

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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**Cecil H. Underwood
Governor**

**Herman H. Jones
Executive Director**

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

March 24, 1998

James E. Deem
806 23rd St.
Vienna, WV 26105

O. Ames Co.
PO Box 1774
Parkersburg, WV 26101

Walt Auvil, Esq.
Pyles & Auvil
1208 Market St.
Parkersburg, WV 26101

Albert Sebok, Esq.
Jackson & Kelly
PO Box 553
Charleston, WV 25322

Re: Deem v. O. Ames Co.
EA-187-96

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision

of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

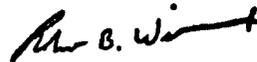
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10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Herman H. Jones, Executive Director
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES EDWARD DEEM,

Complainant,

v.

DOCKET NUMBER(S): EA-187-96

O. AMES COMPANY,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on November 19, 1997, in Wood County, at the Municipal Building in Parkersburg, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, James Edward Deem, appeared in person and by counsel, Walt Auvil with the firm of Pyles & Auvil. The respondent, O. Ames Company, appeared by its representative Tom Davies, Personnel Director for Ames Company, and by its counsel, Albert F. Sebok, with the firm of Jackson & Kelly. The parties have elected to submit this case for decision based upon the Pre-hearing Memoranda of the parties and supporting Memoranda of Law for issues related to ERISA preemption; and have waived the submission of post hearing Proposed Findings of Fact and Conclusions of Law, or other post hearing briefs.

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 necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The complainant, James Edward Deem, is a male resident of West Virginia, who was over the age of 40 at the time he applied for participation in the apprenticeship program with respondent in December 1994. Tr. p. 6, Stipulation of Fact.

2. Complainant was denied admittance to the apprenticeship program on January 2, 1995 because he was over the age of 40 at that time; while the specific qualification provisions of the Standards of Apprenticeship Between Ames Company Plant #1 and United Steelworkers of America AFL-CIO Local #1651, executed effective January 1988, required the applicant be between the age of 18 and 40. Complaint; Tr. p. 6, Stipulation of Fact; and Respondent's Exhibit No. 3.

3. Respondent, O. Ames Co., is a "person" and an "employer" as those terms are defined in W. Va. Code §§ 5-11-3(a) and 5-11-3(d). Tr. pp. 26 and 32.

4. Prior to admission to the apprenticeship program, an applicant is required to pass the Mechanical Aptitudes Test (Respondent's Exhibit No. 13) and a Blueprint Reading Test

(Respondent's Exhibit No. 14). These tests are necessary to ascertain the ability of the apprentice candidate to cope with the algebra, trigonometry, geometry and some calculus required to pass ICS courses as part of their apprenticeship. Tr. pp. 62-63 and 74.

5. The Apprenticeship Program is subject to the terms of the Standards of Apprenticeship Agreement between the union and respondent's Plant #1 (Respondent's Exhibit No. 3). The program is designed to prepare an individual through study and on the job experience to allow them to perform the electrical work at respondent's plant in a safe fashion. The apprentice is required to complete 8,000 hours of training in areas set forth in the schedule of work processes on page 6 of the agreement and training areas on page 12; under the direct supervision of the Electrical Supervisor or of experienced journeymen electricians; and up to 1000 hours may be met by work credit. The electrician apprentice is enrolled in approximately 58 courses with ICS , involving about 576 hours of study time. The apprentice completes the course worksheets and sends them in to ICS to be graded. The apprentice is paid and credited with the hours spent on studying the course. The entire program takes approximately four years to complete under ideal circumstances. All testing and selection of candidates is subject to the direction of the Joint Apprenticeship Committee, which also reviews the progress of the apprentices. Tr. Pp. 27-29, 48-49 and 53-56.

6. The complainant testified credibly that he took the test for apprenticeship sometime in the seventies, he thinks in 1976. He passed the test with a score of 82. It was the respondent's policy prior to 1996 that an applicant need only take the test once. Tr. pp. 10-11 and 13.

7. The respondent's agent, Mr. Cooper, keeps the records of the test summaries, candidates who took the test, the test scores and whether the candidate passed or failed, and if

they passed the candidates seniority dates. He could not locate the records of the complainant having taken the test. It is the respondent's and the union's policy to go by the records on file with the company should there be any question concerning these matters. Tr. pp. 30, 41-43 and 65-66.

