



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.
Governor

October 22, 1987

Lawrence Baumer
600 Clinton Ave.
Morgantown, WV 26505

Clearbrook Corp. dba
University Chevrolet
60 S. University Ave.
Morgantown, WV 26505

Gene Bailey, Esq.
Jackson, Kelly, Holt & O'Farrell
P.O. Box 553
Charleston, WV 25322

Peyton Fireman, Esq.
1460 Center Hill Ave.
Star City, WV 26505

RE: Baumer v. Clearbrook Corp. dba University Chevrolet
EH-553-86

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,

A handwritten signature in cursive script that reads "Howard D. Kenney".

Howard D. Kenney
Executive Director

HDK/mst
Attachments

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE
OF STATUTORY RIGHT TO JUDICIAL REVIEW
AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Enr. H. B. 2628]

3

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an
2 application for review may be prosecuted by either
3 party to the supreme court of appeals within thirty days
4 from the receipt thereof by the filing of a petition
5 therefor to such court against the commission and the
6 adverse party as respondents, and the clerk of such
7 court shall notify each of the respondents and the
8 commission of the filing of such petition. The commis-
9 sion shall, within ten days after receipt of such notice,
10 file with the clerk of the court the record of the
11 proceedings had before it, including all the evidence.
12 The court or any judge thereof in vacation may
13 thereupon determine whether or not a review shall be
14 granted. And if granted to a nonresident of this state,
15 he shall be required to execute and file with the clerk
16 before such order or review shall become effective, a
17 bond, with security to be approved by the clerk,
18 conditioned to perform any judgment which may be
19 awarded against him thereon. The commission may
20 certify to the court and request its decision of any
21 question of law arising upon the record, and withhold
22 its further proceeding in the case, pending the decision
23 of court on the certified question, or until notice that the
24 court has declined to docket the same. If a review be
25 granted or the certified question be docketed for
26 hearing, the clerk shall notify the board and the parties
27 litigant or their attorneys and the commission of the fact
28 by mail. If a review be granted or the certified question
29 docketed, the case shall be heard by the court in the
30 manner provided for other cases.

31 The appeal procedure contained in this subsection
32 shall be the exclusive means of review, notwithstanding
33 the provisions of chapter twenty-nine-a of this code:
34 *Provided*, That such exclusive means of review shall not
35 apply to any case wherein an appeal or a petition for
36 enforcement of a cease and desist order has been filed
37 with a circuit court of this state prior to the first day
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a
40 final order of the commission within thirty days after
41 receipt of the same, or, if applicable, within thirty days
42 after a final order of the supreme court of appeals, a
43 party or the commission may seek an order from the
44 circuit court for its enforcement. Such proceeding shall
45 be initiated by the filing of a petition in said court, and
46 served upon the respondent in the manner provided by
47 law for the service of summons in civil actions; a hearing
48 shall be held on such petition within sixty days of the
49 date of service. The court may grant appropriate
50 temporary relief, and shall make and enter upon the
51 pleadings, testimony and proceedings such order as is
52 necessary to enforce the order of the commission or
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

LAWRENCE BAUMER,

Complainant,

v.

DOCKET NO. EH-553-86

CLEARBROOK CORP., dba
UNIVERSITY CHEVROLET,

Respondent.

FINAL ORDER

On the 8th day of October, 1987, the West Virginia Human Rights Commission reviewed the proposed order and decision of Hearing Examiner, James Gerl, in the above-captioned matter. After consideration of the aforementioned and exceptions thereto, the commission does hereby adopt said proposed order and decision, encompassing findings of fact and conclusions of law, as it own, with the following modifications.

In the subsection titled Findings of Fact, the last sentence contained in finding of fact number 8 is stricken. In the same subsection, finding of fact number 11 is deleted.

In the subsection titled Discussion the first paragraph on page 8 is modified by striking the language "...suffered no injury from his fall on the ice and that he..." contained therein. On page 10 of the same subsection, the entire first paragraph, with the exception of the first two sentences, is stricken.

