



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
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May 5, 1986

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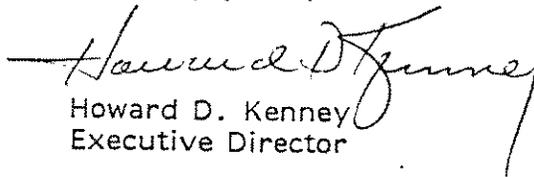
RE: Dettinburn vs. Vacuum Services, Inc., EA-3-83

Dear Above Parties:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Michael Charles Dettinburn vs. Vacuum Services, Inc., EA-3-83.

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,


Howard D. Kenney
Executive Director

HDK/kpv /edw

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MICHAEL CHARLES DETTINBURN,

Complainant.

vs.

Docket No. EA-3-83

VACUUM SERVICES, INC.,

Respondent.

O R D E R

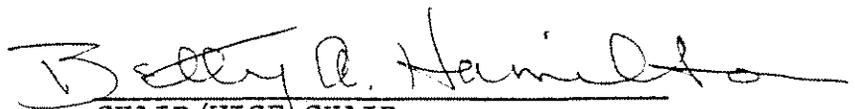
On the 8th day of April, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Christine M. Hedges. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

By this 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 ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 21 day of April, 1986.

Respectfully Submitted,



CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

MICHAEL CHARLES DETTINBURN, /

Complainant, /

vs. /

VACUUM SERVICES, INC., /

Respondent. /

Approved
RRS. 11-2-86
CASE NO. EA 3-83

RECEIVED

JAN 02 1986

RECOMMENDED DECISION

ADMINISTRATIVE DIRECTOR
SUPREME COURT OF APPEALS

A. Preliminary Matters

Michael Charles Dettinburn, age 40, charged Vacuum Services, Inc., with laying him off on April 22, 1982, because of his age. A complaint signed on July 1, 1982, was filed shortly thereafter. A public hearing, scheduled September 11, 1985, was rescheduled for October 16, 1985, by Notice from the Human Rights Commission dated September 6, 1985. The parties waived the right to the presence of a member of the Human Rights Commission by written stipulation. The public hearing was held at the Grant County Courthouse on October 16, 1985. The complainant appeared and was represented by James Paul Geary, II. The respondent appeared by its owner, John Paul Morrison, Jr., and was represented by Andrew Frye.

B. Issue

Whether the respondent unlawfully discriminated against the complainant by laying him off and failing to rehire him because of his age in violation of the West Virginia Human Rights Act, W. Va. Code §5-11-9(a).

C. Findings of Fact

1. The complainant, Michael Charles Dettinburn, is a white male residing in Keyser, West Virginia, who was 40 years of age at the time he was laid off by the respondent. He is a person as defined by the Human Rights Act [W. Va. Code 5-11-3(a)] and falls within the ages protected under the Human Rights Act [W. Va. Code §5-11-3(q)].

2. The respondent, Vacuum Services, Inc., is an employer within the meaning of the West Virginia Human Rights Act [W. Va. Code 5-11-3(d)].

3. The respondent, Vacuum Services, Inc., has an office in Petersburg, West Virginia, and the main work of the company is vacuuming ash from power plants in West Virginia, Virginia, and the Carolinas, Kentucky, Delaware, Maryland, Pennsylvania, New York, Tennessee, Indiana and Illinois. The personnel increases from 15 up to 100 when jobs come up. Most employees are hired on a temporary basis. The busiest time for the company is in the spring when power plants have less demand for electricity and can slow down for cleaning.

4. Michael Dettinburn applied for a job with respondent and was hired March 1, 1982, as a laborer at \$4.97 per hour to clean the VEPCO power plant at Mount Storm. That job ended March 27, 1982, when the cleaning was finished and the power plant resumed normal operation. Dettinburn was told he would be recalled when there was more work.

5. On or around April 22, 1982, Dettinburn received a letter from Vacuum Services informing him that he was terminated and requesting that he return his gear to the Petersburg office.

6. Dettinburn was employed by HRDF from December 7, 1981, until February 8, 1982, when he quit to take the job with Vacuum Services.

