

**WEST VIRGINIA  
SECRETARY OF STATE**

**KEN HECHLER**

**ADMINISTRATIVE LAW DIVISION**

Form #6

**Do Not Mark In this Box**

FILED

1992 APR 29 PM 2:52

OFFICE OF WEST VIRGINIA

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED  
BY THE WEST VIRGINIA LEGISLATURE.**

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: Title 77, Series 4

TITLE OF RULE BEING PROPOSED: Rules Regarding Sexual Harassment

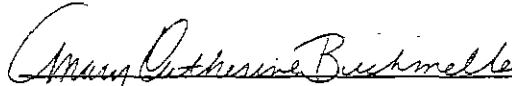
THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) Senate Bill 1

SECTION 64-5-8(b), PASSED ON March 14, 1992

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON

THE FOLLOWING DATE: April 29, 1992

  
MARY CATHERINE BUCHMELTER  
DEPUTY ATTORNEY GENERAL  
CIVIL RIGHTS DIVISION

2.50

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~~ 1991, and filed on the \_\_\_ day of \_\_\_\_\_, ~~1990~~ 1991, in the Office of the Secretary of State.

1.4. Effective Date -- These regulations become effective on the \_\_\_ day of \_\_\_\_\_, ~~1990~~ 1991.

§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 or rejection of 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 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) knew or reasonably should have known of such conduct, 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) knew or should have reasonably known of the conduct and 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.

Bill Human Rts sexual harassment 77-4

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H. B. 4289

(By Delegate Grubb)

(Introduced January 27, 1992; referred to the  
Committee on the Judiciary)

10 A BILL to amend and reenact section eight, article five, chapter  
11 sixty-four of the code of West Virginia, one thousand nine  
12 hundred thirty-one, as amended, relating to authorizing the  
13 human rights commission to promulgate legislative rules  
14 relating to sexual harassment.

15 Be it enacted by the Legislature of West Virginia:

16 That section eight, article five, chapter sixty-four of the  
17 code of West Virginia, one thousand nine hundred thirty-one, as  
18 amended, be amended and reenacted, to read as follows:

19 ARTICLE 5. AUTHORIZATION FOR DEPARTMENT OF HEALTH AND HUMAN  
20 RESOURCES TO PROMULGATE LEGISLATIVE RULES.

21 §64-5-8. Human rights commission.

22 (a) The legislative rules filed in the state register on the  
23 tenth day of August, one thousand nine hundred ninety, modified  
24 by the human rights commission to meet the objections of the

4289

1 legislative rule-making review committee and refiled in the state  
2 register on the twelfth day of December, one thousand nine  
3 hundred ninety, relating to the human rights commission  
4 (discrimination against the handicapped), are authorized.

5 (b) The legislative rules filed in the state register on the  
6 twenty-second day of March, one thousand nine hundred ninety-one,  
7 modified by the human rights commission to meet the objections of  
8 the legislative rule-making review committee and refiled in the  
9 state register on the fourteenth day of August, one thousand nine  
10 hundred ninety-one, relating to the human rights commission  
11 (sexual harassment) are authorized.

12

13 NOTE: The purpose of this bill is to authorize the Human  
14 Rights Commission to promulgate legislative rules relating to  
15 sexual harassment.

16

17 Strike-throughs indicate language that would be stricken from  
18 the present law, and underscoring indicates new language that  
19 would be added.



KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

A. RENEE COE  
Deputy Secretary of State

CATHERINE FREROTTE  
Executive Assistant

Telephone: (304) 558-6000  
Corporations: (304) 558-8000

WILLIAM H. HARRINGTON  
Chief of Staff

JUDY COOPER  
Director, Administrative Law

DONALD R. WILKES  
Director, Corporations

(Plus all the volunteer  
help we can get)

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

RECEIVED  
DEC 15 1992  
ATTORNEY GENERAL  
CIVIL RIGHTS DIV.

TO: Mary Kay Buchmelter

AGENCY: Human Rights Commission

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: December 11, 1992

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 4 TITLE: 77 Human Rights Commission

\* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: \_\_\_\_\_

TITLE OF PERSON SIGNING: \_\_\_\_\_

DATE: \_\_\_\_\_

\*\*\*\*\*

\* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: J. Moore

TITLE OF PERSON SIGNING: Legal Secretary

DATE: 12-30-92

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.



