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ATTORNEYS FOR CREDITOR,  
JAMES R. MACKLIN

5952.01/rh

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

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IN RE:	)	IN PROCEEDINGS UNDER
	)	
MIRANT CORPORATION	)	
	)	CHAPTER 11
Tax I.D. No. 58-2056305	)	
	)	
DEBTOR	)	CASE NO. 03-46590-DML-11
	)	
<hr/>		
JAMES R. MACKLIN	)	
	)	
Movant	)	
	)	
v.	)	(A CONTESTED MATTER)
	)	<b>Preliminary Hearing Set for</b>
MIRANT CORPORATION	)	<b>July 15, 2004 at 9:30 o'clock a.m.</b>
	)	
Respondent	)	
	)	

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**MOTION FOR RELIEF FROM STAY TO PURSUE DISCRIMINATION SUIT**

TO THE HONORABLE D. MICHAEL LYNN, UNITED STATES BANKRUPTCY JUDGE:

**COMES NOW**, JAMES R. MACKLIN, the Movant herein, and files his Motion For Relief From Stay to Pursue Discrimination Suit, based upon the following:

1. Mirant Corporation, hereinafter "Movant" or "Mirant", commenced a case under Chapter 11 on July 14, 2003. Mirant has scheduled assets totaling approximately \$20 billion and liabilities totaling approximately \$16 billion. Upon information and belief, the claims asserted by Movant are covered by insurance maintained by the Debtor.

2. James Macklin, hereinafter "Macklin", was an employee of Mirant Services LLC, or Mirant LLC Midatlantic, which was originally headquartered in Washington, D.C., but has now moved to Upper Marlboro, Maryland.

3. Macklin was employed from March 2, 1987, to April 18, 2003, at which time Macklin was terminated. At the time of his termination Macklin was making approximately \$60,000.00 per year. Since his termination by Mirant, Macklin has been unable to obtain employment due to the fact that Macklin was terminated from Mirant and has to disclose this fact on any application he has filled out to date.

4. Prior to his termination in December, 2002, Macklin filed a complaint against Mirant alleging discrimination based on race. For some reason, the complaint was not forwarded to Mirant until March, 2003. Approximately thirty (30) days after the receipt of the complaint, Macklin was terminated.

5. A copy of Macklin's Complaint as filed with the Alexandria Human Rights Commission is attached as Exhibit "1".

6. Following his termination, and pending the outcome of his complaint with the EEOC,

Macklin sought unemployment benefits by filing a claim with the Virginia Un-Employment Commission in Alexandria, Virginia.

7. Mirant contested the right to employment benefits. Following a two (2) day hearing on September 24, 2003 and October 20, 2003, Macklin's rights to employment benefits were upheld, as evidenced by the Decision of Appeals Examiner, issued on November 7, 2003, a copy of which is attached hereto as Exhibit "2". Additionally, on February 13, 2004, the EEOC in Alexandria, Virginia found that there is reasonable cause to believe that Mirant retaliated against Macklin when Macklin was terminated in April, 2003. A copy of the February 13, 2004 Investigative Report issued by the Office of Human Rights is attached as Exhibit "3".

8. On June 9, 2004, the EEOC issued its right to sue letter, which is attached as Exhibit "4".

9. The issuance of the "right to sue letter" means that Macklin may sue for his personal injuries as a result of his wrongful termination. Suit has to be filed within ninety (90) days of receipt of the "right to sue" letter.

10. Cause to lift the stay exists within the meaning of 11 U.S.C. §362(d)(1) to allow Macklin to bring suit in the United States District Court for the District of Columbia and against Mirant LLC Mid Atlantic.

11. The United States District Court in the District of Columbia is the proper place to file this action. Moreover, Macklin intends to bring several torts claims against Mirant. As such, allowing this action to go forward in that forum is consistent with congressional policy under both the Bankruptcy laws and civil rights laws.

12. Mirant is a huge corporation, which Debtor believes has insurance to cover claims such as those held by Macklin.

13. Because witnesses who live in close proximity to Washington, D.C. will be called to testify in Macklin's claim, requiring Macklin to prosecute his cause of action in Bankruptcy Court in Fort Worth would greatly prejudice Macklin.

14. Further, this Court is not the appropriate forum to try a jury trial involving civil rights violations which occurred in Washington D.C. and Alexandria, VA.

15. This Court should lift the stay for cause to allow Macklin to pursue his causes of action in other appropriate forums.

#### **ARGUMENT AND AUTHORITIES**

\_\_\_\_\_The automatic stay pursuant to 11 U.S.C. §362(a)(1) prevents Macklin from filing, and serving a complaint against Mirant and from proceeding to trial in this matter. The several courts that have dealt with the issues herein presented have generally resolved the issue in favor of lifting the stay to allow the civil rights claims for personal injuries to be prosecuted in the forum that would be proper had the bankruptcy proceeding not have been filed. The following decisions on this issue provide persuasive guidance to this Court in resolving the issues before this Court.

