WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Nov 16, 1990
ADMINISTRATIVE LAW DIVISION

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

RULE TYPE: Legislative ; CITE AUTHORITY W. Va. Code §§ 5-11-8(h) and 29A-3-15(g)

AMENDMENT TO AN EXISTING RULE: YES___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 4

TITLE OF RULE BEING PROPOSED: Rules Regarding Sexual Harassment

DATE OF PUBLIC HEARING: 3 January 1991 TIME: 10:30 a.m.

LOCATION OF PUBLIC HEARING: West Virginia Human Rights Commission
1321 Plaza East, Room 104/106
Charleston, West Virginia 25301

COMMENTS LIMITED TO: ORAL___, WRITTEN___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Norman Lindell
Assistant Director
West Virginia Human Rights Commission
1321 Plaza East
Room 104/106
Charleston, WV 25301

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules Regarding Sexual Harassment

Type of Rule: x Legislative _____ Interpretive _____ Procedural

Agency West Virginia Human Rights Commission Address 1321 Plaza East, Room 104/106, Charleston, West Virginia 25301

1. Effect of Proposed Rule	ANNUAL Increase	ANNUAL Decrease	FISCAL YEAR Current	FISCAL YEAR Next	FISCAL YEAR Thereafter
Estimated Total Cost	$ 0	$ 0	$ 0	$ 0	$ 0
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

The rule will have no fiscal impact on the West Virginia Human Rights Commission.

3. Objectives of these rules: To provide legal guidelines to employees and employers, places of public accommodation and persons marketing real estate regarding their rights and obligations concerning the prohibition of sexual harassment by the West Virginia Human Rights Act.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

None

C. Economic Impact on Citizens/Public at Large.

None

Date: November 16, 1990

Signature of Agency Head or Authorized Representative

SUMMARY OF PROPOSAL

The attached proposed rule concerns sexual harassment. It codifies by regulation the decision of the West Virginia Supreme Court of Appeals in Westmoreland Coal Company v. State Human Rights Commission, 382 S.E.2d 562 (1989), and similar decisions from the federal courts.

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TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION

SERIES 4
RULES REGARDING SEXUAL HARASSMENT

§77-4-1. General.

1.1. Scope -- The following legislative regulations of the West Virginia Human Rights Act (HRA), W. Va. Code § 5-11-1 et seq., set forth guidelines for interpreting the Act's prohibition against discrimination on the basis of sex by means of sexual harassment and are intended to assist all persons in understanding their rights, obligations, and duties under the law in regard to this aspect of the HRA.

1.2. Authority -- These regulations are issued under authority of W. Va. Code § 5-11-8(h) and § 29A-3-1 et seq. They are based on the decision of the West Virginia Supreme Court of Appeals in Westmoreland Coal Co. v. Human Rights Commission, ___ W. Va. ___, 382 S.E.2d 562 (1989), which held that sexual harassment is a form of discrimination prohibited by the West Virginia Human Rights Act and decisions of the federal courts.

1.3. Filing Date -- These regulations are promulgated on the _____ day of _____, 1990, and filed on the _____ day of _____, 1990, in the Office of the Secretary of State.

1.4. Effective Date -- These regulations become effective on the _____ day of _____, 1990.

§77-4-2. Sexual Harassment Prohibited.

2.1. When it occurs in the workplace, harassment on the basis of sex is a violation of W. Va. Code § 5-11-9(a)(1). The HRA affords employees the right to work in an environment free from discriminatory intimidation, ridicule, or insult.

2.2. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

2.2.1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or is exchanged for job benefits;

2.2.2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

2.2.3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

2.3. In determining whether alleged conduct constitutes sexual harassment, the Commission shall look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action shall be made from the facts, on a case-by-case basis, but in all cases the harassment complained of must be sufficiently severe or pervasive.

2.4. In determining whether alleged sexual harassment in a particular case is sufficiently severe or pervasive, the following shall be considered:

2.4.1. Whether it involved unwelcome physical touching;

2.4.2. Whether it involved verbal abuse of an offensive or threatening nature;

2.4.3. Whether it involved consistent sexual innuendo or physical contact; and

2.4.4. The frequency of the offensive encounters.

2.4.5. A person who has been harassed on an isolated basis may offer evidence of harassment suffered by other employees as proof that the harassment was pervasive or severe.

2.5. Harassment is not necessarily confined to unwanted sexual conduct. Hostile or physically aggressive behavior may also constitute sexual harassment, as long as the disparate treatment is based on gender.

§77-4-3. Employer Liability for Sexual Harassment.

3.1. An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their

occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

3.2. With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took timely and appropriate corrective action.

3.3. An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take timely and appropriate corrective action. In reviewing these cases the Commission shall consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

3.4. Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

3.5. Employers are encouraged to take all steps necessary to prevent sexual harassment from occurring. Appropriate preventative steps include, but are not limited to, affirmatively expressing strong disapproval of sexual harassment, developing and implementing appropriate sanctions, informing employees of their right to be free from harassment and the appropriate steps to take if harassment occurs, and developing methods to sensitize all employees regarding appropriate behavior in the workplace.

§77-4-4. Public and Housing Accommodations.

4.1. This rule may be applied to any action involving an owner, lessee, proprietor, manager, superintendent, agent, broker, or employee of any place of public accommodations, as defined by W. Va. Code § 5-11-3(j), or of any housing accommodation, as defined by W. Va. Code § 5-11-3(k).

4.2. The concepts of duty and liability set forth in this series shall be applied to instances of sexual harassment occurring in a place of public accommodations or involving the sale, rental, lease, assignment, sublease, or use of any housing accommodation.