

For Order Book
COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Executive Director

**CERTIFIED MAIL-
RETURN RECEIPT REQUESTED**

July 28, 1995

Ronald R. Blevins
2962 3rd Ave.
Huntington, WV 25702

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City of Huntington
Personnel Dept.
800 5th Ave.
PO Box 1659
Huntington, WV 26717

Frederick G. Staker, Esq.
PO Box 1659
Huntington, WV 25717

Re: Blevins v. City of Huntington
Personnel Dept. EA-186-92 & EH-187-92

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled action. Pursuant to WV Code §5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely yours,


Herman H. Jones
Executive Director

HLJ/mst

Enclosures

cc: The Honorable Ken Hechler

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RONALD R. BLEVINS,
Complainant,

v.

DOCKET NUMBERS: EA-185-92
EH-187-92

CITY OF HUNTINGTON,
Respondent.

FINAL ORDER

On July 13, 1995, the West Virginia Human Rights Commission reviewed the Final Decision of the Administrative Law Judge in the above-styled action issued by Administrative Law Judge Gail Ferguson. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer thereto filed in response to the Administrative Law Judge's Final Decision, the West Virginia Human Rights Commission decided to, and does hereby, adopt said Administrative law Judge's Final Decision as its own, with the following amendments.

1. On page two (2) second to the last sentence of finding of fact number one (1), should be struck and inserted in lieu thereof, "The eye was later removed."

2. On page five (5) second to the last sentence of finding of fact number sixteen (16) strike the word "January" and insert in lieu thereof "June."

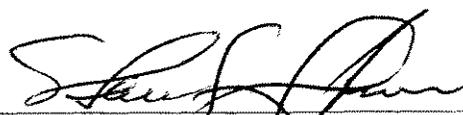
It is, therefore, the Order of the West Virginia Human Rights Commission that the Final Decision of the Administrative Law Judge be attached hereto and made a part of this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

Entered for and at the direction of the West Virginia Human Rights Commission this 28th day of July, 1995, in Kanawha County, Charleston, West Virginia.

WV HUMAN RIGHTS COMMISSION

BY: 
HERMAN H. JONES
EXECUTIVE DIRECTOR

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed, is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code §5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RONALD R. BLEVINS,

Complainant,

v.

DOCKET NUMBER(S): EA-186-92
EH-187-92

CITY OF HUNTINGTON

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on July 12, 1994, in Cabell County, at the Cabell County Courthouse, Huntington, West Virginia, before Administrative Law Judge Gail Ferguson. Briefs were received through October 12, 1994.

The complainant, Ronald R. Blevins, appeared in person and by counsel for the West Virginia Human Rights Commission, Deputy Attorney General Mary C. Buchmelter and second-year law student David Carriger. The respondent, City of Huntington, appeared by its counsel, Frederick G. Staker, III, City Attorney and Russell A. Houck, Personnel Director for the City of Huntington.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings,

conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The complainant, Ronald R. Blevins is a 44 year old resident of West Virginia. Complainant lost the use of his right eye when he was seven years old as a result of an accidental shooting. At age nine, the eye was removed. Blevins now wears a prosthesis.

2. The respondent, City of Huntington, is a municipal corporation organized and existing under the laws of the State of West Virginia.

3. Prior to complainant's employment with the City of Huntington and as a roofer with his brother, complainant began his work history with C. W. Bolt Roofing. He worked repairing roofs, putting up shingles and installing gutters. He worked for C. W. Bolt for approximately one year.

4. In November 1978, complainant began working for the respondent as a full-time truck driver and laborer in the Sanitation Department. As a laborer, he collected trash and brush, etc. He drove a route of his own and had two men on the truck with him. Complainant worked in that capacity for the respondent from 1978 until 1987. In January 1987, complainant attempted to secure a leave of absence with the respondent so he could investigate a job opportunity in South Dakota. He was denied a leave of absence, so he resigned his position in the Sanitation Department.

5. When complainant's job in South Dakota did not materialize, he returned to Huntington, West Virginia, and contracted to do maintenance work.