One of the earliest decisions to deal with this problem was *In re Larkham*, 31 B.R. 273 (Bnkr. D. Vt. 1983). In *Larkham* the Plaintiff had, prior to the commencement of a bankruptcy case commenced a proceeding alleging discrimination under Title VII of the Civil Reports Act of 1964 (herein after "Title VII"). The Plaintiff filed a motion for relief from the stay to continue the Title

VII action, but the Debtor sought the protection of the automatic stay.

After a hearing, the Court lifted the stay holding that Congress intended that civil rights cases to be heard expeditiously and that lifting the stay to allow the civil rights case to go forward would in no way interfere with the purpose of the automatic stay, especially where there would be no prejudice to the bankruptcy estate to allow the civil rights case to go forward.

Following *Larkham*, the Court in *In re Johnson*, 115 B.R. 634, 636 (Bankr. D. Minn. 1989) set forth the following factors to be considered by the Court in determining whether or not to lift the stay:

- a. Whether insurance is available to defend debtor or whether the defense of the suit will impose a financial burden;
- b. Whether judicial economy favors the action to proceed in the court in which it commenced;
- c. Whether a likelihood exists that resources used to prepare the matter for trial would be wasted due to the stay enjoining the action from proceeding;
- d. Whether the issues are solely state law actions or whether a special tribunal should use its expertise to hear the issues;
- e. Whether the litigation involves other parties in which the Bankruptcy Court lacks jurisdiction and whether full relief may be accorded to all non-debtor parties without debtor's presence;
- f. Whether the creditor has a probability of success on the merits;
- g. Whether the Bankruptcy court should first address the threshold

bankruptcy-law issues.

Citing *Larkham* and *Johnson*, the court in *In re. America West Airlines*, 148 B.R. 920, 923 (Bnkr. D. Ariz. 1993), provided additional considerations for the court to consider in making the determination whether or not to lift the stay to permit litigation to continue in another forum, as follows:

a. Whether the litigation causes debtor great prejudice. *In re Johnson*, 115 B.R. 634, 636 (Bankr. D. Minn. 1989).

b. Whether a balancing of the respective hardships tips in favor of the debtor or creditor, resulting from denial or granting of the relief. *Id.*;

c. Whether public policy supports the type or kind of action the Movant is bringing against the Debtor. *Carter v. Larkham (In re Larkham)*, 31 B.R. 2734 (Bankr. D. Vt. 1983). *See also In re: Tricare Rehabilitation Systems, Inc.*, 181 B.R. 569, 573 (Bnkr. D. AL 1994).

Regarding the first determination, Macklin has reason to believe that Mirant has insurance which would cover Macklin's claims. As such, the cost of defending Macklin's Title VIII and state torts claims, would be paid by Mirant's insurance company rather than the Debtor. Assuming arguendo that Mirant lacks insurance to defend Macklin's claim, there is no reason to believe that Mirant, who continues to operate with efficiency throughout these Chapter 11 proceedings and who has incurred substantial attorney's fees and administrative fees to administer the estate, does not have the financial resources to defend the instant case. Indeed, compared to the cost of reorganization, the expenditure to defend the instant claim would be minimal.

Next, the court should consider the consequences should Macklin be prohibited from pursuing his claim in the United States District Court for the District of Columbia. Macklin has already suffered great hardship as a result of Mirant's unlawful actions and will continue to suffer until the rights and liabilities of the parties can be determined by a court of law. Because Macklin was terminated by Mirant, Macklin has become virtually unemployable in that he has to disclose this fact on every employment application he submits.

Moreover, it would be virtually impossible for Macklin to pursue his claim in this court as Macklin as well as his and Mirant's witnesses reside in the Mid-Atlantic region and, at least, Macklin and his witnesses do not have the means to appear before this court. Additionally, as time passes, witnesses may no longer be available or may have fading memories regarding the facts of this case. Mirant, on the other had, has only to file a claim with their insurance carrier or, lacking coverage, must hire local counsel and make its employees available to participate in discovery and to testify.

This Court should also consider the public policy when making the determination as to whether or not cause exists to lift the stay. In *In re American West Airline, supra* the Court observed that "the enactment of Title VII indicates the strong public policy against [discrimination and retaliation]." *Id.* at 924. As such it is important that Title VII claims are resolved without undue delay. More important, it is certainly not in the public interest to allow debtors in Chapter 11 proceedings to escape liability by seeking refuge under 11 U.S.C. 362 (a)(1). Indeed, in *In re Johnson, supra* the Court noted that, "The Bankruptcy Code does not provide unlimited protection for a Debtor [and] the mere filing of a petition in bankruptcy cannot, in and of itself, erase a

plaintiff's claim, their opportunity to litigate, or the fact that a debtor may be liable to the plaintiff in some amount." 115 B.R. at 636.