It is hereby ORDERED that the Hearing Examiner's proposed order and decision, encompassing findings of fact and conclusions

law, be attached hereto and made a part of this final order except as modified by this final order.

It is finally ORDERED that this case be dismissed with prejudice.

By this final order, a copy of which shall be sent by certified mail to the parties, the parties are hereby notified that they have ten days to request a reconsideration of this final order and that they may seek judicial review.

Entered this 22nd day of October, 1987.

RESPECTFULLY SUBMITTED,

BY Betty A. Hamilton
CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

RECEIVED

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

AUG 24 1987
W.V. HUMAN RIGHTS COMM.

LAWERENCE BAUMER,

Complainant,

VS.

DOCKET NO. EH-553-86

CLEARBROOK CORP., dba
UNIVERSITY CHEVROLET,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on June 25-26, 1987, in Morgantown, West Virginia. Commissioner Russell Van Cleve served as Hearing Commissioner. The complaint was filed on May 27, 1986. The notice of hearing was issued on April 9, 1987. Respondent answered on April 24, 1987. A telephone Status Conference was convened on May 1, 1987. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions, and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been

omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against him on the basis of his handicap, knee injury, by firing him. Respondent maintains that complainant is not handicapped and that he was fired for poor job performance.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. Complainant began his employment with respondent on or about September 6, 1985 and he was discharged by respondent on February 22, 1986.

2. During the course of his employment with respondent, complainant was employed in the capacity of a salesperson.

Based upon the preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

3. On June 7, 1985, complainant was in an automobile accident. Approximately a week or two later, complainant was seen by Stoll, an orthopedic surgeon. Stoll's diagnosis was that complainant had a bruised kneecap. Stoll recommended physical therapy to correct this knee problem.

4. Complainant sought a second opinion on August 19, 1985, from Bowers, an orthoedic surgeon. On August 21, 1985, Bowers performed a diagnostic arthroscopic surgical procedure on complainant's knee. The arthroscopic examination was completely normal and no pathology was revealed. Bowers concluded that his prior suspicion that complainant's meniscas was torn was incorrect. Bowers' diagnosis was that complainant had sustained a retro patellar contusion, that is a bruising of the joint surface of the kneecap. Bowers described complainant's knee condition as mild and his opinion was that complainant is not substantially impaired or limited in any of his major life activities because of his knee condition.

5. Sixteen days after the arthroscopic procedure, complainant was hired by respondent. Complainant indicated on his application for employment with respondent that he had no physical limitations which would preclude him from performing the car sales job for which he had applied.

6. During his first month of employment with respondent, complainant sold 7.5 automobiles and earned about \$1,179.00 in commissions. In October 1985, complainant sold 7 cars and earned \$1,362.00. During October 1985, complainant participated in a General Motors "walk around" competition, which measured the product knowledge of salespersons, and placed first. As a result, complainant qualified for a similar competition in Pittsburg, Pennsylvania, in which he placed third. In November 1985, complainant sold 13 cars and was, therefore, the top salesperson of Respondent for that month. Because many small commissions were

involved, complainant earned only \$949.00 in November 1985.

7. In December 1985, complainant sold only 3.5 automobiles and earned approximately \$725.00. In January 1986, complainant sold 6.5 cars and earned \$897.00. From February 1 to February 22, 1986, complainant sold 2.5 cars and earned \$388.00.

8. On January 27, 1986, complainant fell on the ice on respondent's parking lot. The next day complainant went to Monongahelia County General Hospital and was seen by Dr. Harrison who observed no swelling of complainant's knee but recommended that complainant see an orthopedic surgeon. Rather than be seen by Bowers, who was already treating complainant, complainant waited until February 11, 1986 to see an orthopedic surgeon, Michael of Baltimore, Maryland. On February 26, 1986, Michael performed another diagnostic arthroscopic procedure on complainant's knee. Complainant's knee was not injured by his fall on the ice on respondent's parking lot.