REPLY TO: 348-0246  
CIVIL RIGHTS DIVISION  
312 QUARRIER STREET, 5th FLOOR  
CHARLESTON, WEST VIRGINIA 25301

STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON 25305

MARIO J. PALUMBO  
ATTORNEY GENERAL

RICHARD L. GOTTLIEB  
CHIEF DEPUTY ATTORNEY GENERAL

August 14, 1991

(304) 348-2021  
FAX 348-0140

HAND DELIVER

Judy Cooper  
Office of the Secretary of State  
Suite 157-K, State Capitol  
Charleston, West Virginia 25305

FILED  
1991 AUG 14 PM 2:04  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Re: Title 77, Series 4  
Rules Regarding Sexual Harassment  
West Virginia Human Rights Commission

Dear Ms. Cooper:

Marie Nickerson advised me yesterday afternoon that your office still has not yet received the Human Rights Commission's Rules Regarding Sexual Harassment as modified by the Legislative Rule Making Review Committee. As you can see from the enclosed letter to Ms. Nickerson, these rules were mailed to the Committee and to the Office of the Secretary of State on August 7, 1991, and I can only assume that they have been delayed in the mail by the post office.

I have also enclosed an extra copy of the rules which I would appreciate your stamping as "filed" and/or "received" and returning to my office.

I am sorry for any inconvenience which this delay may have caused. If you have any questions, please do not hesitate to contact me. Thank you for your assistance in this matter.

Sincerely,

MARY CATHERINE BUCHMELTER  
DEPUTY ATTORNEY GENERAL  
CIVIL RIGHTS DIVISION

MCB/jm  
Enclosures



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

STATE OF WEST VIRGINIA  
 OFFICE OF THE ATTORNEY GENERAL  
 CHARLESTON 25305

Consumer Protection Division  
 812 Quarrier Street - 8th Floor  
 Charleston, WV 25301  
 (304) 348-8988  
 Consumer Hotline  
 (800) 368-8808

MARIO J. PALUMSO  
 ATTORNEY GENERAL

FAX - (304) 348-0184

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

RICHARD L. GOTTLIEB  
 CHIEF DEPUTY ATTORNEY GENERAL

August 7, 1991

Legislative Rule-Making  
 Review Committee  
 Room 152-B, State Capitol  
 Charleston, West Virginia 25305

Attn: Marie Nickerson

Re: Title 77, Series 4  
 Rules Regarding Sexual Harassment  
West Virginia Human Rights Commission

FILED  
 1991 AUG 14 PM 2:04  
 OFFICE OF WEST VIRGINIA  
 SECRETARY OF STATE

Dear Ms. Nickerson:

In accordance with my telephone conversations with you and Mr. McThomas, enclosed please find six copies of Form #4-Notice of Rule Modification of a Proposed Rule, and Title 77, Series 4-Rules Regarding Sexual Harassment, which I am submitting on behalf of the West Virginia Human Rights Commission.

The only revisions suggested by the Committee which are included in these modified Rules are those contained in Sections 1.3. and 1.4. (date changed from 1990 to 1991), and in Section 2.2.1. (the addition of the phrase "or rejection of").

By this letter, I am also filing one copy of each of these documents with the Office of the Secretary of State.

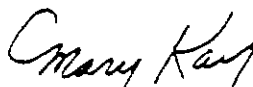
I have enclosed an extra copy so that it may be stamped as "received" or "filed" in your office and returned to me at the above address.

Marie Nickerson  
Legislative Rule-Making  
Review Committee  
August 7, 1991  
Page 2

Please contact me as soon as possible if I have failed to provide any required documents or if you have any questions concerning these Rules.

Thank you for your assistance in this matter.

Sincerely,



MARY CATHERINE BUCHMELTER  
DEPUTY ATTORNEY GENERAL  
CIVIL RIGHTS DIVISION

MCB/jm

Enclosures

cc: The Honorable Ken Hechler  
Secretary of State