Another factor to be considered is whether or not Macklin is likely to succeed on the merits. Here, the balance clearly tips in Macklin's favor. To date, the issue has been presented to two separate quasi judicial bodies. In each case, the presiding official found for Macklin and rejected Mirant's claims that Macklin's termination was justified. (See attached Exhibits "2" and "3")

Finally, it should also be pointed out that the fact that the claim is one for personal injuries. As such, it is unsuitable to be heard in the normal Bankruptcy Claim process by virtue of the prohibitions of 28 U.S.C. §157(b)(5). See *In re Thomas*, 211 B.R. 838, 840-41 (D.S.C. 1997).

Additionally, as Migrant is likely to have insurance which covers this claim, the litigation at issue will not cause the Debtor great prejudice. Assuming, *arguendo*, Migrant is not covered under an insurance policy, it has continued to operate during its Chapter 11 and, to date, has incurred substantial attorney's fees and administrative costs administering the estate. The cost necessary to defend Macklin's Title VII claim are minimal in comparison to the other legal expenses incurred in this case.

More important, it would be virtually impossible and financially prohibitive for Macklin to pursue his claim in this Court as the Plaintiff and all his witnesses reside in the State of Maryland, the District of Columbia and the State of Virginia. Macklin has suffered as a result of Mirant's unlawful actions in that he has become virtually unemployable due to the fact that he has to disclose that he has been terminated by Migrant on any application for employment. He will continue to suffer until the rights and obligations of the parties can be determined by a Court of law.

Migrant discriminated against and terminated Macklin in clear violation of Title VII. As such, Migrant should not be allowed to hide behind the Bankruptcy Code. In *In re Johnson, supra* the Court noted that "the Bankruptcy Code does not provide unlimited protection for a Debtor [and] the mere filing of a petition in bankruptcy cannot, in and of itself, erase a plaintiff's claim, their opportunity to litigate, or the fact that a debtor may be liable to the plaintiff in some amount." 115 B.R. at 636. On balance, a consideration of the various factors that have been considered by other courts under similar circumstances, the facts of this case justify the Court here lifting the stay to permit Movant, James R. Macklin, to continue the prosecution of his claim for violations of Title VII of the Civil Rights Act in the court of appropriate jurisdiction in the District of Columbia..

**WHEREFORE, PREMISES CONSIDERED,** Macklin prays that the Court lift the stay for cause to allow Macklin to pursue his claims in another appropriate forum.

Macklin prays for general relief.

Respectfully submitted:

LAW OFFICES OF  
ST. CLAIR NEWBERN, III  
A Professional Corporation

By: \_\_\_\_\_/s/\_\_\_\_\_  
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Telephone: (817) 870-2647  
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ATTORNEYS FOR CREDITOR,  
JAMES R. MACKLIN

**CERTIFICATE OF CONFERENCE**

\_\_\_\_\_I hereby certify that I conferred with Judith Elkin, one of the Debtor's attorneys, on two occasions, the last being on June 15, 2004, after a several month interval, she advised that the Debtor opposed the relief sought in the Motion.

Dated: June 22, 2004.

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

ST. CLAIR NEWBERN, III

**CERTIFICATE OF SERVICE**

\_\_\_\_\_I hereby certify that I have this date served a true and correct copy of the foregoing via first class mail, proper postage affixed, upon the following:

Office of the U. S. Trustee  
Attn: Ms. Erin Schmidt  
United States Courthouse  
1100 Commerce, Room 9-C-60  
Dallas, TX 75242

Judith Elkin  
Haynes and Boone  
901 Main Street, Suite 3100  
Dallas, TX 75202

Dated: June 22, 2004.

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

ST. CLAIR NEWBERN III

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

Ms. Lisa Johnson  
 Human Resources Official  
 MIRANT  
 1400 North Royal Street  
 Alexandria, VA 22314

PERSON FILING CHARGE

Macklin, James, Jr. R

THIS PERSON (check one)

- CLAIMS TO BE AGGRIEVED
- IS FILING ON BEHALF OF ANOTHER

DATE OF ALLEGED VIOLATION

*Earliest*                      *Most Recent*  
 09/26/2002                      04/18/2003

PLACE OF ALLEGED VIOLATION

Alexandria, VA

EEOC CHARGE NUMBER

10AA300024

FEPA CHARGE NUMBER

E015121602

**NOTICE OF CHARGE OF DISCRIMINATION** IN JURISDICTIONS WHERE A FEP AGENCY WILL INITIALLY PROCESS  
*(See attached information sheet for additional information)*

YOU ARE HEREBY NOTIFIED THAT A CHARGE OF EMPLOYMENT DISCRIMINATION UNDER

- Title VII of the Civil Rights Act of 1964
- The Age Discrimination in Employment Act of 1987 (ADEA)
- The Americans with Disabilities Act

HAS BEEN RECEIVED BY

- The EEOC and sent for initial processing to \_\_\_\_\_  
*(FEP Agency)*
- The Alexandria Office Of Human Right and sent to the EEOC for dual filing purposes.  
*(FEP Agency)*

While EEOC has jurisdiction (upon the expiration of any deferral requirement if this is a Title VII or ADA charge) to investigate this charge, EEOC may refrain from beginning an investigation and await the issuance of the Agency's final findings and orders. These final findings and orders will be given weight by EEOC in making its own determination as to whether or not reasonable cause exists to believe that the allegations made in the charge are true.

