



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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ARCH A. MOORE, JR.
Governor

June 27, 1986

Mildred Taylor Brown
52 Monia Park
Hurricane, WV 25526

Anthony Serreno
Assistant Attorney General
Civil Rights Division
1204 Kanawha Boulevard, E.
Charleston, WV 25301

W. T. Crantill, Jr.
Attorney-at-Law
Blakney, Alexander & Macen
3700 NCNB Plaza
Charlotte, NC 28280

RE: Mildred Taylor Brown V Overnite Transportation
Company/EH-547-85

Dear Ms. Brown, Mr. Serreno & Mr. Crantill:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Mildred Taylor Brown V Overnite Transportation Co./EH-547-85.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

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

Howard D. Kenney
Executive Director

HDK/kpv
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

THE WEST VIRGINIA HUMAN RIGHTS COMMISSION
OFFICE OF THE HEARING EXAMINER

MILDRED TAYLOR BROWN,
Complainant,

v.

DOCKET NO. EH-547-85

OVERNITE TRANSPORTATION CO.,
Respondent.

RECOMMENDED DECISION

I.

Preliminary Matters

This case comes before the Commission upon the verified complaint of Mildred Taylor Brown. The complaint was filed on May 9, 1985 alleging unlawful discrimination under WV Code 5-11-9(a).

Notice of the public hearing was issued on September 11, 1985 assigning the matter to John M. Richardson, Hearing Examiner, for public hearing. Thereafter, a public hearing was held on December 19, 1985, with John M. Richardson, Hearing Examiner, and Russell Van Cleve, Hearing Commissioner, comprising the Hearing Panel. The Complainant was represented by Anthony Serreno, Assistant Attorney General, and the Respondent was represented W. T. Cranfill, Jr. of the law firm of Blakeney, Alexander and Machen (Charlotte, North Carolina) and Steven A. Weber of the law firm of Kay, Casto & Chaney (Charleston, West Virginia).

Whereupon the Complainant presented her evidence and upon completion thereof rested her case. At that time, the Respondent, by counsel, moved for a directed verdict upon the grounds that the Complainant failed to prove that she was a "handicapped person" within the meaning of the Act and that her request to be returned to a position which no longer exists or to displace a person legitimately performing a job for the Respondent was beyond the Commission's power.

The Hearing Examiner deferred ruling on this motion until the taking of all of the evidence. Thereafter, the Respondent presented its evidence and rested its case.

Whereupon, the Hearing Examiner directed that the parties submit their proposed findings of fact and conclusions of law. For the purposes of this decision, the Hearing Examiner has considered all of the pleadings, testimony, exhibits and to the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the various witnesses testimony is not in accord with the findings herein, it is not credited, and to the extent that the findings are conclusionary they are so acknowledged.

II.

Issues

In her complaint, the Complainant alleged that the facts upon which the charge was based were as follows:

1. "I was terminated from my employment on April 12, 1985."
2. "The Respondent discharged me because I refused to perform duties which would be harmful to my health."
3. "I believe that I have been discriminated against because of my handicap, cervical arthritis, in that:
 - a. In February, 1985, I was 'bumped' from my position as receptionist by a more senior woman.
 - b. In February, 1985, I was placed in the position of a bill flagger.
 - c. In March, 1985, I was moved to work in customer service on a permanent basis.
 - d. The Respondent is aware that I am under a doctors care and cannot perform the duties in customer service.
 - e. The position of bill flagger was vacant at the time of my dismissal. It has since been filled by a younger male age 21."

The Complainant's allegations set forth above together with the evidence presented at the public hearing gave rise to the following issues:

1. Was the Complainant a handicapped person within the meaning of the Act.

2. Did the Complainant carry her burden of proof and show that:
 - a. The physical criteria (bending and reaching while filing) were not job related, or,
 - b. Show how the Complainant's handicap (not being able to bend or reach while filing) could be accommodated so that the physical requirement of filing could be accomplished.
3. Was the physical act of filing an essential requirement for any job that the Complainant was qualified to perform for the Respondent.

III.

Findings of Fact

1. Overnite Transportation Company is headquartered in Richmond, Virginia, and operates a trucking terminal facility in Nitro, West Virginia. The Complainant began work for the Respondent in September 1981 and was terminated on April 11, 1985.

2. The Complainant originally began working for the Respondent at its Richmond terminal and worked there from September 1981 until September 1983.