8. Jerry Ash applied for the apprenticeship program in December of 1994, when complainant filed his application, and was the one ultimately selected for the apprenticeship program. He was under the age of 40 at the time of his application. Mr. Ash has been in the program since that time, except for a period of three months when he was cut out of the program and placed back on production for a three month period when things got slow. Mr. Ash expected to complete the apprenticeship sometime in early 1998 at which time he would become a Journeyman Electrician for respondent. The undersigned finds that Mr. Ash would be the proper comparator; and that the sheet in the front of Complainant's Exhibit No. 3 represents the difference in earnings between complainant and the successful apprentice applicant; that difference being \$2,159.92 for the period of January 8, 1995 through July 7, 1997. Tr. pp. 18, 20 and 23; Complainant's Exhibit No. 3.

9. Dan Cooper is the Personnel Manager for respondent at Plant #1 in Parkersburg. He is on the Joint Apprenticeship Committee. Mr. Cooper regularly deals with Mr. Milne with the United States Department of Labor's office in Clarksburg. The Department of Labor oversees and approves apprenticeship programs. The DOL was aware of the age cap since inception of the program and its initial approval. Mr. Cooper specifically questioned Mr. Milnes regarding the validity of the age cap in December 1994 and was told that the age cap was permitted. At that point in time E.E.O.C. regulations specifically exempted qualified apprenticeship programs

from coverage under the age discrimination laws pursuant to 29 C.F.R. § 1625.13. The respondent eliminated the age cap from its apprenticeship program in May 1995 when told to do so by the DOL. The E.E.O.C. regulation was amended effective April 8, 1996 to specify that such age caps were subject to age discrimination provisions in 29 C.F.R. § 1625.21, to reflect an earlier Federal district court ruling that such age caps violated the ADEA, notwithstanding the prior E.E.O.C. regulation. Later in October 1995, the respondent amended its apprenticeship program to require the applicant to have taken the tests for admission within the preceding three years. Tr. pp. 46, 47-49, 59-61 and 71; Respondent's Exhibit No. 1 and Respondent's Exhibit No. 2.

10. The respondent invests approximately \$45,000.00 per electrician trained in the apprenticeship program; including: ICS courses, pay for time studying, and pay increase increments as the training progresses. Tr. p. 29.

11. The respondent sought to introduce evidence of the motivation for imposing the age cap through the testimony of Director of Human Resources for Ames at the corporate level, Thomas R. Davies, that being because it was felt that younger men would serve longer as journeymen electricians if they started out younger, and that they were following industry practices. Mr. Davies admitted however, that studies showed that a person who had worked ten years for respondent was more likely to stay for the next 10 years than would a person who had only worked for respondent for two or three years. As this information goes to whether the age cap was a B.F.O.Q. and that issue was not sufficiently raised, and, in any event not remotely proven by respondent, this evidence is not considered by the undersigned. Tr. pp. 35-37 and 45.

12. Complainant suffered emotional and mental distress as a result of his denial of

admittance to the apprenticeship program. Complainant appeared frustrated while recounting the discussions with Mr. Davies about what to do about the situation in two or three different discussions. He seemed concerned that he was going to make less money as a result of not being in the program, and was frustrated by Mr. Davies suggestion that he start in the program at zero hours; nothing Mr. Davies having said being the least acceptable to him. Tr. pp. 9, 12 and 17.

B.

DISCUSSION

West Virginia Code § 5-11-9(4) makes it an unlawful discriminatory practice, “For any employer, labor organization, ... or any joint labor-management committee controlling apprentice training programs to: ... (B) Discriminate against any individual with respect to his right to be admitted to or participate in ... an apprenticeship training program ...” In order to make out a prima facie case of employment discrimination the complainant 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 concerning the plaintiff; and,
- (3) But for the plaintiff’s protected status, the adverse decision would not have been made.

Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W. Va. 1986). The respondent admits that complainant was a member of a protected class and that he was denied admittance to the apprenticeship program for electrician journeyman because he was over the age of forty at the time he applied for admission to the program; while the express terms of the program prohibited admission to anyone who was not between the ages of 18 and 40. Thus there is no

question but that complainant was discriminated against on account of age, in violation of the express terms of the West Virginia Human Rights Act. The respondent argues instead that the discrimination was legal at the time it occurred because E.E.O.C. regulations in effect at that time permitted discrimination on the basis of age; and that the West Virginia Human Rights Act is preempted by ERISA. The undersigned finds these arguments to be without merit for several reasons.