6. In 1989, complainant returned to work for the respondent as a temporary laborer with the Sanitation Board.

7. In 1990, complainant was hired by the respondent as a part-time truck driver at the City Landfill.

8. After one year, complainant was given "regular/part-time" status.

9. While complainant worked in this capacity, Larry Lunsford was the supervisor of the Huntington Landfill.

10. While complainant worked at the landfill, it was common knowledge that he only had one eye.

11. Complainant did obtain part-time work with the respondent, and worked on and off with the respondent until October 1992. A part-time employee has no benefits; they accrue no sick time, nor are they provided health care benefits. One is paid only for the days worked; there are no holidays and no overtime. Part-time employees

work a maximum of 38 hours a week. Furthermore, a part-time employee may not bid on full-time jobs. Bid sheets for available positions are given only to full-time employees. This practice is called "in-house bidding" and is only for full-time employees. The ability to bid on a full-time job is critical. Full-time employees have the first option. If no full-time employee bids, the position is then advertised in the newspaper. Temporary employees may then apply.

12. In May 1991, the respondent advertised for the position of Landfill Service Person/Mechanic's Helper in the newspaper.

13. The requirements for position advertised were as follows: Some knowledge of less complex mechanical parts of automotive equipment, standard tools, material and practices used in automotive servicing; ability to understand and do minor equipment maintenance work; ability to keep simple records; skill in the use of required tools and in handling equipment; valid West Virginia driver's license; and 24-hour availability.

14. Complainant applied for the position of Landfill Service Person with the respondent in May 1991. At the time he was working as a truck driver on temporary status. He had been in that position for approximately ten months.

15. Complainant felt optimistic about the position because previous practice had been that the person who had been working in a temporary position would be given preference for the permanent position as it became available. Complainant testified that when the position of Service Person had previously become available, he had applied, but another man, Jimmy Spencer, who had been working there longer as a temporary worker, was hired into the position.

Complainant testified that he did not protest Spencer's hiring because it had always been the hiring practice to move temporary workers into permanent positions as they became available.

16. Spencer worked his 60- or 90-day probationary period and bid out of the job of Service Worker into the Sanitation Department. It was that opening complainant applied for and expected to be awarded. He had been a temporary worker for approximately 10 or 11 months. Another temporary worker, Charles Mayo, also applied for the Service Person job. Mayo had only worked as a temporary employee for about three months. Both complainant and Mayo, along with two other applicants, received interviews in January of 1991. It was Mayo who was awarded the position.

17. The officials of the respondent who interviewed the complainant and all other applicants for the position were George Burgess, Director of Public Works, Russell Houck, Director of Personnel and Larry Lunsford, Landfill Supervisor.

18. Mr. Lunsford had had previous contact with complainant. Mr. Lunsford had written a memo and later a letter that clearly set out his concerns about injuries complainant had sustained during his tenure with the respondent and recommended that complainant be discharged. Although Lunsford denied at hearing that he knew that complainant had only one eye, he admitted that he knew he (Blevins) had a "problem" with his right eye.

19. The successful candidate's most recent employment was at Imperial Bedding where he worked as a supply clerk from July 20, 1990, until he began work with the respondent in May, 1994. Prior to that, he worked at Huntington Chrysler-Plymouth changing oil and

running cars through the car wash for about one year. Prior to that, Mayo worked driving a truck for 84-Lumber for approximately two years. Before that, Mayo's longest employment was with McDonald's as a cook and maintenance person, for about five years. Mayo's few months as a laborer at the Landfill was his only work as respondent's employee.

20. Mayo, who was 32 at the time of his interview, testified that his qualifications for the Landfill Service Person position were when someone showed him how to operate a 963 Loader. This was on break time for a couple of minutes a day.

