

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JULIA BROWN

Complainant,

v.

DOCKET NO. ER-51-77

CITY NATIONAL BANK OF
CHARLESTON, WEST VIRGINIA

Respondent.

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

PROCEEDINGS

This case came on for hearing on March 15, 1979, at 9:00 a.m., at Building Seven, Capitol Complex, Charleston, West Virginia, before Hearing Examiner James E. Williams, Esq., and Hearing Commissioner George Rutherford. The Complainant appeared in person, and was represented by Cheryl A. Fuller, Attorney, who also represented the West Virginia Human Rights Commission. The Respondent, City National Bank of Charleston, West Virginia, appeared by its counsel Otis L. O'Connor, Attorney and Ronald R. Morgan. Witnesses for the Complainant were Robin Bailes, Nancy Lynch, Intern and Raymond Hammarth and for the Respondent, Larry L. Dawson, Egbert L. Burton, Brenda Sutphin and James L. Burns. The hearing was reported by Janet T. Surface, Court Reporter.

The West Virginia Human Rights Commission, after considering the testimony of all witnesses, all exhibits presented, all motions presented, all briefs filed, all arguments of counsel and the recommendations of the Hearing Examiner, makes the following Findings of Fact and Conclusions of Law.

II

ISSUES

A. WAS THE COMPLAINT FILED TIMELY?

Complainant submitted her application for proof-operator and was interviewed on April 16, 1975. At that time the position Complainant applied for was filled. After submitting her application, Complainant made several inquiries to Respondent concerning her status as a potential proof-operator and at no times was employment ever offered. On May 5, 1976, Joyce Ann McCartney was employed as a proof-operator. Later, on August 13, 1976, Complainant filed her complaint.

West Virginia Code, Chapter 5, Article 11, Section 10, states. . . .

"Any complaint filed pursuant to this article must be filed within ninety days after the alleged act of discrimination".

The West Virginia Human Rights Commission's Regulation further states: (d) Timely Filing of Complaint. (1) Ninety-day Limitation - The complaint shall be filed within ninety (90) days after the occurrence of the alleged unlawful discriminatory practice or act. Admin. Regs., West Virginia Human Rights Commission §3.05 (d), as adopted May 8, 1975. Respondent contends that Complainant failed to file timely her complaint because the position of proof-operator was filled May 5, 1976

(Commission's Exhibit a), which date preceded the filing of Complainant's complaint by more than ninety days. Thus, the only time that Complainant could possibly have been discriminated against occurred more than 90 days prior to the filing of the complaint.

Courts have been reluctant to allow technicalities to bar Title VII claims. "Such technicalities" says the Supreme Court, "are particularly inappropriate in a statutory scheme in which Laymen unassisted by trained lawyers initiate the process". Love v. Pullman Company, 404 U. S. 522, 925 S. Ct. 616 30 L. Ed. 679 (1971).

Thus, the courts have consistently given a liberal interpretation to the filing requirements of Title VII. Reeb v. Economic Opportunity Atlanta, Inc., 516 F. 2d 924 (5th Cir. 1975); Molybdenum Corp. of America v. EEOC, 457 F. 2d 984 (10th Cir. 1972); Phillips v. Columbia Gas of West Virginia, Inc., 347 F. Supp. 533 (S.D. W. VA. 1972), aff'd without opinion 47 F. 2d 1342 (4th Cir. 1973); Weise v. Syracuse Universtiy, 522 F. 2d 397 (2d Cir. 1975). A flexible and equitable approach has been adopted whether the filing has been viewed as "jurisdictional" or directory. Reeb, supra. Antonopulus v. Aerojet General Corp., 1 EPD 9953 (E. D. Cal. 1968); Culpepper v. Reynold Metal Co., 421 F. 2d 888 (5th Cir. 1970); Pittman v. Anaconda Wire & Cable Company, 408 F. Supp. 286 (E. D. N. C. 1976); Gebhard v. GAP Corp., 50 F. R. D. 504 (D. Dc. 1973); Washington v. T. G. & Y. Stores Company, 324 F. Supp. 849 (W. D. La. 1971); Weise, supra.

However, the filing period commences "anew from the last allegedly unlawful employment practice." Molybdenum Corp. of America v. EEOC, supra. The Complainant's last call on August 13, 1976, is sufficient to

meet the timing requirements. Whether or not there actually was a position available at that time, the Complainant could not know. She had been strung along since she applied on April 16, 1975. During the period from her application until she last called and then filed her complaint, at least one person was hired as proof-operator while the Complainant was being told there were no openings, but her application would be kept active. (Tr. 15, 85). Therefore, the Complainant believed she was still being considered for a job and would be unlikely to jeopardize her chances while still holding such a belief fostered by the statements of the bank's own interviewers.

Therefore, the Commission holds that the Complainant's complaint was timely filed.