3. Prior to her employment with the Respondent the Complainant had received medical attention for cervical arthritis.

4. The Complainant listed on her application for employment with the Respondent that she had had back difficulty due to arthritis but did not list any physical limitation.

5. Complainant was hired by Overnite to work at its Richmond terminal as a key punch operator. The Complainant voluntarily requested to transfer to the Nitro terminal in September 1983 in order to be able to care for her mother. This transfer request was granted and the Complainant was placed in a receptionist position at Nitro.

6. The duties of the receptionist position at Nitro included answering the telephone, dispatching calls, addressing and mailing bills, separating audits, sending late notices, handling some of the accounts receivable and filing invoices.

7. Riley Jackson was the terminal manager at Nitro during the entire time Complainant worked at that location. He had overall responsibility for the operations of the terminal.

8. Linda Gunnoe was the office manager and had direct supervisory authority over the office employees, including the Complainant.

9. The Respondent introduced a computer system which centralized all of the accounts receivable work at its various terminals thereby eliminating the need of an accounts receivable clerk at the Nitro terminal, a job then held by Terry Sparks.

10. The Respondent had a policy whereby a more senior employee could bump a less senior employee, when, as a result of a reduction in force, the more-senior employee was minimally qualified to perform the duties of the less-senior employee.

11. Terry Sparks had eight years of seniority and the Complainant had three years of seniority.

12. Terry Sparks had been the receptionist at the Respondent's Nitro terminal prior to her being moved to the position of accounts receivable clerk.

13. Terry Sparks opted to bump the Complainant and was qualified to perform the Complainant's job.

14. Debbie Briscoe, a more senior employee than the Complainant, was due to go on maternity leave in three or four months.

15. Linda Gunnoe, Office Manager, agreed to permit Complainant to train under Debbie Briscoe and bump Mike Caplinger a less senior part-time employee and a bill-flagger. This permitted the Complainant to have a full-time job while working and training (part-time) in customer service and (part-time) as a bill-flagger.

16. The Respondent had no other jobs available and agreed to Linda Gunnoe's arrangement understanding that Debbie Briscoe intended to return after her maternity leave.

[It is noted that the Complainant hoped business would improve to the extent that her services would continue to be needed after Debbie Briscoe's return].

treating physician arranged for X-Rays to be obtained and analyzed by Doctor Deardorff.

25. Doctor Lewis' analysis confirmed that the condition of the cervical spine could cause the pain in her spine, numbness of her left arm and tenderness in the neck and shoulder areas. It was his opinion that the Complainant should not lift objects weighing more than 3 to 5 pounds over her head until therapy could be started and that this condition could be alleviated with physical therapy and medication.

26. Doctor Deardorff acknowledged that the condition was permanent and could improve in that the pain was intermittent in nature and with rest would subside. However, the condition was based upon a degenerative disc disease and would most likely worsen.

27. The Complainant offered no evidence suggesting that a change in the type of filing cabinets would in any way accommodate her situation or that the filing required in the customer service function was not essential.

IV.

Discussion

In the present case, the applicable statute is WV Code 5-11-9(a):

"It shall be an unlawful discriminatory practice, unless based upon a bonifide occupational

17. Filing was a substantial and an essential part of the job required to be performed in the customer service function.

18. The filing requirement in customer service was different from that filing requirement as a receptionist in that it required a greater degree of stooping and bending as well as reaching overhead.

19. During the period from April 1, to April 11, 1985, the Complainant informed Linda Gunnoe that she could not work in customer service because it hurt her back.

20. Linda Gunnoe requested that the Complainant consult a physician and obtain an evaluation which the Complainant attempted to accomplish on April 8, 1985.

21. On April 8, 1985, the Complainant visited Doctor Lewis and obtained a note indicating that she had cervical arthritis. No other information was contained on Dr. Lewis' perscription pad slip.

22. The Complainant informed Linda Gunnoe that the work in customer service caused her pain and would no longer perform that work.

23. Linda Gunnoe after consulting with Riley Jackson terminal manager terminated the Complainant effective April 12, 1985.

24. The Complainant offered testimony of two physicians, namely, Doctor Richard A. Lewis and Doctor W. Alva Deardorff who qualified as experts and whose testimony was uncontested by the Respondent. Doctor Lewis, the

qualification, or except where based upon applicable security regulations established by the United States or the State of West Virginia or its agencies or political subdivisions;... For any employer to discriminate against an individual with respect to compensation, hire, tenure terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or handicapped:..."