21. John Basham, respondent's employee who works as Body Repairman, testified on complainant's behalf. Basham had worked for approximately eight years at the Landfill. He ran heavy equipment, such as bulldozers, endloaders, excavators and off-the-road trucks. Basham has known complainant for approximately 25 years. He testified that he worked with complainant at the Landfill. He stated that he observed complainant's work often. Basham testified that he thought that with a little more experience complainant would have made a good operator. When asked, "How did he (Blevins) do as a truck driver?" he answered, "Excellent." Basham testified that because he was so sure that complainant had the qualifications for the position, he had encouraged him to apply for the position of Service Person. After reciting the duties of the position in questions, Basham testified unequivocally that complainant had the qualifications to perform the job. Basham also testified that he had supervised Mr. Mayo in Mayo's short tenure at the landfill, and from his observations the complainant was more qualified to perform the

duties of Landfill Service Person than Mr. Mayo. Basham also testified that it was common knowledge on the job that complainant had only one eye.

22. Manford Short also testified for complainant. Mr. Short began work at the Landfill in 1991. He stated that he knew complainant had only one eye. Short recounted that he had had a conversation with Larry Lunsford, who was complainant's supervisor. In that conversation, Short testified, he and Lunsford were talking about complainant, and Lunsford stated that he had "fired the one-eyed son-of-a-bitch before and he would fire him again.

23. Complainant, whose work history included approximately 12 years with the respondent as a laborer and as a full-time and part-time employee, was clearly more qualified for the position in question.

24. The duties of the position in issue included handling the mechanic tools, changing oil in the equipment, changing filters, adjusting tracks on bulldozers, etc. Serious engine repair work and maintenance is done by mechanics or by the company who sold the equipment.

25. Complainant, as a truck driver, was certainly more qualified to assist a mechanic in ascertaining the need for equipment repair than a person with the qualifications of the successful candidate.

26. Respondent's position that its aforementioned interview committee was unaware that complainant had an eye impairment or suffered any noticeable physical handicap or disability is not credible.

27. The respondent offered the position of Landfill Service Person to Charles Mayo in June 1991. Mr. Mayo began employment in this position at a wage of \$7.14 per hour. Following a 60-day probationary period, Mr. Mayo began earning \$7.85 per hour. He also worked approximately 40 hours per month in overtime, earning one-and-one-half time his hourly wage.

28. Complainant suffered humiliation and mental anguish as a result of treatment by respondent.

B.

DISCUSSION

The complainant established a prima facie case. The West Virginia Human Rights Act prohibits discrimination in "terms, conditions or privileges of employment." West Virginia Code §5-11-3(h), as amended, defines the terms "discriminate" or "discrimination" to mean, in relevant part, "to exclude from, or fail or refuse to extend to, a person equal opportunities because of...handicap [or] age...."

The prima facie case for handicap discrimination was first articulated by the West Virginia Supreme Court in Ranger Fuel Corp. v. WV Human Rights Commission, 180 WV 260, 376, S.E.2d 154 (1988).

The Court stated that:

A handicapped person claiming employment discrimination under WV Code, 5-11-9 [1981], must prove as a prima facie case that such person (1) meets the definition of "handicapped," (2) possesses the skills to do the desired job with reasonable accommodations and (3) applied for and was rejected for the desired job. The burden then shifts to the employer to rebut the

claimant's prima facie case by presenting a legitimate, nondiscriminatory reason for such person's rejection. An example of such a legitimate, nondiscriminatory reason is that a person's handicap creates a reasonable probability of a materially enhanced risk of substantial harm to the handicapped person or others.

Ranger Fuel, syl. pt. 2; see also Anderson v. Live Plants, Inc., 187 WV 365, 419 S.E.2d 305 (1992).

Complainant has established his prima facie burden.

Complainant meets the definition of "handicapped." As stated in the West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against the Handicapped, 6 WV C.S.R. §77-1-1 et seq., a handicapped person means a person who:

2.1.1. Has a mental or physical impairment which substantially limits one or more of a person's major life activities; or

2.1.2. Has a record of such impairment; or

2.1.3. Is regarded as having such an impairment.

2.2. "Physical Impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory; speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine.

2.4. "Physical or Mental Impairment: includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

2.6. "Major Life Activities" means functions such as caring for one's self, performing manual tasks, walking, seeing,

hearing, speaking, breathing, learning, working,
transportation, and adapting to housing.