B. DID COMPLAINANT ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION?

Complainant formerly had worked as a mail inserter for a local newspaper and through a friend identified as "Chuck", was lead to believe Respondent had openings in similar positions. Complainant had no experience as a bank employee.

The position for which she applied required only a high school diploma. However, on the two page application for employment form completed by Complainant, she omitted any reference to high school. In addition, she compounded that error by making approximately 49 more, either through grammer, spelling or omission.

Complainant contends that her educational background should have been developed in the interview. However, logic would dictate that the time allowed for the interview would better be spent in developing areas not listed on the application. To do otherwise would be redundant.

Though Complainant on direct testing did develop her educational background, it must be remembered that this was evidence that should have been developed at the August 16, 1976 interview. And where the omissions of such information would injure one of the parties' position, then fairness dictates that it not injure the innocent party. Hence, the omission of such vital information should be weighed against the negligent party.

Complainant in her brief, cites McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), as the leading case under Title VII. Therein, the Court stated that a prima facie case of racial discrimination could be established:

by showing (i) that she (Complainant) belongs to a racial minority; (ii) that she applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite her qualifications, she was rejected; and (iv) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of Complainant's qualifications. . .The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the Complainant's rejection. At page 799.

In this case, only (1) of the four criteria has been met, i.e., that she, the Complainant, belongs to a racial minority. Contrary to Complainant's view the Complainant did not apply and was qualified for

a job which the employer was seeking applicants. Further, Complainant was not rejected despite her qualifications. In fact, the evidence shows Complainant to be woefully unqualified for the position. Still further, the position did not remain open and the employer did not continue to seek applicants from persons of Complainant's qualifications. In fact, the evidence showed that when Complainant applied for the position, there were no openings. Further, evidence showed that no opening for proof-operator existed until May of 1976, thirteen months after the interview.

Therefore, the Commission holds that Complainant failed to establish a prima facie case of discrimination.

C. DOES A PATTERN AND PRACTICE OF DISCRIMINATION EXIST IN THE HIRING PRACTICES OF RESPONDENT?

A scarcity of judicial decisions interpreting the applicable statutes and the similarity between the said Act and Title VII of the 1964 Civil Rights Act, forces the Commission to be guided in its decision by those of the Federal Judiciary.

In the year 1975, the year the Complainant applied for work, the Respondent bank had 37 full-time employees. (Tr. 139). This figure remained fairly constant; being 45 in 1973 (Tr. 138) and 42 in the year Larry Dawson left Respondent (possibly 1978 Tr. 139). During this same period, two of the employees were Black. (Tr. 137 Respondent's Ex. 1). While both Blacks were employed at the Respondent bank, their presence represented 5.40 per cent of the bank's work force and

in 1976 and thereafter, when there was but one black out of a work force of 42, (Tr. 139) the percentage of the work force constituted by blacks was 2.4%. These figures compare with a black work force in Kanawha County of 4.94% (Commission's EXhibit 22). While it is true that statistical data can establish racial discrimination, Parham v. Southwestern Bell Telephone Company, 433 F. 2d. 421 (8th Cir. 1970) the use of such data generally goes to establish a prima facie case. International Brotherhood of Teamsters v. U.S., 975 S. Ct. 1843 (1977). Here, the statistical data does not reflect that "stark" pattern as the Court referred to in Village of Arlington Heights v. Metropolitan Heights Development Corp., 429 U.S. 252, 50 L. Ed. 2d 450, 975 Ct. 555. The difference between 4.9% and 2.4% is not of the magnitude as envisioned by the Court in Arlington Heights, op. cit.

Therefore, as to issue Number Three, the Commission holds that a pattern and practice of discrimination did not exist in the hiring practice of Respondent Bank.

FINDINGS OF FACT

1. The Complainant in these proceedings, Julia Brown, is a black female, residing in Charleston, West Virginia.
2. The Respondent, City National Bank of Charleston is a national banking association and is engaged in the banking business.
3. On April 16, 1975, the Complainant submitted an application to the Respondent for work in the Proof Department (Commission's Exhibit 8).
4. The job Complainant applied for, Proof Operator, involves recording the daily customer transactions using a machine. The item to

be recorded (e.g., a check) is placed in the machine, then the amount of the item, its character as a debit or credit, and its appropriate "pocket" (transferee bank) are punched out on the machine's keyboard. (Tr. 48). The machine produces a continuous type which is checked and balanced by the proof-operator against the check-balance records of the tellers and against a complementary proof-machine tape. The operators of the machines are responsible for the accuracy of their entries and for obtaining figures that balance. The tapes are forwarded to the Federal Reserve Bank. (Tr. pp. 48-49, 56-57, 59-60, 78).