The Commission has provided in its Rules and Regulations Pertaining to Practice and Procedure before the West Virginia Human Rights Commission Rule 7.14(d) that the Hearing Examiner shall take notice of the Commission's Interpretive Rules Governing Discrimination on the Handicapped (1982). In accordance with that direction, Interpretive Rule 4.02 defines a qualified handicap person "as it relates to employment, a 'qualified handicapped person' is one who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question. 11/

Footnote 11 provides:

11/"The West Virginia statute prohibits employment discrimination against an individual who is 'able and competent to perform the services required.' For brevity and to achieve consistency with the federal regulations, such a person is identified herein as a 'qualified handicapped person.' This definition makes it clear that ability to perform the job means ability to perform the 'essential functions' of the job. This qualification is essential to prevent job discrimination against handicapped persons because job descriptions may often include requirements which would exclude a handicapped person which are extraneous or

least not essential to the performance of the job. This definition may require a job description to be rewritten if it includes requirements that are not necessary to the essential functions of the job and which operate to exclude a handicapped person (e.g., the requirement that the applicant be able to climb stairs if the job could be done on the ground floor, or the ability to drive if the job is essentially an office job).***

While keeping the above statute and interpretive rule in mind, it is necessary to note, that, in order to prove handicapped discrimination, a Complainant must first make a prima facie showing that, except for the handicap, the individual is qualified to do the job and that the handicap is preventing the Complainant from meeting the physical criteria for employment. The Complainant must show why the physical criteria are not job related or show how the handicap can be accommodated so that the physical criteria can be met. After the Complainant has proved a prima facie case, the burden of proof then shifts to the Respondent to show that the physical criteria are job related and that the handicapped individual cannot "safely and effeciently" perform the essentials of the job. The employer must also demonstrate that the proposed accommodation would cause an undue hardship. Should the Respondent carry this burden of proof, then it becomes the obligation of the Complainant to show that those reasons offered by the Respondent were pretextual.

It is at this point, in the present case, that Issue No. 1 needs to be resolved, i.e. determining whether or not

the Complainant was a handicapped person. The Complainant showed, by credible evidence, that she was suffering from cervical arthritis which in turn caused her pain in performing her filing duties which required bending and stooping or reaching over shoulder height. The Complainant provided further evidence that her condition of cervical arthritis was a permanent condition which would worsen over time even though the discomfort or pain would be intermittent and would be relieved somewhat with proper therapy. It was also shown that physical exertion could cause pain and that rest and medication would help alleviate it.

In the present case, it becomes a question as to the severity of the cervical arthritis suffered by the Complainant which would in turn determine whether or not the Complainant was handicapped. The doctor's testimony herein did not indicate that the Complainant was suffering from severe distress as a result of the cervical arthritis even though the condition was considered to be progressive and therefore might at some time require a greater restriction on her activities.

However, it appears that the Complainant was capable of performing the job but for the discomfort (pain) caused by stooping and reaching while filing. Thus, while the Complainant was unquestionably qualified to do the job, the discomfort caused by the cervical arthritis prevented her from performing the essential filing portion of her duties

in customer service. Under the circumstances, it becomes reasonable to conclude that the Complainant was a "qualified handicapped person" within the meaning of the statute and the interpretive rules.

This brings the matter to the Issue No. 2 concerning the Complainant's burden of proof in showing that the physical criteria (bending and reaching while filing) were not job related, or in the alternative to show that those physical requirements could be accommodated by the Respondent.

In the instant case, the Complainant offered no proof that the filing required in customer service was not an essential part of the job, however, the Respondent affirmatively showed that filing was an essential part of that job. Thus, at this point, it was incumbent upon the Complainant then to show that the bending and reaching required in customer service could be accommodated by some alternative means of filing. The Complainant offered no evidence to show that the filing could be accomplished without bending or reaching. It is, of course, within the imagination of the Hearing Examiner to envision that a filing system could be employed where there would be little or no bending or reaching (over the head) but no attempt was made to introduce evidence as to feasibility of employing such a system or its cost. In this regard the Complainant has failed to carry her burden of proof.

The Respondent further showed, with respect to Issue No. 3, that it had no other jobs available wherein filing was not required including the previous job that the Complainant had held, namely, receptionist.

In view of the Complainant's failure to carry her burden of proof and thereby establish a prima facie case and in addition failed to provide evidence that the Respondent could accommodate her handicap, leaves this Hearing Examiner no alternative but to recommend to the Commission that her complaint be dismissed.