The undersigned agrees with respondent that the apprenticeship program at issue in this case is an “employee welfare benefit plan” within the meaning of ERISA. 29 U.S.C.A. § 1002(1). Notwithstanding the fact that the West Virginia Human Rights Act relates to an ERISA plan, its provisions are not preempted because the United States Supreme Court has held that deference should be paid to state schemes for enforcement of anti-discrimination laws, based upon the importance of state fair employment laws to the enforcement of Title VII’s administrative enforcement scheme. As the West Virginia Human Rights Commission is a deferral agency for Title VII (and ADEA), it is in essence enforcing federal anti-discrimination law and is thus not subject to state law ERISA preemption. Shaw v. Deleta Airlines, Inc., 463 U.S. 85 (1983).

When Mr. Cooper checked with the Department of Labor about whether complainant should be denied admittance to the apprenticeship program, Mr. Milnes, at the U.S. Department of Labor’s Clarksburg office, relied upon the E.E.O.C. regulation in effect at that time, 29 C.F.R. § 1625.13, which provided that age limitations for entry into a bona fide apprenticeship programs were not subject to the ADEA. Effective May 1995 the E.E.O.C. changed this regulation when it promulgated a new rule, 29 C.F.R. § 1625.21, which rescinded the earlier

provision and specified that such apprenticeship programs were in fact subject to the ADEA age discrimination prohibition. Nevertheless, the only Federal court to address this issue, found that the E.E.O.C. did not have the authority under the ADEA to provide an administrative exemption by E.E.O.C. regulation for a bona fide apprenticeship program. Quinn v. New York State Elec. And Gas Corp., 569 F.Supp. 655 (N.D.N.Y. 1983). The purpose of the ADEA is to “promote the employment of older persons based upon their ability rather than age; to prohibit arbitrary age discrimination in employment ...” 29 U.S.C. § 621(a)(2). The court in Quinn looked at this strong expression of Congress’s intent in enacting the ADEA; and the Legislative history. Congress excluded an exemption for apprenticeship programs, although it was aware of seven states out of twenty-three with age discrimination statutes at the time it passed the ADEA, precisely because those who supported its passage wished to tailor it to reach unjustified age limitations in those states that had not prohibited them in their own anti-discrimination laws. Supporters sought to alleviate denial of employment opportunities to individuals who were educable, retrainable, and desirous of employment, merely because they had reached or surpassed age forty. Thus the court concluded that the E.E.O.C. had acted inconsistently with the statutory mandate. The undersigned finds that as a matter of law, the age limitation in the apprenticeship agreement violated both the ADEA and the West Virginia Human Rights Act; notwithstanding the E.E.O.C. regulation then in effect, purporting to allow such age discrimination, or the fact that respondent may have relied on such regulation and not have acted out of any animus based upon the age of complainant. The undersigned finds as a matter of fact that respondent has not offered sufficient evidence to establish that the age limitation is a B.F.O.Q. and apparently concedes that it is not, given their removal of the provision effective

May 1995, shortly after complainant was denied admission to the apprenticeship program, when the E.E.O.C. regulation prohibiting such age limitations went into effect.

The undersigned finds that complainant is entitled to an award of incidental damages in the amount of \$3,277.45, for humiliation, embarrassment and emotional and mental distress and loss of personal dignity. Pearlman Real Estate Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977). A cap on incidental awards for a non jury trial is set at \$3,277.45 in cases before the Human Rights Commission as adjusted to conform to the consumer price index pursuant to the West Virginia Supreme Court's decision in Bishop Coal Company v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989). The respondent objected to admission of testimony relative to discussions undertaken in response to scheduled mediation pursuant to Rule 408 of the West Virginia Rules of Evidence. The undersigned did not consider any testimony elicited in response to the question objected to by respondent in determining liability but did consider such evidence as it would relate to complainant's qualification for admittance to the apprenticeship program and for other purposes, other than those of liability.

Although the undersigned accepts as fact that complainant took the Mechanical Aptitude Test and Blueprint Reading Test in 1976 and passed them with a score of 82 and that at the time he applied for the apprenticeship program those scores would still be valid; the undersigned concludes that the respondent nor the complainant may rely upon that test as there is no record of his having taken it and the score obtained. The respondent has established as a matter of fact that successful passage of these tests is a prerequisite to admission and that both the respondent employer and the union have agreed to go by the official records kept by the respondent, to meet this requirement. The undersigned agrees with respondent that the appropriate remedy at his

stage is to order the complainant admitted to the apprenticeship program; contingent upon the complainant's passing the Mechanical Aptitude and Blueprint Reading Tests. The undersigned finds the Court's reasoning in Darnell v. City of Jasper, Ala., 730 F.2d 653 (11th Cir. 1984), to be persuasive as to the proper course to pursue in fashioning a remedy. To that end the undersigned retains jurisdiction to fashion the most complete remedy possible. Upon successful completion of the apprenticeship program; the complainant is entitled to back pay in the amount of \$2,159.92 plus the difference between what Mr. Ash and complainant earned from July 7, 1997 through his completion of the apprenticeship program. Should complainant successfully complete the apprenticeship program, complainant shall be given seniority as journeyman electrician retroactive to the day immediately preceding the date on which Mr. Ash became a journeyman electrician; and shall be paid at a rate comparable to Mr. Ash.

C.

CONCLUSIONS OF LAW

1. The complainant, James Edward Deem, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, W. Va. Code § 5-11-10.
2. The respondent, O. Ames Company, is an employer as defined by W. Va. Code § 5-11-1 et seq., 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 W. Va. Code § 5-11-10.

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

5. The complainant has established a prima facie case of age discrimination.

6. The respondent has articulated a legitimate non discriminatory reason for its action toward the complainant, that being that excluding complainant from the apprenticeship was made pursuant to the terms of the apprenticeship program and was therefore permissible as a matter of law, which the complainant has established, is not a valid exception as a matter of law notwithstanding the existence of E.E.O.C. regulations permitting the exception in effect at the time of the discriminatory action.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to back pay upon completion of the electrician journeyman apprenticeship program, in the amount of \$2,159.92 plus the difference in earnings between complainant and Mr. Ash for the period of July 7, 1997 through the date of Mr. Ash's completion of the program, plus statutory interest from the date of completion complainant's successful completion of the program.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of reasonable attorney's fees and costs in the aggregate amount to be determined by the undersigned. Within two weeks from the date of receipt of this decision, Complainant's counsel shall file and serve upon counsel for respondent a fee petition and

accounting of time and costs incurred. Respondent's counsel shall have two weeks from receipt of the fee petition and accounting thereof, in which to file and serve any objections or responses thereto.

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 the receipt of this decision, the respondent shall administer the Mechanical Aptitude Test and Blueprint Reading Test to the complainant and determine whether he has made a passing score. Upon obtaining a passing score, the respondent shall immediately thereafter place complainant in the electrical journeyman apprenticeship program.
3. Within 31 days of receipt of the undersigned's order granting reasonable attorneys fees and costs in an aggregate amount to be determined after submissions pursuant to Conclusion of Law Number 9, the respondent shall pay said reasonable attorneys fees and costs so awarded.
4. Within 31 days of the receipt of this decision, the respondent shall pay the complainant incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.
5. The respondent shall pay ten percent per annum interest on all monetary relief.
6. The respondent shall report to the undersigned on the status of complainant's

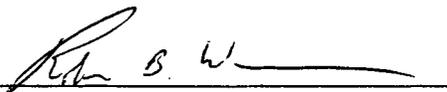
Mechanical Aptitude Test and Blueprint Reading Test results within forty-five days from receipt of this decision. The respondent shall submit to the undersigned a new back pay calculation upon Mr. Ash's completion of the apprenticeship program. The respondent shall file a yearly report with the undersigned describing the progress of complainant toward completing his electrician apprenticeship program.

7. In the event of failure of the respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human rights Commission, Norman Lindell, Deputy Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 24th day of March, 1998.

WV HUMAN RIGHTS COMMISSION

BY: 

ROBERT B. WILSON

ADMINISTRATIVE LAW JUDGE