You are therefore encouraged to cooperate fully with the Agency. All facts and evidence provided by you to the Agency in the course of its proceedings will be considered by the Commission when it reviews the Agency's final findings and orders. In many instances the Commission will take no further action, thereby avoiding the necessity of an investigation by both the Agency and the Commission. This likelihood is increased by your active cooperation with the Agency.

- As a party to the charge, you may request that EEOC review the final decision and order of the above named Agency. For such a request to be honored, you must notify the Commission in writing within 15 days of your receipt of the Agency's final decision and order. If the Agency terminates its proceedings without issuing a final finding and order, you will be contacted further by the Commission. Regardless of whether the Agency or the Commission processes the charge, the Recordkeeping and Non-Retaliation provisions of Title VII and the ADEA as explained in the "EEOC Rules and Regulations" apply.

For further correspondence on this matter, please use the charge number(s) shown.

- An Equal Pay Act investigation (29 U.S.C. 206(d)) will be conducted by the Commission concurrently with the Agency's investigation of the charge.
- Enclosure: Copy of Charge

BASIS OF DISCRIMINATION

- RACE     COLOR     SEX     RELIGION     NAT. ORIGIN     AGE     DISABILITY     RETALIATION     OTHER

CIRCUMSTANCES OF ALLEGED VIOLATION

See enclosed Form 5, Charge of Discrimination.

DATE  
07/01/2003

TYPED NAME/TITLE OF AUTHORIZED EEOC OFFICIAL  
 Silvio Fernandez, Acting  
 Director

SIGNATURE



DECISION OF APPEALS EXAMINER



Date Referred or Appealed : 06/18/03  
Date Deputy's Determination: 06/18/03

Local Office : Alexandria O  
Claimant's SSN : 220-02-8828  
Date of Hearing: 10/20/2003  
Decision No. : 924 200 UI-0311783  
Decision Mailed: 11/07/2003

ILONA MCCLINTICK, ESQ  
2822 OVERLAND AVE  
BALTIMORE MD 21214

CLAIMANT:  
JAMES R MACKLIN JR  
1420 WEST ABINGDON DRIVE  
APT 228  
ALEXANDRIA VA 22314

LIABLE EMPLOYER:  
MIRANT SERVICES LLC  
P.O. BOX 18112  
TOWSON MD 21284

IN THE MATTER OF: MIRANT SERVICES LLC  
VS  
JAMES R MACKLIN JR

NOTICE: THIS DECISION BECOMES FINAL 30 DAYS AFTER MAILING UNLESS AN APPEAL IS FILED. THE APPEAL MUST BE IN WRITING AND SHOULD STATE THE REASON FOR THE APPEAL. THE APPEAL SHALL BE FILED (1) IN PERSON AT THE LOCAL OFFICE WHERE THE CLAIM WAS FILED, OR AT ANY OTHER V.E.C. OFFICE, (2) BY MAIL TO THE V.E.C., COMMISSION APPEALS - ROOM 128, P.O. BOX 1388, RICHMOND, VA 23218-1388, OR (3) BY FACSIMILE TRANSMISSION TO COMMISSION APPEALS AT (804) 788-8034, NOT LATER THAN MIDNIGHT OF DECEMBER 07, 2003.

APPEARANCES: Claimant; Attorney for Claimant; Employer Representative; Two Witnesses

STATUTORY PROVISION(S) AND POINT(S) AT ISSUE: Code of Virginia, Section 60.2-618(2) - Was the claimant discharged for misconduct connected with work?

FINDINGS OF FACT: This case is before the Appeals Examiner pursuant to a timely appeal filed by the employer from a Deputy's determination, which found the claimant qualified effective April 20, 2003.

The claimant's liable employer is Mirant Services, LLC, where he worked as a chemistry process technician from March 2, 1987 to April 18, 2003. The claimant worked full time and earned \$25.87 per hour.

The employer's progressive disciplinary practice consists of an initial reminder, a supplemental reminder, and a decision making day of leave. Each of these steps remains in effect for a period of anywhere from six months for the initial reminder to 18 months for a decision making day of leave. The claimant was placed on a decision making day of leave on November 19, 2002. At that time he was told that any further problems would result in discharge.



