WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

DO NOT WRITE IN THIS BOX

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

NOTICE OF AN EMERGENCY RULE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

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

EMERGENCY 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 RULE BEING FILED AS AN EMERGENCY: 4

TITLE OF RULE BEING FILED AS AN EMERGENCY: Rules Regarding Sexual Harassment

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See attached sheet.

Use Additional Sheets If Necessary.

2.90

REPLY TO:
CIVIL RIGHTS DIVISION
812 QUARRIER STREET 5th FLOOR
CHARLESTON, WV 25301

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

ROGER W. TOMPKINS
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOTLINE
(800) 368-8808

16 November 1990

The Honorable Ken Hechler
Secretary of State
Suite K-157, State Capitol Complex
Charleston, West Virginia

Re: Filing of agency approved emergency legislative rules pertaining to sexual harassment
Title 77, Series 4

Dear Mr. Hechler:

Enclosed please find a copy of the following information relative to the proposed emergency legislative rules which I submitting on behalf of the West Virginia Human Rights Commission:

1. The full text of the emergency rule as proposed by the Commission;
2. A brief summary of the content of the proposed rule;
3. A statement of the circumstances which require the rule; and
4. A fiscal note containing a statement of the economic impact of the rule on the Commission and the State or its residents.

I have enclosed an extra copy so that it may be stamped by your office and returned to me. If you have any questions, please do not hesitate to contact me.

Sincerely,

Mike Kelly

MIKE KELLY
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

MK/jm
Enclosure

DATE: 16 November 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia Human Rights Commission

EMERGENCY RULE TITLE: Rules Regarding Sexual Harassment

1. Date of filing: 16 November 1990

2. Statutory authority for promulgating the emergency rule: W. Va. Code §§ 5-11-8(h) and 29A-3-15(g)

3. Date of filing of proposed legislative rule: 16 November 1990

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?
The rule adopts new language consistent with 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)

5. Has the same or similar emergency rule previously been filed and expired?
No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.
See attached sheet.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

Not applicable

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

See answer to Question No. 6.

RULES REGARDING SEXUAL HARASSMENT
WEST VIRGINIA HUMAN RIGHTS COMMISSION

Response to Questions No. 6 & 8

A. In Westmoreland Coal Company v. State Human Rights Commission, 382 S.E.2d 562 (1989), the West Virginia Supreme Court of Appeals declared that sexual harassment in the workplace is actionable under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq.

B. This was the first clear indication from the Court that the Human Rights Act covered acts of sexual harassment.

C. The proposed rule faithfully reflects the decision of the Supreme Court of Appeals, as well as similar decisions from the federal courts.

D. The proposed rule is necessary to assist all persons in understanding their rights, obligations, and duties under the Human Rights Act, and to help employers affirmatively deal with problems of sexual harassment in the workplace.

E. Unless filed as an emergency rule, employers and employees will be making critical legal decisions, and facing potential legal liability, without benefit of the clear guidelines offered by the rule.

F. Failure to file the rule as an emergency rule would do substantial harm to the public interest in that persons may be held legally liable for acts of discrimination, or may forego those rights, without full benefit of the explanations of the complex legal question offered by this rule.

RULES REGARDING SEXUAL HARASSMENT
WEST VIRGINIA HUMAN RIGHTS COMMISSION

Attachment to Form #7

A. In Westmoreland Coal Company v. State Human Rights Commission, 382 S.E.2d 562 (1989), the West Virginia Supreme Court of Appeals declared that sexual harassment in the workplace is actionable under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq.

B. This was the first clear indication from the Court that the Human Rights Act covered acts of sexual harassment.

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D. The proposed rule is necessary to assist all persons in understanding their rights, obligations, and duties under the Human Rights Act, and to help employers affirmatively deal with problems of sexual harassment in the workplace.

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F. Failure to file the rule as an emergency rule would do substantial harm to the public interest in that persons may be held legally liable for acts of discrimination, or may forego those rights, without full benefit of the explanations of the complex legal question offered by this rule.

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

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.