5. The Complainant was interviewed by Mr. Larry Dawson, Vice President in charge of Personnel, and Mr. E. L. Burton, Vice President, Auditor on the day she applied. She was told that day that there were no openings at that time. (Tr. 13, 14, 74, 87, 126).
6. At the time Complainant submitted her application, there were no openings in proof department, but she was granted an interview with Larry Dawson, Vice President in charge of personnel. Mr. Dawson testified that Complainant "explained to me the reason she had applied for the job as a Proof Operator is that she had worked part time at Charleston Newspaper as a proofreader and was under the impression the two jobs were similar." (Tr. 77). Mr. Dawson testified that "when I explained to her the difference between a proofreader and a proof operator, that comprised the majority of the interview and the rest was related to the individual who had referred her to the banking type job." (Tr. 89).

7. At the time Complainant applied, Mr. Dawson explained that there were no openings but that her file would be maintained. (Tr. 14-15, 85, 87, 126).
8. Both Mr. Burton and Mr. Dawson testified that they were of the opinion, at the time of their interviews with Complainant, and thereafter, that she was not qualified to be a proof-operator. (Tr. 79, 85-86, 126-128). The primary reason given for this opinion by both men was that the application submitted by Complainant contained numerous errors and omissions indicating lack of necessary accuracy to be a proof-operator. (Tr. 76, 127). In addition, there were no entries in the blanks provided on the application to show Complainant's high school and whether she graduated therefrom, and both Burton and Dawson referred to this in their testimony, stating that at a minimum, all employees are required to be high school graduates. (Tr. 76, 127).
9. After April 16, 1975, the Complainant made periodic calls to the Respondent to inquire about a job. (Tr. 14, 15, 85). On these occasions she would normally ask to speak to Mr. Dawson who would inform the Complainant that there were no openings but that her application would be kept in the active file. (Tr. 15, 85).
10. The Complainant had indicated that she graduated from Lanier on her application but had placed that information two lines above the proper line on the form. She had also indicated on her application that she had completed 3 1/2 years of college at West Virginia State College majoring in music. (Commission's Exhibit 8).

11. The Complainant testified and both Mr. Dawson and Mr. Burton confirmed that the Complainant was never asked about her high school graduation or her 3 1/2 years of College in either the interview or during any of the subsequent phone contacts. (Tr. 88, 133, 135).
12. On August 23, 1976, Complainant filed her complaint.
13. During the period when Complainant was seeking employment with Respondent as a proof-operator (April, 1975 to August 23, 1976), Respondent hired only one person as a proof-operator -- Joyce Ann McCartney, hired on May 5, 1976. A copy of her application was stipulated into evidence. (Commission's Exhibits No 3 and 9, Tr. 5).
14. At the time when the Complainant applied for employment with the Respondent, there was only one black male employed in the position of janitor out of a total of 37 employees. (Commission's Exhibits 9, 10, Tr. 91).
15. All of the applications of persons hired by Respondent as proof-operators indicate that the applicants had graduated from high school.
16. Respondent advertises as an Equal Opportunity Employer. (Respondent's Exhibit 3, Tr. 86).

CONCLUSIONS OF LAW

Based on the heretofore stated facts, the Commission finds as follows:

1. The complaint in this case was filed timely, properly and in accordance with the procedures established by the West Virginia

Human Rights Commission and states facts sufficient upon which to support a charge of a violation of the West Virginia Human Rights Act, West Virginia Code, Chapter 5, Article 11, Section 9(a) and Chapter 5, Article 11, Section 10.

2. The West Virginia Human Rights Commission has at all times referred to herein, had and continued to have jurisdiction over the Respondent and the subject matter of this complaint.
3. At all times referred to herein, the Respondent herein, was an "employer" as defined in West Virginia Code, Chapter 5, Article 11, Section 3(a) and used in West Virginia Code, Chapter 5, Article 11, Section 9(a).
4. At all times referred to herein, the Complainant has been and continued to be, a citizen and resident of West Virginia within the meaning of West Virginia Code, Chapter 5, Article 11, Section 2.

Applicable provisions of the West Virginia Human Rights Act states that:

It shall be unlawful discriminatory practice unless based upon a bona fide occupational qualification or except where based upon applicable security regulations established by the United States of West Virginia or its agencies or political subdivisions:

(a) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions, privileges of employment if the individual is able and competent to perform the services required . . .
(W.Va. Code §5-11-9).

Discrimination is defined to mean: ". . . to exclude from, or fail or refuse to extend to a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, or blindness and includes to separate or segregate" (W.Va. Code § Chapter 5-11-3h)).

ORDER

Therefore, pursuant to the above and foregoing Findings of Fact and Conclusions of Law, it is hereby, ORDERED that the Complaint against City National Bank of Charleston by Julia Brown be and is hereby dismissed.

July 29 1983
DATE

Enter:

Russell Van Cleve

Russell Van Cleve
Chairperson

ON BEHALF OF THE WEST
VIRGINIA HUMAN RIGHTS
COMMISSION