V.

Conclusions of Law

1. The Commission had jurisdiction of the subject matter of this complaint.
2. The Complainant was a qualified handicapped person within the meaning of the Act.
3. The Complainant did not provide sufficient evidence to establish a prima facie case.
4. The Complainant failed to prove that the Respondent could accommodate the Complainant's handicap by any means, reasonable or otherwise.
5. The Complainant's complaint should be dismissed with prejudice.
6. The parties should each bear their own costs and expenses in this matter.

VI.

Recommended Order

For its Final Order, the Hearing Examiner recommends that the Commission adopt the following:

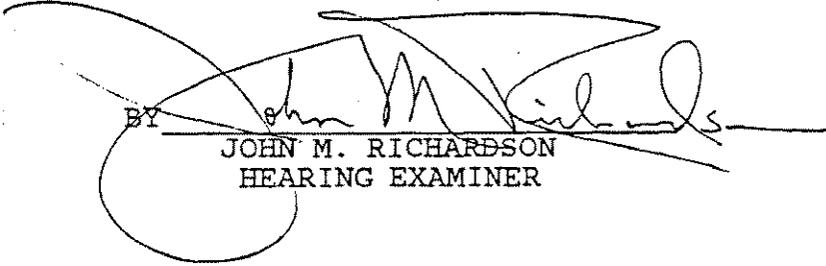
1. The Hearing Examiner's recommended decision and the contents thereof.

2. That the complaint be dismissed with prejudice.

3. That each of the parties bear their own costs of this action.

RESPECTFULLY SUBMITTED

BY


JOHN M. RICHARDSON
HEARING EXAMINER

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RECEIVED

MILDRED TAYLOR BROWN,

MAY 19 1986

Complainant,

W.V. HUMAN RIGHTS COMM.

DOCKET NO. EH-547-85

OVERNITE TRANSPORTATION
COMPANY,

Respondent.

EXCEPTIONS TO THE HEARING
EXAMINER'S RECOMMENDED DECISION

The complainant by the undersigned counsel, hereby files her objections and exceptions with the Human Rights Commission to the "Hearing Examiner's Findings of Fact and Conclusions of Law" along with the "Recommended Order" dated April 17, 1986. The complainant cites her specific exceptions as follows:

1. The complainant takes exception to the Hearing Examiner's Findings of Fact set out in paragraph 16. In paragraph 16 the Hearing Examiner finds:

"The Respondent had no other jobs available and agreed to Linda Gunnoe's arrangement understanding that Debbie Briscoe intended to return after her maternity leave. [It is noted that the Complainant hoped business would improve to the extent that her services would continue to be needed after Debbie Briscoe's return]."

The complainant disagrees with the finding of fact of the Hearing Examiner and states that the evidence clearly calls for a finding that the respondent did have additional or other jobs available to complainant at the time complainant was "bumped" from her receptionist job and when she was fired. Tr. at 142. The option to place Terry Sparks in the customer service/bill flagger job all through the complainant's transfer process was a reasonable accommodation which would have permitted complainant to continue the receptionist job that she had held until transferred to customer service.

2. The complainant takes exception to the Hearing Examiner's Finding of Fact set out in paragraph 19. In paragraph 19 the Hearing Examiner finds:

"During the period from April 1, to April 11, 1985, the Complainant informed Linda Gunnoe that she could not work in customer service because it hurt her back."

The complainant disagrees with the Finding of Fact and states that the evidence clearly calls for a finding of fact that the complainant did in fact notify respondent through Riley Jackson and Linda Gunnoe prior to April 1 through April 11, 1985, of her inability to do the Customer Service duties. Tr. at 19, 20.

3. The complainant takes exception to the Hearing Examiner's Finding of Fact set out in paragraph 21. In paragraph 21 the Hearing Examiner finds:

"On April 8, 1985, the Complainant visited Doctor Lewis and obtained a note indicating that she had cervical arthritis. No other information was contained on Dr. Lewis' perscription [sic] pad slip."

The complainant disagrees with the finding of fact and states that the evidence clearly calls for a finding of fact that complainant did in fact provide other information. Complainant requested that respondent, through Linda Gunnoe, call Dr. Lewis, at his request, if respondent had any further questions regarding complainant's condition. Tr. at 31, 32.

4. The complainant takes exception to the Hearing Examiner's Finding of Fact set out in paragraph 27. In paragraph 27 the Hearing Examiner finds:

"The Complainant offered no evidence suggesting that a change in the type of filing cabinets would in any way accommodate her situation or that the filing required in the customer service function was not essential."

The complainant disagrees with the Finding of Fact of the Hearing Examiner and states that the evidence clearly calls for a finding that the complainant did testify, responsive to the Hearing Examiner's inquiry, (Tr. at 37, 38, 39), that to place such file drawers on a table would alleviate the reaching and stooping position duties of the customer service duties that caused her the pain.

The Hearing Examiner erred in holding that there was not sufficient evidence to establish a prima facie case in that he concluded that "The individual was a qualified handicapped person within the meaning of the Act." Conclusions of Law, paragraph 2.

The Hearing Examiner provided to complainant a rebuttable presumption that the termination was discriminatory in finding that complainant was a "qualified handicapped individual". The burden then shifts to the employer/respondent to show that the dismissal was for reasons other than the handicap or that she could not have been accommodated without undue hardship. Pushkin v. Board of Regents, 658 F.2d 1372, 1387 (10th Cir. 1981).

Respondent totally failed to meet this burden. Complainant could have been accommodated in two ways. First, the file drawers could have been placed at table height in the job she was doing. Tr. at 15. Second, she could have been returned to the receptionist job which she could perform without accommodation. Tr. at 9, 13, 16, 18, 20. The Hearing Examiner erred in not considering that accommodation could have been accomplished through a re-transfer.

It is important to recall the facts of this case in evaluating the complainant's claim to the receptionist job. This was Ms. Brown's job, from which she was "bumped". The respondent knew of her back condition when she was reassigned. To allow an employer to transfer and then terminate handicapped employees because of their inability to do the new job will leave a loophole under the Act for employers to

discriminate deliberately against handicapped employees. Therefore, it is not only reasonable, but essential, that respondent be required to show that it would have constituted an undue hardship within the meaning of the Interpretive Regulations to return Ms. Brown to her previously held position.

This respondent has failed to do. The only justification offered for the refusal to transfer is that the new receptionist was more senior than Ms. Brown. A seniority system particularly where there is no contract or other clear policy, does not constitute a showing of undue hardship. It is simply not a defense to a charge of failure to accommodate a handicapped person.

In Prewitt v. United States Postal Service, 662 F2d 292, 305 (5th Cir. 1981), the barrier to performing the specific duties of a specific job while prohibitive of disparate impact relief may be overcome if the complainant can prove that the bar to employment is a surmountable barrier. The discrimination in complainant's case, termination, does have a relief if the handicapped person could have performed the job with reasonable accommodation. Such accommodation could be accomplished by respondent returning complainant to her original job as a receptionist or returning her to the bill flagger/customer service job or by placing the file drawers in customer service on a table.

The requirement that individuals be placed in jobs according to seniority could appear to be fair in form.

When the impact is to bar an interoffice transfer to accommodate a qualified handicapped individual as in complainant's case the West Virginia Human Rights Act becomes applicable to grant relief. In Griggs v. Duke Power Company, 401 U.S. 401, 431 (1971), the United States Supreme Court noted regarding the United States Civil Rights Act of 1964 that, "the Act proscribes not only to overt discrimination but also practices that are fair in form, but discriminatory in operation." This is complainant's contention.

In the discriminatory impact that complainant contends accompanied her two interoffice transfers the complainant need not prove that the respondent acted with discriminatory intent. Griggs v. Duke Power Company, supra at 430-432; Teamsters v. United States, 431 U.S. 324, h. 15 (1977). The elements complainant needs to prove to establish a prima facie case are that the challenged standard, seniority, disparately disadvantaged her, a member of a protected group and that she is qualified for the position (through accommodation) under all but the challenged criteria, seniority. The burden of proof then shifts to the respondent to prove that the challenged criteria are "job related" i.e., that the challenged criteria are required by "business necessity". Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1977); Griggs, supra at 431; Johnson v. Uncle Ben's, Inc., 675 F.2d 750 (5th Cir. 1981).

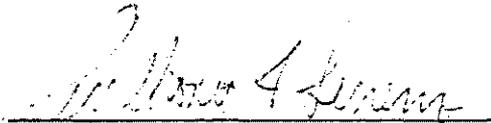
The weight of the evidence offered by both sides recommends only one conclusion here--that the complainant

was fired due to her handicap and suffered damages because of said discrimination. Thus the complainant asks the Commission to reject and overturn the Hearing Examiner's Recommended Decision.

