for comparable behavior to that alleged against Complainant.

In the face of these circumstances one must evaluate the adequacy of Respondent's response to Complainant's request that Mr. Godlewski reevaluate the demotion he was given in light of the circumstance surrounding ethnically abusive harassment to which he was being regularly subjected. Respondent's response was that his demotion could not be reconsidered and would stand. Mr. Godlewski then requested Complainant to provide names, dates and instances concerning the ethnic harassment. At that point Complainant would have been required to level complaints against his supervisor, Mr. MacDonald and former peer and now supervisor, Mr. Spada. When Complainant refused to do so, Mr. Godlewski simply said well

we don't have anything to investigate. This reaction to ethnic slurs of the type encountered is woefully inadequate, given that Respondent had plenty of information upon which to initiate an investigation from the statement already in its possession from Mr. Staggs and from what Complainant had told them.

The effect of demoting Complainant would cause him to be putting together credit packages for dealerships which Mr. Spada was incompetent to do himself, under Mr. Spada's direct supervision. Complainant would be doing DSA work with dealers, whose business relationship was critical to his success, subject to ethnic harassment with no opportunity to respond by "firing back" without getting into further trouble with Respondent. Given that Complainant was the only one demoted, when other supervisors swore and were engaging in equally and far more egregious ethnic slurs and offensive comments it is unreasonable to expect that the Complainant could continue to work at the Respondent's Huntington Office. Respondent argues that Complainant was never told to resign. Yet its agents accepted his resignation without trying to dissuade him from doing so. They made no effort to allay his concerns when he refused to cooperate after their refusal to link his allegations to the investigation and his demotion, but rather seized upon that refusal as an excuse to ignore allegations of serious ethnic harassment of the Complainant.

DAMAGES

The Complainant is entitled to such relief as will effectuate the purposes of the West

Virginia Human Rights Act and “make persons whole for injuries suffered on account of unlawful employment discrimination.” Albermarle Paper Co. V. Moody, 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). The injured party is to be placed as near as possible to the situation he would have occupied had he not been discriminated against.

Mr. Akl, under the “make whole” rule is entitled to receive the difference between his expected earnings had he continued with Respondent on his career path with Respondent, less the Complainant’s expected earnings in his new career path as a restaurant manager. Complainant has demonstrated a reasonable belief that Respondent would not promote him were he to be reinstated with Respondent because the Respondent’s higher ups would be aware of his litigation against Respondent. What transpired with Complainant’s friend, Mr. Staggs, in this matter makes an order of reinstatement in this case unwarranted. Also, he is entitled to receive the maximum available incidental damages for his claim against Respondent. Gino’s Pizza of West Hamlin v. West Virginia Human Rights Commission, 187 W. Va. 318, 418 S.E.2d 764 (1992). The Complainant is entitled to interest on back pay. Interest is payable on Complainant’s lifetime earnings award as reduced to present value at the time of the economic expert’s testimony at a rate of ten percent (10%) per annum. Rodriguez v. Consolidation Coal Co., 206 W. Va. 317, 524 S.E.2d 672 (1999); W. Va. Code § 56-6-31. The Commission does not compound interest.

It is well settled that discrimination complainants have a duty to mitigate their damages by accepting equivalent employment. Paxton v. Crabtree, 184 W. Va. 237, 400

S.E.2d 245 (1990). However, the burden of raising the issue of mitigation is on the employer. Mason County Board of Education v. State Superintendent of Schools, Syl. Pt. 2, 170 W. Va. 632, 395 S.E.2d 719 (1982). Complainant undertook mitigating employment first as a bank loan officer, then later as a restaurant manger when the bank job was discontinued for lack of work, and Complainant learned that he would need to take a pay cut and work as a loan officer associate while learning FDIC regulations before he would be suited for work in the banking loan officer field. Complainant's lost earnings potential award was mitigated by the amount of Complainant's expected earnings as a restaurant manager through his expected work life over which the award accrues.

The Complainant is entitled to incidental damages with respect to his claim against Respondent. Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977); Bishop Coal Co. V. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989). Bishop Coal provides that the \$2,500 cap on incidental damages may be adjusted from time to time to conform with the Consumer Price Index. Bishop Coal, 380 S.E.2d at 247. In keeping with this language, the Commission has periodically raised the cap on incidental damages. Currently the cap for emotional distress is \$5,000.00 for each claim. The Complainant is entitled to such damages from the Respondent in no less than this amount. The Commission takes the position that in virtually all cases where discrimination has occurred, the Complainant has suffered injury well in excess of the constitutionally capped amount awarded by the Commission for such injuries. Accordingly, Respondent should be

charged with the maximum available award.

The Commission and the Complainant are entitled to a cease and desist order. The Commission in its cease and desist order may make provisions which will aid in eliminating future discrimination. The cease and desist order may require affirmative action program and a sworn affirmation from a responsible officer of the Respondent that the Commission order has been implemented and will continue to be implemented. Whittington v. Monsanto Corp., Docket No. ES-2-77, and Pittinger, et al. v. Shepardstown Volunteer Fire Dep't, Docket No. PAS-48-77; see also Shepardstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983).