9. In late January 1986, Sonntag was hired by respondent as general sales manager. The reason Sonntag was hired was to turn the dealership around. In 1985, respondent lost approximately \$250,000.00. Sonntag eventually converted the dealership into a profitable operation by hiring a more productive sales force. Sonntag determined that only 3 or 4 qualified salespeople were employed by respondent before the changes he ordered. Sonntag determined that complainant and Benoit would be the first two salespeople to be discharged. Complainant and the other unqualified salespeople employed by respondent before Sonntag's changes, would sometimes all be in the backroom ignoring customers

on the sales floor. Complainant's performance from December 1985 through February 1986 was deemed unacceptable by Sonntag.

10. Ziglear, respondent's sales manager, counselled complainant regarding his poor sales performance several times in December 1985 and January 1986.

11. During the period that Sonntag was respondent's general manager (January 1986 through June 1987), respondent employed two handicapped salespeople. Brunner, who remained employed as a salesperson for respondent after Sonntag's changes, has a severe limp as a result of an automobile accident in 1975 and will be required in the future to undergo surgery for a hip replacement. Dinges, who was hired by Sonntag, is able to walk only with the use of two arm crutches.

12. Complainant describes his walking stick as very attractive and hand crafted, and complainant believes that the attractive nature of the walking stick causes people to pick it up and play with it. Some employees of respondent pretended to play golf with complainant's walking stick. Brunner used his own cane to play golf.

13. Some of complainant's co-employees joked regarding complainant's knee condition. Such phrases as "knee-monia" were uttered. Most of these comments were made by Bryan, who was described as the dealership clown. Complainant did not make his concern regarding these comments known to Sonntag.

14. Respondent made accommodations for complainant's knee condition. Complainant was permitted to attend physical therapy sessions during normal working hours two times per week.

Complainant, unlike the other salespeople, was not required to clean snow off of vehicles during the winter.

15. Respondent's sales system is a track system wherein the first salesperson to greet a new customer in the sales area is permitted to attempt to make the sale without interference from other salespeople. Salespeople are encouraged to cultivate their own customer base by "prospecting," that is by making phone calls and mailing information to prospective customers.

16. An alternative sales system, known as the "rotation" or "up" system, requires that salespeople rotate in order when a new customer enters the dealership. The up system eliminates a salesperson's initiative, and it has not worked where it has been tried.

CONCLUSIONS OF THE LAW

1. Lawrence Baumer is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act. West Virginia Code §5-11-10.

2. Clearbrook Corporation, dba University Chevrolet is an employer as defined by West Virginia Code Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has not established a prima facie case of handicap discrimination.

4. Respondent has not discriminated against complainant on the basis of his handicap by terminating him. West Virginia Code, Section 5-11-9(a).

DISCUSSION

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W.Va. 1983); McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, complainant has not established a prima facie case of handicap discrimination. Complainant has not demonstrated that he is handicapped within the meaning of the Human Rights Act. Handicap "[m]eans any physical or mental impairment which substantially limits one or more of a person's major life activities." Interpretive Rules Governing Discrimination on the Handicapped; §2.01. The only expert medical testimony offered at the hearing herein was that of Bowers, one of many doctors seen by complainant for his knee condition, who was called by respondent. Bowers testified that complainant has a sore kneecap and that complainant's condition does not limit his major life activities. Indeed, complainant's knee condition is so minor and insignificant that it cannot reasonably be said to limit his major life activities. The legislature could not have intended such a condition to be a handicap.

In his brief, complainant argues that his subsequent fall on the ice on respondent's parking lot caused complainant to be limited in a major life activity, that is ambulation. The record evidence reveals however that complainant waited 15 days before seeing an orthopedic surgeon. Complainant did not obtain the opinion of the orthopedic surgeon who had been treating him. It is concluded that complainant suffered no injury from his fall on the ice and that he was not substantially limited in any major life activity by said fall.