Rules Regarding Discrimination Against the
Handicapped, 6 W.Va. C.S.R. §§77-1-2
(Emphasis supplied).

Also, complainant testified that he was rejected from the Armed Services, denied employment because of his disability and denied his dream of being a police officer.^{1/}

Further, the record establishes that complainant possessed the requisite skills to do the desired job. He worked for the respondent on and off for approximately 12 years. Witnesses testified to his ability and, more importantly, the respondent would be hard pressed to dispute his qualifications in that out of over 30 applicants, complainant made the short list of four applicants interviewed. Also, complainant, after the interviews, came in second.

Finally, it is undisputed that complainant applied for and was rejected for the position. Complainant easily meets his prima facie burden in his disability claim. Likewise, complainant meets the prima facie burden in his age claim.

That test was first promulgated by the Court in Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (1986). In Conaway, the Court discussed the test for measuring the complainant's prima facie case. In order to meet his burden, "the plaintiff must offer proof of the following: (1) that the plaintiff is a member of a protected class; (2) that the employer made an adverse decision

^{1/} Complainant's testimony refers to a time before there was protection for people with disabilities.

concerning the plaintiff; [and that] (3) but for the plaintiff's protected status, the adverse decision would not have been made." Conaway, 358 S.e.2d 423, Syl. pt. 3.

In Conaway, as well as subsequent cases, the Court has stated that the prima facie burden is not meant to be onerous, and when discussing the "but for" burden (inexplicably inserted into the prima facie burden), the Court has consistently stated that this may be shown in a variety of ways.

Also in Conaway, the Court reiterated language from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817 (1973), speaking to the type of evidence required to make a prima facie case of disparate treatment discrimination. The Court stated that:

"... because discrimination is essentially an element of the mind, there will normally be very little, if any, direct evidence available. What is required of the complainant is to show some circumstantial evidence which would sufficiently link the employer's decision and the complainant's status as a member of a protected class so as to give rise to an inference that the employment-related decision was based upon an unlawful discriminatory criterion."

Conaway, 358 S.E.2d at 429-430.

The complainant has established all three prongs of his prima facie case. Complainant was born on February 10, 1947. It is also undisputed that the respondent made an adverse decision concerning the complainant in that he was not selected for a position for which he was qualified and that respondent selected a less qualified, younger person for the position in question.

Once the complainant has proven his prima facie case, the burden then shifts to the employer to rebut the complainant's prima facie

case by presenting a legitimate, nondiscriminatory reason for such person's rejection. Ranger Fuel v. WV Human Rights Commission, 376 S.E.2d 154 (1988); Anderson v. Live Plants, 419 S.E.2d 305 (1992).

In this case, the respondent claims that its denial of the position of Landfill Service Person to complainant was not connected to his handicap or his age. Instead, respondent claims, it merely hired the most qualified person for the position. This defense is clearly pretextual. Complainant's experience and qualifications clearly exceed Mr. Mayo's. Mr. Mayo testified that his previous experience consisted of employment at Imperial Bedding, a mattress factory. The longest employment Mr. Mayo had prior to being hired in complainant's stead was five years of employment as a cook and maintenance person with McDonald's. Mr. Mayo was only in the respondent's employ for a total of two months before he was moved up to the Service Person position. Nothing in his work history indicates that he was qualified for the position. The respondent's defense that it hired the most qualified applicant is clearly pretextual.

The third and final step in the proof of alleged disparate treatment discrimination is that the complainant will prevail if the complainant shows "by a preponderance of the evidence that the facially legitimate reason given by the employer for the employment-related decision is merely a pretext for a discriminatory motive." Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.2d 342 (1983); Mingo County Equal Opportunity Council v. WV Human Rights Commission, 376 S.E.2d 134 (1988); West

Virginia Institute of Technology v. WV Human Rights Commission, 383 S.E.2d 490 (1989).