WEST VIRGINIA HUMAN RIGHTS
COMMISSION, on behalf of
MILDRED TAYLOR BROWN,
Complainant

By Counsel

CHARLES G. BROWN
ATTORNEY GENERAL



ANTHONY F. SERRENO
ASSISTANT ATTORNEY GENERAL
1204 Kanawha Boulevard, East
Charleston, West Virginia 25301

CERTIFICATE OF SERVICE

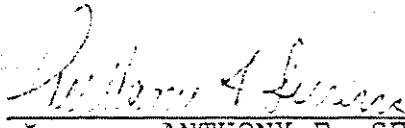
I, Anthony F. Serreno, Assistant Attorney General of the State of West Virginia, do hereby certify that a true copy of the foregoing Exceptions to the Hearing Examiner's Recommended Decision was served on the following persons by depositing said copy of the United States mail with first-class postage prepaid, on the 15th day of May, 1986, addressed as follows:

TO: W. T. Cranfill Jr., Esquire
Blakney, Alexander, & Macen
3700 NCNB Plaza
Charlotte, North Carolina 28280

John Richardson, Hearing Examiner
West Virginia Human Rights Commission
1036 Quarrier Street
Charleston, West Virginia 25301

The original was mailed this same date to:

Nathaniel G. Jackson, Chairman
135 South Randolph Street
Elkins, West Virginia 26241



ANTHONY F. SERRENO

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

RECEIVED

MAY 29 1985

W.V. HUMAN RIGHTS COMM.

ON THE COMPLAINT OF:)
MILDRED TAYLOR BROWN,)
Complainant,)
v.)
OVERNITE TRANSPORTATION)
COMPANY,)
Respondent.)

Docket No.
EH-547-85

OVERNITE TRANSPORTATION COMPANY'S RESPONSE
TO THE COMPLAINANT'S EXCEPTIONS TO THE
HEARING EXAMINER'S RECOMMENDED DECISION

Although Overnite relies on the arguments and authorities presented in its Proposed Findings of Fact and Conclusions of Law, as well as its Exceptions to the Hearing Examiner's Decision, two arguments made in the Complainant's Exceptions make this further response necessary.

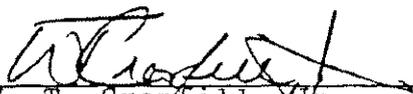
First: The Complainant states in her Exceptions (p. 3) that she was capable of filing only in drawers at waist level and then goes on to argue that her testimony in this regard should be taken as evidence that Overnite could have reasonably accommodated her handicap by placing all file drawers at her waist level. This argument stretches the testimony beyond reason. At no time, including the hearing, has the Complainant argued or suggested that she desired to be reinstated into the Customer Service job that involved the use of those file cabinets and from which she voluntarily quit. To the contrary, Ms. Brown has specifically

rejected any remedy that would return her to this former position. Instead, she testified without equivocation that she desired to displace Terry Sparks, a far more senior employee, and be placed into the Receptionist position (Transcript, p. 46).

Second: The other argument made by the Complainant is that she is entitled to the remedy of bumping a more senior employee out of an entirely different job -- i.e., bumping Receptionist Terry Sparks. The West Virginia Human Rights Act does not, however, require that a more senior employee lose his her job or be transferred to an entirely different job in order to accommodate a handicapped person. To the contrary, the Act and the handicap discrimination rules focus only on the particular job which the Complainant's handicap purportedly prevents her from doing. Specifically, Section 4.02 of the West Virginia handicap discrimination rules defines a qualified handicapped person as "one who is able and competent, with reasonable accommodation to perform the essential functions of the job in question" (emphasis added). The entire thrust of the Act is to insure that a handicapped person will not be unlawfully discriminated against under circumstances where he or she can perform the essential duties of a specific job. Nowhere does the Act state that an employer is required to find an entirely different job, or even bump a more senior employee out of another job, in order to provide employment to the handicapped person.

Because the Complainant's Exceptions are wholly without merit, Overnite urges the Commission to adopt the Hearing Examiner's Recommended Decision.

This 28TH day of May, 1986.



W. T. Craffill, Jr.
Paul B. Taylor
BLAKENEY, ALEXANDER & MACHEN
3700 NCNB Plaza
Charlotte, North Carolina 28280
704 372-3680

Attorneys for Overnite Trans-
portation Co.