The employer operates a power plant. One of the claimant's duties was to operate a demineralizer which included working with acid. When the claimant got to the area on March 21, 2003 there was water on the floor around the demineralizer. Because it was common for water to come into the area from a trough along the side of the building when it rained, the claimant did not believe that there was an immediate problem. The employer has operators whose responsibility, among others, is to clean up spills. An operator was told by the claimant's supervisor to put on a rubber suit, a mask, and gloves to clean up the area. The supervisor helped, wearing only his street clothes, and without wearing a mask or gloves. The supervisor did not rope off the area, and did not put out any danger signs. There was no oil on the floor and the sides of the containment area for handling overflow were not wet.

During the claimant's shift on March 21 he reported to his supervisor that the sump pump in the overflow containment area was not working. He also reported that there was an acid leak and that he put a bucket under the drip to catch the acid. The claimant was subsequently discharged for failure to clean up the area or to properly handle an acid leak when the employer alleged that the liquid on the floor had a low pH level.

OPINION: Section 60.2-618(2) of the Code of Virginia provides a disqualification if it is found a claimant was discharged for misconduct connected with work.

In the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978), The Supreme Court of Virginia defined misconduct as follows:

In our view, an employee is guilty of "misconduct connected with his work" when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer. ...Absent circumstances in mitigation of such conduct, the employee is "disqualified for benefits," and the burden of proving mitigating circumstances rests upon the employee.

In the present case the claimant was discharged for allegedly failing to follow the employer's policies with respect to an acid spill, and failing to clean up acidic water on the floor around the demineralization equipment. The employer provided a policy for handling a chemical spill. However, the claimant and two witnesses, both of whom continue to work for the employer, testified that they had not been given the policy and had not seen it posted in the workplace.

With respect to the claimant's treatment of the acid leak, one of the witnesses testified that it was not out of the ordinary to see a bucket placed under a drip, that the employer experiences spills two or three times a year, and it is the responsibility of the operators to clean up spills if no laborers are present.

The employer has not demonstrated that there was an established policy that the

claimant is alleged to have violated. Although a policy was provided to the Appeals Examiner, neither the claimant nor the witnesses had any knowledge of it. Moreover, the employer has not demonstrated that the water on the floor on March 21, 2003 contained any acid or was anything other than rainwater. Certainly, the supervisor's failure to wear any safety equipment when helping to clean up the liquid negates the allegation that the liquid had a very low pH level. Therefore, the Appeals Examiner finds that the employer has not met its burden to show misconduct connected with work.

In making that decision, no issue is taken with the employer's right to discharge the claimant. Indeed, as the court held in Kennedy's Piggly Wiggly Stores, Inc., v. Cooper, 14 Va. App. 701, 419 S.E.2d 278 (1992): "Even employees who are fired for what the employer considers good cause may be entitled to unemployment compensation. (Citations omitted.) The issue in this case is not the right of the employer to discharge an employee. rather, the issue is the employee's right, upon discharge, to receive unemployment benefits."

DECISION: The determination of the Deputy is hereby affirmed.

The claimant is qualified to receive benefits effective April 20, 2003 with respect to his separation from the services of Mirant Services, LLC.

P. A. Mertens  
Appeals Examiner

cc: Ilona McClintick, Esq.  
2822 Overland Ave.  
Baltimore, Maryland 21214

OFFICE OF HUMAN RIGHTS  
ALEXANDRIA, VIRGINIA

INVESTIGATIVE REPORT

James R. Macklin, Jr.

Complainant

v.

MIRANT

Respondent

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EEOC #10A-A3-00024

AHRO #E-015-121602

ALLEGATION:

DISPARATE TREATMENT;  
HOSTILE WORK ENVIRONMENT;  
WRONGFUL DISCHARGE; RETALIATION

BASIS:

RACE (Black)  
PROTECTED ACTIVITY

RECOMMENDATION:

RACE: NO REASONABLE CAUSE  
RETALIATION: REASONABLE CAUSE

RELEVANT DATES:

A. ALLEGED VIOLATION:	November 19, 2002
B. RECEIVED COMPLAINT:	December 16, 2002
C. AMENDED COMPLAINT:	June 27, 2003
D. FINDING ISSUED:	February 13, 2004

RESPONDENT TYPE/SIZE:

Electric Power Company/>90

STATUTORY AUTHORITY:

ALEXANDRIA HUMAN RIGHTS CODE  
SECTION 12-4-17



A. COMPLAINT AND RESPONSE

James R. Macklin (hereinafter referred to as "Complainant") states that he was hired by Potomac Electric Power Company ("PEPCO") in March 1987. On December 19, 2000, Mirant (hereinafter referred to as "Respondent") purchased generating stations from PEPCO, which included the Potomac River facility where the Complainant was employed. The Complainant began working for the Respondent. According to the Complainant, he has been subjected to discrimination based on his race by management and co-workers. The Complainant alleges that the Respondent ignored his complaints and participated in creating an intolerable and hostile work environment. As a result, the Complainant filed a discrimination complaint with the Alexandria Office of Human Rights on December 16, 2002, alleging that he had been subjected to disparate treatment and harassment because of his race.

According to the Complainant, on or about April 7, 2003, approximately 30 days after the Respondent received his complaint, the Complainant was placed on "crisis suspension." The Complainant explains that the Respondent claimed that the suspension was based on an incident that occurred on or about March 21, 2003. Complainant states that a "continuation of employment" hearing was held on April 9, 2003, and that his employment was terminated on April 18, 2003. The Complainant contends that his employment was terminated in retaliation for his complaint of discrimination against the Respondent. Consequently, the Complainant amended the original discrimination complaint to include retaliation and wrongful discharge.

Respondent provided position statements, affidavits and documents on April 11, 2003 (race), and on August 25, 2003 (retaliation), which generally deny the allegations of race discrimination and retaliation. Respondent contends that the Complainant was disciplined as a

result of his inability to control his temper and his threatening behavior towards another employee. Respondent claims that the Complainant's employment was terminated as a result of his violation of work and safety procedures.

The Respondent explains that on September 26, 2002, the Complainant entered the test shop at the Potomac River generating facility to ask another employee if he knew of the manufacturer of a specific part. The Respondent claims that the employee answered the Complainant and proceeded to ask if there was a problem with the part. The Respondent reports that the Complainant did not respond to the question, but walked out of the shop indicating that he wanted to talk to someone who was civilized. The Respondent advises that the employee requested that the Complainant's supervisor, Narayanan Iyer (Asian), organize a meeting between the employee and the Complainant to address the Complainant's reference to the employee as uncivil. The Respondent explains that at this meeting the Complainant became angry and shouted at the employee, and that Mr. Iyer was forced to separate the Complainant from the employee after the Complainant had pinned the employee against the wall.

Respondent contends that there was no racial element to the confrontation; no racial remarks or gestures were made, and no mention of race was made by anyone involved. The Respondent claims that "the situation arose and was heightened solely by the Complainant's inability to control his temper and his threatening behavior toward another employee."

The Complainant asserts that the so-called investigation of the "March 21, 2003, incident," was motivated by retaliation. The Complainant feels that the Respondent simply used this incident to build a case for termination of his employment. The Complainant contends that, had the Respondent fully investigated the incident, that the Complainant would have been

cleared of any work-related violations. The Complainant states in his rebuttal statement, that "in light of the severity of the punishment that the Complainant received, the Respondent's indifferent approach to fact-finding is simply iniquitous." He believes the punishment was retaliatory and not warranted.

The Respondent explains, in its position statement, that the Complainant's employment was terminated due to his "violation of conduct & safety and work performance consistent with the decision making leave letter properly received by the Complainant in December 2002." The Respondent contends that there was no retaliation element involved and that the Complainant's employment was terminated based solely on the facts, not on any other consideration.

#### **B. INVESTIGATION**

The Alexandria Office of Human Rights (hereinafter "AHRO") conducted interviews, reviewed affidavits and documentation supplied by both the Complainant and Respondent and makes its finding upon the evidence obtained.

The investigation revealed that the Complainant had several encounters while working for the Respondent where his "perceived" negative conduct has been formally documented. As a result of the September 26, 2002, encounter with another employee, and the subsequent meeting and repercussions, the Complainant filed his original discrimination complaint with AHRO. Specifically, the Complainant charged that he was subjected to disparate treatment in that he was disciplined and the other employee involved, Robert Woods (White), was not. The Respondent acknowledged in its position statement that on November 18, 2002, the Complainant, pursuant to the Respondent's discipline guidelines, was placed on "Decision Making Leave" for what the Respondent deemed as "threatening and inappropriate" conduct during the meeting to discuss the

encounter with Mr. Woods. According to the letter that placed the Complainant on "Decision Making Leave" (DML), dated November 19, 2002, the Complainant was required to enroll in an anger management program and maintain a fully acceptable level in his total job performance in every area. The letter clearly warned the Complainant that any work-related problem that occurred within the eighteen-month probationary period, would result in the termination his employment.

The investigation revealed that on March 21, 2003, the Complainant had been assigned the task of regenerating the "Make Up Demineralizer". According to a letter to the Complainant from the Respondent dated April 18, 2003, while the Complainant was performing the task, there was an incident which caused a significant amount of acidic water to be released onto the floor. In that letter, the Respondent claimed that the Complainant failed to report the leak to his supervisor or to any other management employee. The letter explained that the Complainant's failure to make proper notification was unacceptable and posed a safety threat to everyone working in the facility.