Complainant's qualifications far outweigh those of Mr. Mayo. Complainant has over nine years of relevant experience. Complainant was positioned for this job by virtue of his years as a temporary part-time employee. Mayo stepped into a position for which he had no training or background.

Also, instructive in establishing pretext is the statement of Larry Lunsford, as testified about by Manford Short. Mr. Short's statement that Larry Lunsford said that he had "fired the one-eyed son-of-a-bitch before and he would fire him again" is critical to this case. It presents the link between complainant's protected class and the respondent's adverse action. Documents admitted into evidence also point to Mr. Lunsford, a prime decision maker, as a person who took disability into consideration in making hiring decisions. Although Mr. Lunsford denied making the statement, Mr. Short's testimony was compelling.

When there is conflicting testimony, it is within the purview of the Administrative Law Judge to make a determination of credibility. Westmoreland Coal Co. v. WV Human Rights Commission, 382 S.E.2d 562, 567 (1989). In assessing and weighing credibility of testimony, courts look to: (1) whether the testimony is internally consistent, (2) the demeanor of the individuals while testifying, and (3) whose testimony is better supported by the record. Maturo v. National Graphics, 722 F. Supp. 916 (D.Conn. 1989). See also, Thomas v. WV Human Rights Commission, 383 S.E.2d 60 (1989). Complainant's and Mr. Short's demeanor, as opposed to Mr. Lunsford's evasiveness, leads

the undersigned to a determination that the complainant's witness is more credible.

In conclusion, the complainant has established a prima facie case and proved by a preponderance of the evidence that respondent's defense is pretextual, thus proving his ultimate burden.

C.

CONCLUSIONS OF LAW

1. The complainant, Ronald R. Blevins, is an individual claiming to be aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10 (1987).

2. The respondent, City of Huntington, is and was at all times relevant hereto, an employer as defined by WV Code §5-11-3(d) (1992) and is subject to the provisions of the West Virginia Human Rights Act.

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. The complainant is a handicapped person as defined by WV Code §5-11-3(m)(1) (1992) in that he has a physical impairment which substantially limits major life activities.

6. The complainant is in the protected age class as defined by WV Code §5-11-3(k) (1992) in that he is and was at all times relevant hereto, over the age of forty.

7. The complainant has established a prima facie case of handicap discrimination in that he has shown that he meets the definition of handicap, he possesses the skills to do the desired job with reasonable accommodation, and he was not hired by respondent for an available position for which he was qualified.

8. The complainant has established a prima facie case of age discrimination in that he has shown that he is a member of the protected age group, he possesses the skills to do the desired job, and an individual who was not a member of the protected age group was hired for the position for which the complainant was qualified.

9. Respondent's articulated nondiscriminatory reason for its failure to hire the complainant, that Charles Mayo was the most qualified person for the available position, is shown to be pretextual.

10. As a result of the alleged discriminatory action of the respondent, complainant is entitled to:

(a) The next available position for which he applied and was illegally denied (Landfill Service Person) or a comparable position;

(b) Front pay and benefits until hired by the respondent from September 30, 1994 until his hire date;

(c) Back pay, benefits and prejudgment interest thereon at the rate of ten percent (10%) per annum, in the amount of \$81,288.54, from June 4, 1991 through September 30, 1994;

(d) Incidental damages in the amount of \$2,950.00 for embarrassment and humiliation for each claim;

(e) Reimbursement of the complainant's and the Commission's witness fees, deposition and hearing transcript costs, and travel expenses associated with prosecuting this claim in the amount of \$570.00; and

(f) A cease and desist order aimed at preventing the respondent from continuing the illegal discriminatory practices evidenced in its actions.

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant \$81,288.54.

3. The respondent shall reinstate the complainant as a landfill service operator or in a comparable position. Until that time complainant's front pay shall continue to accrue with interest.

3. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,950.00 for each claim for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination totalling \$5,900.00.

5. The respondent shall pay ten percent per annum interest on all monetary relief.

6. In the event of failure of respondent to comply with any of the provisions of this decision, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Acting Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 7 day of May, 1995.

WV HUMAN RIGHTS COMMISSION

BY


GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE