WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

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: §77-4-1

TITLE OF RULE BEING PROPOSED: Rules Regarding Sexual Harassment

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

3.10

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: December 16, 1992

Signature of Agency Head or Authorized Representative

DATE: 22 March 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: WEST VIRGINIA HUMAN RIGHTS COMMISSION

LEGISLATIVE RULE TITLE: RULES REGARDING SEXUAL HARASSMENT

1. Authorizing statute(s) citation W. Va. Code §§ 5-11-8(h) and 29A-3-15(g)

2. a. Date filed in State Register with Notice of Hearing:

16 November 1990

b. What other notice, including advertising, did you give of the hearing?

Notice to all members, West Virginia State Bar Employment Committee

c. Date of hearing (s): 3 January 1991

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached x No comments received ____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

22 March 1991

f. Name and phone number of agency person to contact for additional information:

Mary Catherine Buchmelter
Civil Rights Division
812 Quarrier Street, 5th Floor
Charleston, WV 25301
348-0246

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing: N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

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 will 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 will 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 Commission will consider:

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 unwelcome and consistent sexual innuendo or physical contact; and

2.4.4. The frequency of the unwelcome and 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 officers, 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 reasonably should have known of their occurrence, except that the employer is not responsible if the officer, agent or supervisory employee was acting outside the scope of his employment. 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~~ acted as an officer, or in either a supervisory or agency capacity, and acted within or outside of the scope of his employment.

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~~ knew or reasonably should have known of ~~the~~ such conduct, ~~unless it can show that it took timely and appropriate corrective action.~~ or expressly or impliedly authorized or ratified such conduct. As a defense an employer may show that it took timely and appropriate corrective action regarding such conduct.

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~~ knew or should have reasonably known of the conduct and ~~fails~~ failed to take timely and appropriate corrective action. In reviewing these cases the Commission will 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 may 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.

RECORD OF PUBLIC HEARING

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Rules Regarding Sexual Harassment
6 WVCSR §77-4-1

1. Date of Public Hearing: 3 January 1991

2. Attendance at Public Hearing: No members of the public attended the hearing.

3. Comments Received: Comments were received from the West Virginia Coal Association, and are attached hereto.

4. Amendments Made as a Result of Hearing or Comments: As a result of comments received, and the decision of the West Virginia Supreme Court of Appeals in Paxton v. Crabtree, et al., No. 19615 (Slip Opinion filed 4 December 1990), the following amendments were made:

2.4.3. Inserted new words as follows: "unwelcome and"

2.4.3. Inserted new words as follows: "unwelcome and"

3.1. Inserted new language as follows:

". . .and those of its officers, agents . . ."

"knew or reasonably should have known . . ."

"occurrence, except that the employer is not responsible if the officer, agent or supervisory employee was acting outside the scope of his employment. . . ."

". . . individual ~~acts~~ acted as an officer, or in either a supervisory or agency capacity,

and acted within or outside of the scope of his employment."

3.2. Changed the following words and added the following new language:

". . . employees) ~~knows~~ knew or reasonably should have known of ~~the~~ such conduct, ~~unless it can show that it took timely and appropriate corrective action.~~ or expressly or impliedly authorized or ratified such conduct. As a defense an employer may show that it took timely and appropriate corrective action regarding such conduct."

3.3. Changed the words "~~knows~~" to "knew" and "~~fails~~" to "failed" and add the word ". . . reasonably should have known of the conduct . . ."

5. Reason for the Amendments:

A. Changes were made to Rules 2.4.3. and 2.4.4. to clarify that only "unwelcome" conduct may constitute sexual harassment.

B. Changes were made to Rules 3.1., 3.2., and 3.3. to conform to the standards established by the West Virginia Supreme Court of Appeals in Paxton v. Crabtree, supra.

Dated this 22nd day of March, 1991.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

M E M O R A N D U M

TO: Quewanncoii C. Stephens, Executive Director
West Virginia Human Rights Commission

Mike Kelly, Esquire
Deputy Attorney General, Civil Rights Division

FROM: West Virginia Coal Association

DATE: January 24, 1991

RE: Comments on Proposed Rules
Regarding Sexual Harassment

The West Virginia Coal Association, by counsel, respectfully submits the following comments to the West Virginia Human Rights Commission on the Proposed Rules Regarding Sexual Harassment.

EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

The West Virginia Coal Association strongly urges that the Commission substantially revise Rule 3.1 which defines employer liability for sexual harassment. The present rule imposing strict liability on employers for any type of sexual harassment is inconsistent with case law and current EEOC policy guidance.

In Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986), the Supreme Court confirmed that sexual harassment violates Title VII of the Civil Rights Act of 1964. See also,

Westmoreland Coal v. Human Rights Commission, 382 S.E. 2d 562 (W.Va. 1989) (following federal precedent, the court recognizes that Human Rights Act prohibits sexual harassment.) The Court in Vinson declined to issue any definitive rule on employer reliability for sexual harassment. However, the Court made it clear that employers are not "automatically liable" for the acts of their supervisors. Consequently, the EEOC published its Policy Guidance on Current Issues of Sexual Harassment, N-915-050 (March 19, 1990) to provide guidance on certain issues in light of the developing law after Vinson. In determining employer liability for sexual harassment, the EEOC and the courts look to common law "agency" principles. According to current EEOC policy, an employer will always be held responsible for acts of "quid pro quo" harassment. With respect to "hostile environment" sexual harassment, the EEOC Policy Guidance sets forth that employer liability obtains when the employer knew or had reason to know of the sexual harassment and fails to take corrective action. Accordingly, the Coal Association requests Rule 3.1 be changed to the following:

> Employer liability for sexual harassment shall be determined in accordance with common law agency principles. With respect to "quid pro quo" sexual harassment as defined in subrules 2.2.1 and 2.2.2 above, 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. With respect to "hostile environment" sexual harassment, an employer may be liable if it knew or should have known of the alleged sexual harassment and if the employer failed to take immediate and appropriate corrective action. 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.

The Coal Association also urges that the subrules under Rule 2.4 be substantially modified to reflect both current EEOC policy and post-Vinson judicial decisions. Under the Commission's proposed subrules, the inquiry as to whether certain conduct is "unwelcome" is confined only to "physical touching." Subrule 2.4.1. Recent case law indicates that "welcomeness" is an issue in defense of virtually all sexual harassment claims, not just physical touching. See, e.g., Paroline v. Unisys Corp., 900 F.2d 27 (4th Cir. 1990); Spencer v. General Electric Co., 894 F.2d 651 (4th Cir. 1990). Accordingly, the term "unwelcome" should be inserted in subrules 2.4.2, 2.4.3 and 2.4.4.

Respectfully submitted,

WEST VIRGINIA COAL ASSOCIATION
By Counsel

Roger A. Wolfe /BWB

ROGER A. WOLFE

Gene W. Bailey II

GENE W. BAILEY, II
JACKSON & KELLY
1600 Laidley Tower
P. O. Box 553
Charleston, West Virginia 25322

4101q/p.11

Antitrust & Civil Rights Divisions
812 Quarrier Street - 5th Floor
Charleston, WV 25301
(304) 348-0246

MARIO J. PALUMBO
ATTORNEY GENERAL

RICHARD L. GOTTLIEB
CHIEF DEPUTY ATTORNEY GENERAL

STATE OF WEST VIRGINIA

OFFICE OF THE ATTORNEY GENERAL

CHARLESTON 25305

FAX - (304) 348-0184

Consumer Protection Division
812 Quarrier Street - 6th Floor
Charleston, WV 25301
(304) 348-8986
Consumer Hotline
(800) 368-8808

Preneed-Funeral
812 Quarrier Street - 4th Floor
Charleston, WV 25301
(304) 348-0303

22 March 1991

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OFFICE OF THE CLERK
SECRETARY OF STATE

Chairman, Legislative Rule-
Making Review Committee
State Capitol, M-436
Charleston, West Virginia 25305

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

Dear Sir/Ms.:

Enclosed please find fifteen (15) copies of the following documents relative to the above-referenced emergency rule, which rule was previously filed with the Legislative Rule-Making Review Committee on 16 November 1990:

1. Notice of Agency Approval of a Proposed Rule and Filing with the Legislative Rule-Making Review Committee;
2. The full text of the agency approved rule, as amended;
3. Record of public hearing; and
4. Comments received from the West Virginia Coal Association.

Please let me know if we have failed to attach any required documents.

Sincerely,

MIKE KELLY
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

MK/jm
Enclosures
cc: ~~The Hon. Ken Hechler~~
Secretary of State