7. From April 28, 1982, until the job was completed on May 17, 1982, Dettinburn worked as a laborer for Standard Services, receiving an hourly wage of \$10.36.

8. Dettinburn was unable to qualify for unemployment benefits in June, 1982, because he had quit his last 30 day employer in February to take the job with Vacuum Services. Dettinburn felt he had been treated unfairly by Vacuum Services because he was terminated after working 27 days. If he had worked 30 days he would have qualified for unemployment benefits and he would have been off probationary status and a member of the union at Vacuum Services with the right to be recalled.

9. Out of 53 probationary helpers hired by the respondent between January and April, 1982, three were over the age of 40. Seven of those 53 probationary employees were laid off and not recalled between January and August, 1982. Of those seven, Dettinburn and one other were over 40. As of August, 1982, two of the thirty three helpers on the payroll were over 40.

10. Dettinburn was laid off because the job he was on closed down. He was not called back for work because his supervisor recommended that he not be recalled.

11. The respondent had no formal evaluations and no written criteria to determine who would be recalled. Recommendations were made orally to the general manager by supervisors.

D. Conclusions of Law

1. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter of this action pursuant to W. Va. Code §5-11-1 et seq.

2. The West Virginia Human Rights Act is violated when an employer lays off for legitimate business reasons but fails to recall because of the employee's age. W. Va. Code §5-11-9(a).

3. The complainant must prove four elements to establish a prima facie case: a) that he is a member of a protected group; b) that he was qualified and was seeking to be recalled when more work was available; c) that he was not recalled despite his qualifications; and d) that he was replaced with younger persons of similar qualifications. McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973). These elements under Title VII of the Civil Rights Act of a prima facie case from Green, supra, were adopted by the West Virginia Supreme Court to apply to the West Virginia Human Rights Act. Shepherdstown Volunteer Fire Dept. v. W. Va. HRC, 309 S.E.2d 343 at 352 (1983). After the complainant proves a prima facie case, the respondent must offer some nondiscriminatory reason for the failure to rehire in order to rebut the presumption of discrimination created by the prima facie case. Green, supra, and Shepherdstown VFD, supra. If the respondent succeeds in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination. Green, supra; and Shepherdstown, VFD, supra.

4. The complainant made a prima facie showing that respondent

The complainant established that (a) he was 40, within the protected age range; (b) that he had been hired, worked until the job ended and was qualified to be recalled; (c) that he was terminated and not recalled despite his previous work experience, and (d) that the respondent recalled thirty one younger employees and two older employees of similar qualification to the complainant's.

5. The respondent articulated a legitimate, nondiscriminatory reason for not recalling the complainant: that complainant was not recommended for recall because of evaluations of his ability by his supervisor.

6. The complainant failed to meet his burden of proof by failing to show by a preponderance of evidence that the reason articulated by the respondent was a pretext, and that respondent was more likely motivated by an unlawful discriminatory reason. The temporary nature of the work and the fact that the complainant was terminated while probationary and under evaluation are persuasive that respondent's articulated reason was not pretext. The complainant's feeling of being treated unfairly because he did not qualify for unemployment is understandable but does not prove that the employer terminated him because of his age. No inferences of age discrimination can be drawn from the evidence of the number of persons over 40 who were recalled by the employer, because the employer terminated more younger workers than older workers. The only evidence presented by the complainant that the employer's reason was a pretext, was the complainant's uncorroborated testimony that he did everything that was asked of him

and was complimented on his work by his foreman. The complainant failed to produce any evidence, direct or circumstantial, that there was any discriminatory reason that the employer would fail to recall older workers.

E. DETERMINATION

The complainant failed to prove by a preponderance of the evidence that his age was a significant factor in the respondent's decision to terminate him.

F. PROPOSED ORDER

The hearing examiner recommends that the Commission dismiss the complaint in this action.

Date: Dec 30, 1985

CC Hedges
Christine M. Hedges
Hearing Examiner

Approved:

Date: Jan. 2, 1986

Paul Stone
Paul Stone
Chief Administrative Law Judge
Supreme Court of Appeals of West Virginia