The Administrative law Judge is authorized to award such other equitable relief as will make the Complainant whole, including but not limited to, an award of attorneys fees and costs. C.S.R. § 77-2-9.3.c. Complainant is entitled to an award of attorneys fees and costs. The West Virginia Supreme Court has set forth a twelve factor test for determining reasonableness of the attorneys fees set forth in Aetna Casualty and Surety Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986); See also, Brown v. Thompson, 192 W.Va. 412, 452 S.E.2d 728 (1994). Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the question presented; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (5) the customary fee charged in similar cases; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount

involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and the length of the professional relationship with the client; and, (12) awards in similar cases. Counsel for complainant originally filed affidavits and requests for attorneys fees and costs in the amount of \$60,231.75. This amount includes \$213.00 for transcript copies a past due fee of \$68.75 and apparently \$59,950.00 for 218 hours attorney fees, through the date of the fee petition October 23, 2008. The undersigned having examined the time and labor required in relation to the hours submitted by counsel finds that the hours seem to be grossly overstated for the following reasons: 1) Counsel for Complainant has claimed to have spent 25.5 hours working on preparing written discovery in this case. However, when the Complainant's discovery file in the case was reviewed the preparation of the Complainants Interrogatories and Requests for Production as well as the limited Responses to an initial set of discovery and a follow up set of discovery from Respondent's counsel simply does not appear to have enough to justify any more than perhaps five hours to ten hours at most for its preparation. 2) Complainant's counsel has submitted a total of 7 hours for preparation of the Complainant's Pre-hearing Memo. That memo is just over four pages in length, witness and exhibit lists included, or just over a page of actual text. That task would require at most perhaps half an hour of attorney time to prepare. 3) All task times are in quarter hour increments. Many of the smaller tasks are clearly well less the quarter hours submitted. Those tasks similarly appear to have secretarial time for document preparation, mailing, etc. included in the hours listed. Other

tasks do appear closer to a legitimate hourly amount specified for those items, particularly preparation and participation in depositions and at the Public Hearings in this matter. Counsel for Complainant has spent an additional two hours for teleconference, and day of additional Public Hearings for the additional testimony related to the Staggs matters; as well as preparation of Post Hearing briefs. The customary fees and skill required in this matter do not warrant a two hundred seventy five dollar per hour rate by Mr. Katz. In consideration of the foregoing the undersigned concludes that an award of 125 hours at \$250.00 per hour or \$31,250.00 is a reasonable attorney fee award for this case. No invoices were submitted to document costs incurred.

VI.

CONCLUSIONS OF LAW

1. The Complainant, Nabil R. Akl, is an individual aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act, W. Va. Code §5-11-10.
2. The Respondent, Ford Motor Credit Company, is a “person” and an “employer” as those terms are defined under W. Va. Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.
3. The West Virginia Human Rights Commission has proper jurisdiction over the

parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

4. The Complainant has established a prima facie case of national origin hostile work environment, disparate treatment in his demotion from supervisory responsibility, and subsequent constructive discharge from his employment. The Respondent's alternative explanations that Complainant left his employment for reasons other than those of the hostile work environment created by its failure to adequately respond to the racially demeaning and humiliating conditions, related to his demotion, have been proven by the preponderance of the evidence to be false. Respondent's assertions that the national origin harassment did not occur, was welcome or was not sufficiently severe and that its response to Complainant's complaints of national origin harassment were swift and effective to end that discrimination are without merit. Respondent's argument that the national origin of the Complainant played no part in its decision to demote Complainant has been proven false by a preponderance of the evidence.

5. The Complainant was subjected to an ethnic harassment by employees and supervisors of Respondent which changed the conditions of his employment so as to create a hostile workplace. In light of Respondent's failure to take appropriate actions in response to the ethnic harassment and to reconsider the demotion of the Complainant, the ethnic harassment of Complainant is imputable to the Respondent.

6. The Complainant was constructively discharged from his employment with Respondent, given the demotion and its effects upon the conditions which he would have had

to endure, to continue his employment with Respondent.

VII.

RELIEF AND ORDER

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

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

2. Within 31 days of the receipt of the undersigned's order, the Respondent shall pay the reasonable costs and attorneys fees totaling \$31,250.00 incurred in the prosecution of this matter.

3. Within 31 days of receipt of the undersigned's order, the Respondent shall pay the Complainant incidental damages in the amount of \$5,000.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination, plus statutory interest.

4. Within 31 days of receipt of the undersigned's order, the respondent shall pay the Complainant damages resulting from his constructive discharge, of a net loss of earnings through the age 72 expected working life, reduced to present value as of the date of Mr. Griffith's report, of \$624,654.00, based upon the expected earnings of a restaurant manager

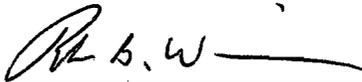
career for complainant, plus post judgement interest thereon at the statutory rate.

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

It is so **ORDERED**.

Entered this 25th day of March, 2009.

WV HUMAN RIGHTS COMMISSION



ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE
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