Assuming arguendo that complainant had established a prima facie case, respondent has articulated a legitimate non-discriminatory reason for complainant's discharge. Respondent was losing money because its sales force was inept and incompetent. Sonntag was hired to correct the situation, and he made wholesale changes in respondent's sales force. One of the changes was to fire complainant who had had three very bad consecutive months with respect to sales.

Complainant has not demonstrated that the reason articulated by respondent for his discharge is pretextual. The testimony of complainant and his witnesses was not as credible as the testimony of respondent's witnesses and any conflict in testimony is resolved in favor of respondent. Complainant's demeanor was very evasive and belligerent on cross-examination. In addition, complainant's credibility is impaired by a prior inconsistent statement. At the hearing, complainant testified that he told Isner of the alleged verbal harrassment of him. At his deposition, however, complainant testified that he had never told anybody at

respondent about the alleged harrassment. Complainant's credibility is also impaired by the chart which summarizes sales data which he prepared that deceptively distorts sales data, for example, by not counting half sales where two employees worked on a sale. The testimony of the witnesses called by complainant is not credible because of their demeanor, because of various inconsistencies in their testimony, and in many instances because of their bias against respondent in general, and against Sonntag in particular, because of adverse employment actions taken against them.

The only evidence offered by complainant which, if true, would show pretext involves his allegation that respondent harassed him because of his knee condition. Complainant testified that respondent permitted him to be harrassed by employees who used his walking stick as a pretend golf club. Complainant testified, however, that the attractive nature of his hand crafted walking stick often caused people to pick it up and play with it. In any event, the incidents cited by complainant, in themselves, cannot reasonably be said to constitute harrassment.

In addition, complainant claims to have suffered verbal harrassment at respondent. Complainant testified that Sonntag called complainant a "cripple" and "damaged goods." Sonntag denies having made these statements. The testimony of Sonntag is credible. The testimony of complainant is not credible. It is concluded that Sonntag never called complainant any such names.

Complainant testified that co-workers, especially Bryan, made comments such as knee-monia. Complainant, however, never

made his displeasure with these comments known to management. Accordingly, respondent took no steps to cause its employees to stop making such comments.

Complainant testified that on the day before his discharge Sonntag said that a salesperson named Benoit will always be a runner, "but you're damaged goods." As discussed above, Sonntag denies this statement and his denial is accorded more credibility than complainant's allegation. Significantly, Benoit was terminated by respondent on the same day as complainant. Thus, even assuming arguendo that Sonntag had made this statement, the firing of Benoit on the same day as complainant would seem to negate handicap discrimination as the reason for complainant's discharge. This conclusion is bolstered by the fact that Sonntag retained Brunner, who has a serious ambulatory handicap, as a salesperson and that Sonntag hired Dinges, who also has a serious ambulatory handicap.

Complainant's argument that respondent failed to accommodate him is rejected. Respondent permitted complainant to attend physical therapy sessions twice per week during working hours. In addition, complainant, unlike other salespersons, was not required to clean snow off cars in the winter. Complainant would require respondent to dramatically restructure its sales system from a "track" system to an "up" system in order to accommodate him. Such a change to a system which does not work well is not a reasonable accommodation within the meaning of the Interpretive Guidelines on Discrimination on the Handicapped, §4.03.

PROPOSED ORDER

Based upon the foregoing, the Hearing Examiner hereby recommends that the Commission dismiss the complaint in this matter with prejudice.



James Gerl
Hearing Examiner

ENTERED: August 20, 1988

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served
the foregoing Proposed Order and Decision
by placing true and correct copies thereof in the United States
Mail, postage prepaid, addressed to the following:

Peyton Fireman, Esq.
1460 Center Hill Ave.
Star City, WV 26505

Gene Bailey, Esq.
Charles Surber, Esq.
JACKSON KELLY, HOLT & O'FARRELL
P.O. Box 619
Morgantown, WV 26507

on this 21st day of August, 1987.



James Gerl