The Complainant explained, in his rebuttal statement, that he not only attempted to contact his supervisor when he noticed the acid leak, but he also made several subsequent attempts to contact his supervisor, Naraynna Iyer, until they literally ran into each other. The Complainant explained that, as he attempted to start the sump pump in an effort to transfer the liquid out of the overflowing container, sparks "shot out from both sides of the control box". The Complainant claims that he immediately attempted to page Mr. Iyer to report the problem, but received no response. According to the rebuttal statement, the Complainant then began the regeneration process. He explained that, during the acid injection stage, he noticed that acid was

dripping from a leak beneath the mixing chamber and, again, he paged Mr. Iyer without receiving a response. The Complainant states that he noted the drip on the Demineralizer worksheet, placed a bucket under the drip and continued the process. He explained that, at the end of the acid injection phase, the valve was shut off and the leak stopped. According to his rebuttal statement, the Complainant, having successfully regenerated the Demineralizer, went to the lab to inform Mr. Iyer of the problems he had encountered and to alert him to the fact that the containment area was high and that the pump was not working. The Complainant noted that he could not locate Mr. Iyer. The Complainant reports in his rebuttal that he did speak to Bill Jensen (Laboratory Technician), who advised the Complainant of a temporary pump that could be used to pump out the containment area. In fact, according to a copy of an incident report signed by Mr. Jensen (White) on May 16, 2003, included in the Complainant's rebuttal statement, Mr. Jensen and the Complainant were engaged in a conversation in reference to the problems that the Complainant was experiencing during his attempts to perform the regeneration of the Demineralizer when Mr. Iyer approached the Complainant to then be informed of the related problems.

According to the Respondent's letter of April 18, 2003, a continuation of employment meeting was held on April 9, 2003, in order to discuss the events of March 21, 2003, and to make a determination on the Complainant's employment status. The letter states that, as a result of that meeting and the associated investigation of the incident, the Respondent determined that the Complainant's failure to report the acid leak was a behavior that was unacceptable and posed a safety threat to himself and co-workers. The letter emphasized that this poor work performance was in direct violation of the DML probationary period and Respondent decided to terminate the

Complainant's employment.

C. ANALYSIS

To establish a *prima facie* case of unlawful discrimination, according to McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973), Complainant must show: (1) that he is a member of a protected class; (2) that he was a qualified employee in his position; (3) that, despite these qualifications, he suffered an adverse employment action; and (4) that he was treated differently than similarly-situated employees, not in his protected class.

Complainant is a member of a protected class and Respondent has offered no evidence to demonstrate that Complainant was not a qualified employee. Therefore, AHRO assumes *arguendo* that he was a qualified employee. The disciplinary act of placing the Complainant on Decision-Making Leave status is unquestionably an adverse employment action. However, there is nothing in the evidence, other than the Complainant's own assertions, to suggest that the Complainant was treated differently than similarly-situated "non-black" employees or to suggest that the Respondent discriminated against him because of his race. The Complainant alleges that Mr. Robert Woods (White) was treated differently with respect to discipline for the confrontation on September 26, 2002. Evidence shows that both employees, who were similarly situated, were treated the same up until the meeting of October 4, 2002. According to eyewitness Mr. Iyer's affidavit, Mr. Woods was the victim of the Complainant's violent aggression during that meeting, the purpose of which was to discuss the "September 26, 2002 -test shop incident." Even if the Complainant could satisfy the fourth required element to establish a *prima facie* case, as a result of his behavior, viewed as "not tolerable" according to their Workplace Violence Policy, Workplace Standards Policy and, Code of Ethics and Business Conduct, the Respondent

had a legitimate, non-discriminatory reason to discipline the Complainant.

Although the Complainant makes assertions of numerous incidents of rude and disrespectful behavior from co-workers, other evidence does not support a finding of harassment or a hostile work environment.

In a *prima facie* case of retaliation, the Complainant must show that (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. Ross v. Communications Satellite Corp. 759 F. 2d 355 (4<sup>th</sup> Cir. 1985). AHRO finds that the Complainant engaged in a protected activity in filing a discrimination complaint in the Office of Human Rights on December 16, 2002. AHRO finds that the subsequent termination of the Respondent's employment was an adverse employment action, caused by his engaging in a protected activity. AHRO finds that the Respondent's conclusion, as a result of its investigation, was based on unfounded and unsupported evidence. Respondent's eagerness to rush to a conclusion thus over-looking evidence contrary to its original position (that the Complainant failed to report the acid leak) demonstrates a predisposition to terminate the Complainant's employment.

**D. CONCLUSION**

AHRO finds that there is insufficient evidence to support the race discrimination charge.

The Complainant engaged in a protected activity and subsequently suffered an adverse employment action; there was a causal connection between the two. He does make a *prima facie* case of retaliation.

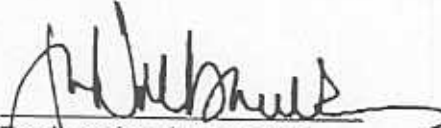
E. RECOMMENDATION

A finding of no reasonable cause is recommended on the charge of race discrimination.

A finding of reasonable cause is recommended on the charge of retaliation.

F. REMEDY

With regard to the discrimination, under the Alexandria Human Rights Code, a 30-day conciliation period will commence on the date of issuance of a reasonable cause finding. Should conciliation prove unsuccessful, a public hearing before the Alexandria Human Rights Commission will be scheduled or the matter will be referred to the EEOC. The Complainant may receive any and all remedies which the Commission is empowered to grant and deems appropriate.

  
Reviewed and Approved  
Jean Kelleher Niebauer  
Director

2/13/04  
Date

JKN/mib

EEOC Form 161-B (3/98)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)

To: James R. Macklin, Jr.
c/o Iлона McClintick, Esq.
2822 Overland Avenue
Baltimore, MD 21214

From: Washington DC Field Office
1400 L Street, NW
Suite 200
Washington, DC 20005

On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))

Table with 3 columns: Charge No., EEOC Representative, Telephone No.
Row 1: 10A-2003-00024, David Gonzalez, State & Local Coordinator, (202) 275-7376

NOTICE TO THE PERSON AGGRIEVED: (See also the additional information enclosed with this form.)

Title VII of the Civil Rights Act of 1964 and/or the Americans with Disabilities Act (ADA): This is your Notice of Right to Sue, issued under Title VII and/or the ADA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII or the ADA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice or your right to sue based on this

- More than 180 days have passed since the filing of this charge.
Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of the charge.
The EEOC is terminating its processing of this charge.
The EEOC will continue to process this charge.

Age Discrimination in Employment Act (ADEA): You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, the paragraph marked below

- The EEOC is closing your case. Therefore, your lawsuit under the ADEA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost.
The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of your charge, you may file suit in federal or state court under the ADEA at this time.

Equal Pay Act (EPA): You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

Dana Hutter (Signature)

Dana Hutter, Acting Director

JUN - 9 2004

(Date Mailed)

Enclosure(s)

cc: Lisa Johnson
MIRANT
1400 North Royal Street
Alexandria, VA 22314



Enclosure with EEOC  
Form 161-B (3/98)

**INFORMATION RELATED TO FILING SUIT  
UNDER THE LAWS ENFORCED BY THE EEOC**

*(This information relates to filing suit in Federal or State court under Federal law.  
If you also plan to sue claiming violations of State law, please be aware that time limits and other  
provisions of State law may be shorter or more limited than those described below.)*

**PRIVATE SUIT RIGHTS -- Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA),  
or the Age Discrimination in Employment Act (ADEA):**

In order to pursue this matter further, you must file a lawsuit against the respondent(s) named in the charge **within 90 days of the date you receive this Notice**. Therefore, you should keep a record of this date. Once this 90-day period is over, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and its envelope, and tell him or her the date you received it. Furthermore, in order to avoid any question that you did not act in a timely manner, it is prudent that your suit be filed **within 90 days of the date this Notice was mailed to you** (as indicated where the Notice is signed) or the date of the postmark, if later.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the appropriate State court is the general civil trial court.) Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. Filing this Notice is not enough. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Your suit may include any matter alleged in the charge or, to the extent permitted by court decisions, matters like or related to the matters alleged in the charge. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office. If you have simple questions, you usually can get answers from the office of the clerk of the court where you are bringing suit, but do not expect that office to write your complaint or make legal strategy decisions for you.

**PRIVATE SUIT RIGHTS -- Equal Pay Act (EPA):**

EPA suits must be filed in court within 2 years (3 years for willful violations) of the alleged EPA underpayment; backpay due for violations that occurred **more than 2 years (3 years) before you file suit** may not be collectible. For example, if you were underpaid under the EPA for work performed from 7/1/00 to 12/1/00, you should file suit **before 7/1/02 -- not 12/1/02** -- in order to recover unpaid wages due for July 2000. This time limit for filing an EPA suit is separate from the 90-day filing period under Title VII, the ADA or the ADEA referred to above. Therefore, if you also plan to sue under Title VII, the ADA or the ADEA, in addition to suing on the EPA claim, suit must be filed within 90 days of this Notice **and** within the 2- or 3-year EPA backpay recovery period.

**ATTORNEY REPRESENTATION -- Title VII and the ADA:**

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, assist you in obtaining a lawyer. Requests for such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do **not** relieve you of the requirement to bring suit within 90 days.

**ATTORNEY REFERRAL AND EEOC ASSISTANCE -- All Statutes:**

You may contact the EEOC representative shown on your Notice if you need help in finding a lawyer or if you have any questions about your legal rights, including advice on which U.S. District Court can hear your case. If you need to inspect or obtain a copy of information in EEOC's file on the charge, please request it promptly in writing and provide your charge number (as shown on your Notice). While EEOC destroys charge files after a certain time, all charge files are kept for at least 6 months after our last action on the case. Therefore, if you file suit and want to review the charge file, **please make your review request within 6 months of this Notice**. (Before filing suit, any request should be made within the next 90 days.)

**IF YOU FILE SUIT, PLEASE SEND A COPY OF YOUR COURT COMPLAINT TO THIS OFFICE.**